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

TO: Honorable Alicemarie Stotler, Chair, and Members of the Standing Committee on Rules of Practice and Procedure

FROM: Honorable James K. Logan, Chair
Advisory Committee on Appellate Rules

DATE: May 27, 1994

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

I. Action Items

A. Proposed amendments to Federal Rules of Appellate Procedure 4(a)(4), 8, 10, 47, and 49, approved by the Advisory Committee on Appellate Rules at its April 25 and 26 meeting. The Advisory Committee requests that the Standing Committee approve these amended rules and forward them to the Judicial Conference.

The proposed amendments were published in November 1993. A public hearing was scheduled for March 14, 1994 in Denver, Colorado, but was rescheduled for April 25. None of the testimony dealt with any of the rules that the Advisory Committee requests be sent to the Judicial Conference. The Advisory Committee has reviewed the written comments and, in some instances, altered the proposed amendments in light of the comments.

- Part A(1) of this Report summarizes the proposed amendments.
- Part A(2) includes the text of the amended rules.
- Part A(3) is the GAP Report, indicating the changes that have occurred since publication.
- Part A(4) summarizes the comments.

B. Proposed amendments to Federal Rules of Appellate Procedure 21, 25, 26, 27, 28, and 32, approved by the Advisory Committee on Appellate Rules at its April 25 and 26 meeting. The Advisory Committee requests the Standing Committee's approval of these proposed amendments for publication.

The Advisory Committee actually requests republication of Rules 21, 25, and 32. Those rules were also published last November and a public hearing was scheduled for March 15. Because only four people, representing two companies, requested the opportunity to testify, the hearing was rescheduled for 8:30 a.m., April 25, immediately preceding the Advisory Committee meeting. The testimony addressed only Rule 32. After considering the oral testimony and reviewing the written comments, the Committee recommends what it believes are significant changes in these published rules and requests republication to provide an additional period for public comment.

The Advisory Committee requests initial publication of proposed amendments to Rules 26, 27, and 28.

- Part B(1) of this report summarizes the proposed amendments.
- Part B(2) includes the text of the proposed amendments.
- Part B(3) is the GAP Report for Rules 21, 25, and 32, summarizing the changes made since publication.
- Part B(4) summarizes the public comments.

C. Part C of this report is the Advisory Committee's recommendations to the Standing Committee regarding Ninth Circuit Local Rule 22. Ninth Circuit Rule 22 establishes the procedures for handling death penalty cases. The Attorney Generals of five capital states in the ninth circuit wrote to the Chief Justice. They requested that the Judicial Conference modify or abrogate the ninth circuit death penalty rules because they are inconsistent with federal law.

II. Information Items

Part II of this report includes the Advisory Committee's Table of Agenda Items which indicates the status of proposed amendments under consideration by the Committee.

III. Minutes

Part III of the report is draft minutes of the Advisory Committee Meeting held April 25 and 26 in Denver, Colorado. The minutes have not yet been approved by the Advisory Committee.

cc with enclosures: Members of the Advisory Committee on Appellate Rules

SUMMARY OF PROPOSED RULE AMENDMENTS TO BE FORWARDED TO THE JUDICIAL CONFERENCE

1. An amendment to Rule 4(a)(4) is proposed. The amendment is intended to clarify the procedure for a party who wants to obtain review of an alteration or amendment of a judgment upon disposition of a posttrial motion. The party may file a notice of appeal, or, if the party filed a notice of appeal prior to disposition of the motion, the party may amend the previously filed notice. Under changes to Rule 4(a)(4) that became effective on December 1, 1993, a previously filed notice of appeal ripens into an operative notice of appeal upon disposition of the posttrial motion but only as to the judgment or order specified in the original notice of appeal. Appeal from the disposition of the motion requires either amendment of the previously filed notice or the filing of a notice of appeal.

   In addition Rule 4(a)(4) is amended to conform to amendments to Fed. R. Civ. P. 50, 52, and 59. Civil Rules 50, 52, and 59 were previously inconsistent with respect to whether postjudgment motions must be filed or merely served no later than 10 days after entry of judgment. As a consequence Rule 4(a)(4) said that such motions must be "made" or "served" within the 10-day period in order to extend the time for filing a notice of appeal. Civil Rules 50, 52, and 59, are being amended to require "filing" no later than 10 days after entry of judgment. Consequently, Rule 4(a)(4) is being amended to require "filing" of a postjudgment motion within the same period in order to extend the time for filing a notice of appeal.

2. A technical amendment to Rule 8(c) is proposed. The amendment conforms subdivision (c) to previous amendments to Fed. R. Crim. P. 38.

   Subdivision 8(c) currently provides that a stay in a criminal case shall be had in accordance with the provisions of Rule 38(a). When Rule 8(c) was adopted, Criminal Rule 38(a) established procedures for obtaining a stay of execution when the sentence in question was death, imprisonment, a fine, or probation. Criminal Rule 38 was later amended and it now treats each of those topics in a separate subdivision. The proper cross-reference is to all of Criminal Rule 38, so the reference to subdivision (a) is deleted.

3. An amendment to Rule 10(b)(1) is proposed to conform that paragraph to the amendments to Rule 4(a)(4). The purpose of this amendment is to

suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 4(a)(4).

4. Amendments to Rule 47 are proposed. These amendments, and the proposed Rule 49, are the result of collaborative efforts by the chairs and reporters of the various advisory committees. The amendments to Rule 47 require that local rules be consistent not only with the national rules but also with Acts of Congress and that local rules be numbered according to a uniform numbering system. The amendments further require that all general directions regarding practice before the court be in local rules rather than internal operating procedures or standing orders. The amendments also state that a nonwillful violation of a local rule imposing a requirement of form may not be sanctioned in any way that will cause the party to lose rights. The amendments further allow a court to regulate practice in a particular case in a variety of ways so long as any such orders are consistent with federal law.

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

PROPOSED RULE AMENDMENTS
TO BE FORWARDED TO THE JUDICIAL CONFERENCE

Rule 4. Appeal as of Right - When Taken

(a) *Appeal in a Civil Case.*

* * * * *

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

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

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

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

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

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

(F) for relief under Rule 60 if the motion is ~~served~~ filed ~~within~~ no later than 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the ~~date~~

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

* * * * *

Committee Note

Fed. R. Civ. P. 50, 52, and 59 were previously inconsistent with respect to whether certain postjudgment motions had to be filed or merely served no later than 10 days after entry of judgment. As a consequence Rule 4(a)(4) spoke of making or serving such motions rather than filing them. Civil Rules 50, 52, and 59, are being revised to require filing before the end of the 10-day period. As a consequence, this rule is being amended to provide that "filing" must occur within the 10 day period in order to affect the finality of the judgment and extend the period for filing a notice of appeal.

The Civil Rules require the filing of postjudgment motions "no later than 10 days after entry of judgment" -- rather than "within" 10 days -- to include postjudgment motions that are filed before actual entry of the judgment by the clerk. This rule is amended, therefore, to use the same terminology.

The rule is further amended to clarify the fact that a party who wants to obtain review of an alteration or amendment of a judgment must file a notice of appeal or amend a previously filed notice to indicate intent to appeal from the altered judgment.

Rule 8. Stay or Injunction Pending Appeal

* * * * *

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

Committee Note

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

Rule 10. The Record on Appeal

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

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

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

* * * * *

Committee Note

Paragraph (b)(1). The amendment conforms this rule to amendments being made in Rule 4(a)(4). The amendments to Rule 4(a)(4) provide that certain postjudgment motions have the effect of suspending a filed notice of appeal until the disposition of the last of such motions. The purpose of this amendment is to suspend

the 10-day period for ordering a transcript if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 4(a)(4). The 10-day period set forth in the first sentence of this rule begins to run when the order disposing of the last of such postjudgment motions outstanding is entered.

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

(a) *Local Rules.*

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

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) *Procedure When There Is No Controlling Law.* -- A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit.

Committee Note

Subdivision (a). This rule is amended to require that a generally applicable direction regarding practice before a court of appeals must be in a local rule rather than an internal operating procedure or some other general directive. It is the intent of this rule that a local rule may not bar any practice that these rules explicitly or implicitly permit. Subdivision (b) allows a court of appeals to regulate practice in an individual case by entry of an order in the case. The amendment also reflects the requirement that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat national rules and Acts of Congress.

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

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. The proscription of paragraph (2) is narrowly drawn -- covering only violations that are not willful and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form.

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

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

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

Rule 49. Technical and Conforming Amendments

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

Committee Note

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

GAP REPORT
CHANGES MADE AFTER PUBLICATION

1. There were no comments on the proposed amendment of Rule 4(a)(4), and no changes have been made.

2. There were no comments on the proposed amendment of Rule 8, and no changes have been made.

3. There was one comment on the proposed amendment of Rule 10, but it resulted in no change in the proposed amendment.

   The purpose of the amendment is to suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made that suspends a filed notice of appeal under Rule 4(a)(4). The commentator suggested that counsel be required to notify the court reporter when there is no need to proceed with preparation of the transcript because the appeal is suspended or dismissed pending disposition of the postjudgment motion. The Advisory Committee did not add such a requirement, believing that the party bearing the cost of production of the transcript will inform the court reporter.

4. There were three comments on the proposed amendment of Rule 47 and the Advisory Committee recommends several changes in Rule 47. The changes on pages 11 and 12 are indicated by the shading.

   a. At its February meeting, the Advisory Committee on Bankruptcy Rules recommended a change in that part of the rule dealing with sanctions for violation of a local rule imposing a requirement of form. The published rule said that no sanction that would cause a party to lose rights should be imposed for a "negligent" failure to comply with such a local rule. The Bankruptcy Committee recommended that "negligent" be changed to "nonwillful." The Advisory Committee on Appellate Rules recommends an identical change found at line 23 of the amended rule.

   b. Two of the commentators expressed concern about that in some circuits "internal operating procedures" (I.O.P.'s) are used like local rules and directly affect a party's dealings with the court.

Because directions concerning practice and procedure should be in local rules and not I.O.P.'s, the Advisory Committee recommends the addition of a sentence to 47(a)(1), requiring that generally applicable directions regarding practice before a court must be in a local rule rather than an I.O.P. or standing order. The new sentence is at lines 5-8.

The civil, bankruptcy, and criminal versions of this rule do not contain a parallel sentence. During prior discussions, the other committees were apparently satisfied that the language of subdivision (b) provides a strong incentive for a court to use local rules whenever possible rather than internal operating procedures or standing orders. Subdivision (b) states that "no sanction or other disadvantage may be imposed" for noncompliance with a requirement that is not contained in the federal rules or local rules unless the violator has "actual notice of the requirement."

The issue is different in courts of appeals than in district courts because a court of appeals judge does not sit solo in a courtroom. Indeed, the panel of three is constantly reconstituted and, for that reason, practice is uniform within a circuit. Standing orders are not a problem in the courts of appeals. It is far more likely in a court of appeals that all general directives could be placed in local rules. The inappropriate use of internal operating procedures rather than local rules is a problem. A practitioner who examines the local rules, but not the internal operating procedures, may be caught unaware of a practice requirement buried in the internal operating procedures. Furthermore, the procedures for promulgation of local rules is not applicable to the development of internal operating procedures.

The Advisory Committee believes that the situation in the courts of appeals is sufficiently dissimilar to that in the district courts to justify different treatment in the rule.

c. The Advisory Committee also recommends changing subdivision (b), if the new sentence discussed above is approved.

As published, subdivision (b) authorizes general regulation of practice by means other than rules. The published rule does not limit such regulation to entry of an order in a particular case. The

published rule states that a court may not sanction failure to comply with a non-rule requirement "unless the alleged violator has been furnished in the particular case with actual notice of the requirement." That limitation applies to regulation by standing order or some other similar means.

If, as recommended by the Advisory Committee, a sentence is added to rule (a) requiring that all general directions regarding practice must be in rules, there is no need for the sanctions limitation in (b). The only type of non-rule regulation permitted would be by order in a particular case, in which instance there is actual notice. So, the Advisory Committee recommends deletion of the sanctions limitation and amendment of the first sentence, lines 24 through 26, to make it clear that it is referring to orders in individual cases.

d. The Committee Notes have been altered to conform to the changes recommended above. The altered portion of the comments are shaded for easy identification.
In addition to the conforming changes, the Advisory Committee voted to add a new sentence to the Notes. The sentence states, "It is the intent of this rule that a local rule may not bar any practice that these rules explicitly or implicitly permit." It may be found at lines 3 through 5 of the Committee Note.

5. The only comment on Rule 49 was that the delegation of authority to the Judicial Conference to make technical amendments might be better made by amending the Rules Enabling Act. The Advisory Committee has made no changes in the proposed Rule 49.

SUMMARY
COMMENTS RECEIVED ON PROPOSED AMENDMENTS

1. There were no comments on the proposed amendment of **Fed. R. App. P. 4(a)(4).**

2. There were no comments on the proposed amendment of **Fed. R. App. P. 8.**

3. There was one comment on the proposed amendment of **Fed. R. App. P. 10.** The purpose of the amendment is to suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made that suspends a filed notice of appeal under Rule 4(a)(4).

   The commentator suggests that counsel should be required to notify the court reporter when there is no need to proceed with preparation of the transcript because the appeal is suspended or dismissed pending disposition of the postjudgment motion.

4. Three comments were submitted that discuss the proposed amendments of **Fed. R. App. P. 47.**

   One commentator expressed approval of all of the amendments to Rule 47. Another commentator approved the proposed amendments but stated that they were not strong enough to preclude conflicting local rules or to prevent divergent local practices. That commentator suggested strengthening Rule 47. The third commentator was concerned about the fact that internal operating procedures operate like local rules in some circuits and that Rule 47 did not subject I.O.P's to the same constraints as local rules and standing orders. That commentator also pointed out that subdivision (a) requires consistency with Acts of Congress and the national rules, but subdivision (b) requires consistency with federal law. He asked whether the language should be consistent.

5. Only one comment was received concerning proposed **Rule 49.** The commentator suggested that the authorization of the Judicial Conference to make technical amendments without the participation of the Supreme Court or the Congress would be better made by amending the Rules Enabling Act than by rule.

LIST OF COMMENTATORS
SUMMARY OF THEIR INDIVIDUAL COMMENTS

1. Rule 4(a)(4)
none

2. Rule 8
none

3. Rule 10
There was one commentator

Honorable J. Clifford Wallace
Chief Judge, United States Court of Appeals
United States Courthouse
San Diego, California 92101-8918

Chief Judge Wallace suggests that counsel be required to notify the court reporter when there is no need to proceed with preparation of the transcript if the appeal is suspended or dismissed pending disposition of the postjudgment motion.

4. Rule 47
There were three commentators

   a. Philip A. Lacovara, Esquire
   Mayer, Brown & Platt
   2000 Pennsylvania Avenue, N.W.
   Washington, D.C. 20006-1882

   Mr. Lacovara has three comments:
   i. He notes that paragraph (a)(1) requires that circuit "rules" and "local rules" must conform to federal law. The third sentence of the paragraph requires the clerk of a court of appeals to send the Administrative Office a copy not only of each "local rule" but also of each "internal operating procedure." Mr. Lacovara suggests that the rule should require that internal operating procedures, as well as local rules, be consistent with federal law.
   ii. Because in some circuits "internal operating procedures" directly affect the parties' dealings with the court, paragraph (a)(2) and

subdivision (b) (both of which deal with enforcement of local practice requirements) should assure that the provisions requiring notice and the limitation on sanctions for negligent non-compliance should apply to violations of internal operating procedures.

iii. Shouldn't the same language be used in paragraph (a)(1), requiring that local rules be consistent with "Acts of Congress," and subdivision (b), requiring that local regulation of practice be consistent with "federal law"?

b. National Association of Criminal Defense Lawyers
1627 K Street
Washington, D.C. 20006

The National Association of Criminal Defense Lawyers expressed general approval of the proposed amendments to Rule 47.

c. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 606011

The ABA Section of Litigation states that the amendments to Rule 47 represent a step in the right direction, but the Section believes that a stronger proclamation is needed to ensure the consistency of local rules (and internal operating procedures) with the federal rules and to control supplementation of the federal rules with divergent local requirements. Specifically, the Section recommends:

i. Rule 47 should preclude conflicting local rules. Local rules that are more burdensome than the national rules should not be permitted unless expressly authorized by the national rule. Local rules that simplify or streamline procedure, however, should be permitted, provided that compliance with the FRAP satisfies the party's obligation to the court.

ii. Each circuit should be permitted to amend its local rules only once a year absent exigent circumstances.

iii. Each circuit should have a rules officer to whom questions concerning local rules are referred for an authoritative answer.

5. Rule 49
There was one commentator

Alan B. Morrison, Esquire
Public Citizen Litigation Group
Suite 799
2000 P Street, N.W.
Washington, D.C. 20046

Public Citizen does not oppose giving the Judicial Conference the power to make technical amendments to the rules without the need to go through the Supreme Court and Congress. Public Citizen questions, however, whether such delegation to the Judicial Conference is authorized by the Rules Enabling Act. To avoid a controversy, Public Citizen suggests that the Supreme Court ask Congress to amend the Rules Enabling Act to authorize this limited type of amendment. Public Citizen further urges that Congress require the Judicial Conference to provide notice and opportunity for comment before making even technical changes. That requirement would help assure that the technical changes are appropriate and clear and that changes that are not technical are not inappropriately made under the delegation.

SUMMARY OF PROPOSED RULE AMENDMENTS TO BE PUBLISHED FOR COMMENT

1. Amendments to Rule 21 governing petitions for mandamus are proposed. The rule is amended so that the trial judge is not named in the petition and is not treated as a respondent. The 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 the petition.

2. The proposed 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 an "equally 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 also amended to permit service on other parties by an "equally 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.

3. The proposed amendment to Rule 26 makes the three day extension for responding to a document served by mail also applicable when the document is served by an "equally reliable commercial carrier."

4. Rule 27, governing motions, is entirely rewritten. The amendments require that any legal argument necessary to support the motion must be contained in the motion; no separate brief is permitted. The amendments also make it clear that a reply to a response may be filed. A motion or a response to a motion must not exceed 20 pages and a reply to a response may not exceed 10 pages. The form requirements are moved from Rule 32(b) to subdivision (d) of this rule. Subdivision (e) makes it clear that a motion will be decided without oral argument unless the court orders otherwise.

5. Rule 28 is amended to delete the page limitations for a brief. The length limitations have been moved to Rule 32. Rule 32 deals generally with the form and format for a brief.

6. Rule 32 is amended in several significant ways. The rule permits a brief to be produced using either a monospaced typeface or a proportionately spaced typeface, although the rule expresses a preference for the latter.

Monospaced and proportionately spaced typefaces are defined in the rule. Margins are specified for different paper sizes and different typefaces.

The rule establishes new length limitations for briefs. A principal brief is limited to a total of 12,500 words and a reply brief may not exceed 6,250 words. In addition, the average number of words per page may not exceed 280 words. The latter limitation is included to ensure that the typeface used is sufficiently large to be easily legible.

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

(a) ~~*Mandamus or prohibition to a judge or judges; petition, for writ; service, and filing.*~~ *Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.*

(1) ~~Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing~~ A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition ~~therefor~~ with the clerk of the court of appeals with proof of service on ~~the respondent judge or judges and on~~ all parties to the ~~action~~ proceeding in the trial court. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

(2) ~~The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and~~

The petition must:

(A) be titled In re [name of petitioner];

(B) state

(i) the relief sought;

(i) the issues presented;

(iii) the facts necessary to understand the issues presented by the application; and

(iv) the reasons why the writ should issue; and

(C) include copies of any order or opinion or parts of the record ~~which~~ that may be essential to ~~an~~ understand~~ing of~~ the matters set forth in the petition.

(3) ~~Upon receipt of~~ When the clerk receives the prescribed docket fee, the clerk ~~shall~~ must docket the petition and submit it to the court.

(b) *Denial; Order Directing Answer; Briefs; Precedence.*

~~If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk~~

~~and all parties by letter, but the petition shall not thereby be taken as admitted.~~

(1) The court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed time.

(2) The court of appeals may order the trial court judge to respond or may invite an amicus curiae to do so.

(3) The clerk must serve the order to respond on all persons directed to respond.

(4) Two or more respondents may answer jointly.

(5) If briefs or oral argument are required, ~~T~~the clerk ~~shall~~ must advise the parties, and when appropriate, the trial court judge or amicus curiae. ~~of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument.~~

(6) The proceeding ~~shall~~ must be given preference over ordinary civil cases.

(c) *Other Extraordinary Writs.* Application for extraordinary writs other than those provided for in subdivisions (a) and (b) of this rule ~~shall~~ must be made by petition filed with the clerk of the court of appeals with proof service on the parties named as respondents. Proceedings on such applications ~~shall~~ must conform, so far as is

practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule.

(d) *Form of Papers; Number of Copies.*-- All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

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

Subdivision (a). Subdivision (a) applies to writs of mandamus or prohibition directed to a court, but it is amended so that a petition for a writ of mandamus or prohibition does not bear the name of the judge. The amendments to subdivision (a) speak, however, about mandamus or prohibition "directed to a court." This language is inserted to distinguish subdivision (a) from subdivision (c). Subdivision (c) governs all other extraordinary writs, including a writ of mandamus or prohibition directed to an administrative agency rather than to a court and a writ of habeas corpus.

Subdivision (b). The amendment provides that even if relief is requested of a particular judge, the judge may not respond unless the court orders the judge to respond.

The court of appeals ordinarily will be adequately informed not only by the opinions or statements made by the trial court judge contemporaneously with the

entry of the challenged order but also by the arguments made on behalf of the party opposing the relief. The latter does not create an attorney-client relationship between the party's attorney and the judge whose action is challenged, nor does it give rise to any right to compensation from the judge.

If the court of appeals desires to hear from the trial court judge, however, the court may order the judge to respond. In some instances, especially those involving court administration or the failure of a judge to act, it may be that no one other than the judge can provide a thorough explanation of the matters at issue. Because it is ordinarily undesirable to place the trial court judge, even temporarily, in an adversarial posture with a litigant, the rule permits a court of appeals to invite an *amicus curiae* to provide a response to the petition. In those instances in which the respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response, participation of an *amicus* may avoid the need for the trial judge to participate.

Rule 25. Filing and Service

(a) *Filing.*

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

(2) *Filing: Method and Timeliness.*

(A) *In general.* Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the paper within the time fixed for filing. ~~, except that~~

(B) *A brief or appendix.* ~~briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is used~~ A brief or appendix is timely filed, however, if accompanied by a certification that on or before the last day for filing, it was

(i) mailed to the clerk by first-class mail, postage prepaid; or

(ii) dispatched to the clerk by an equally reliable commercial carrier.

(C) *Inmate filing.* ~~Papers~~ A paper filed by an inmate confined in an institution ~~are~~ is timely filed if

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

(D) *Electronic filing.* A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States.

(3) *Filing a Motion with a Judge.* If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; ~~in which event~~ the judge ~~shall~~ must note ~~thereon~~ the filing date on the motion and ~~thereafter~~ give it to the clerk. ~~A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States.~~

(4) *Clerk's Refusal of Documents.* The clerk ~~shall~~ must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

* * * * *

(c) *Manner of Service.* Service may be personal, ~~or~~ by mail, or by equally reliable commercial carrier. When feasible, service on a party must be by a manner at least as expeditious as the manner of filing with the court. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

Committee Note

Subdivision (a). The amendment deletes the language requiring a party to use "the most expeditious form of delivery by mail, excepting special delivery" in order to file a brief using the mailbox rule. That language was adopted before the Postal Service offered Express Mail and other expedited delivery services. The amendment makes it clear that it is sufficient to use first-class mail. In addition, the amendment permits the use of other equally reliable commercial carriers. The use of private, overnight courier services has become commonplace in law practice. Commercial carriers usually make delivery more expeditiously than the postal service; therefore, there should be no objection to their use as long as they are at least equally reliable. The amendment adds a requirement that there must a certificate stating that the brief or appendix was mailed or delivered to the private carrier on or before the last day for filing.

Subdivision (c). The amendment permits service by "equally reliable commercial carrier." The amendment also expresses a desire that when feasible, service on a party be accomplished by a manner at least as expeditious as the manner of filing. When a brief or motion is filed with the court by overnight courier, the copies should be served on the other parties in as expeditious a manner -- meaning either by personal service, if distance permits, or by overnight courier, if mail delivery to the party is not ordinarily accomplished overnight.

Rule 26. Computation and Extension of Time

* * * * *

(c) *Additional Time after Service by Mail or Commercial Carrier.* -- Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon that party and the paper is served by mail, or by equally reliable commercial carrier, 3 days ~~shall be~~ are added to the prescribed period.

Committee Note

The amendment is a companion to the proposed amendments to Rule 25 that permit service on a party by commercial carrier. The amendment to this rule makes the three day extension for responding to a paper served by mail also applicable when the paper is served by commercial carrier.

~~**Rule 27. Motions**~~

~~(a) *Content of motions; response.* Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or other relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.~~

~~(b) *Determination of motions for procedural orders.* Notwithstanding the provisions of (a) of this Rule 27 as to motions generally, motions for procedural orders, including any motion under Rule 26(b), may be acted upon at any time, without awaiting a response thereto, and pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. Any party adversely affected by such action may by application to the court request consideration, vacation or modification of such action.~~

~~(c) *Power of a single judge to entertain motions.* In addition to the authority~~

~~expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.~~

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

Rule 27. Motions

(a) *In General.*

(1) *Application for Relief.* An application for an order or other relief is made by motion unless another form is prescribed by these rules.

(2) *Content of a Motion.*

(A) *Grounds and relief sought.* A motion must state with particularity the grounds for the motion and the relief sought. The motion must contain the legal argument necessary to support it.

(B) *Accompanying documents.* If a motion is supported by affidavits or other papers, they must be served and filed with the motion.

(i) Only affidavits and papers necessary for the determination of the motion may be attached.

(ii) An affidavit may contain only factual information and not legal argument.

(iii) A motion seeking substantive relief must include a copy of the lower court opinion or agency decision as a separately identified exhibit.

(C) *Documents not required.*

(i) A separate brief supporting or responding to a motion must not be filed.

(ii) A notice of motion is not required.

(iii) A proposed order is not required.

(3) *Response.* Any party may file a response to a motion. The provisions of (2) apply to a response. The response must be filed within 7 days after service of the motion unless the court shortens or extends the time, but

(A) a motion for a procedural order is governed by

subdivision (b) of this rule; and

(B) a motion authorized by Rules 8, 9, 18, or 41 may be acted upon after reasonable notice.

(4) *Reply to Response.* The moving party may file a reply to a response. A reply must be filed no later than 3 days after service of the response, unless the court shortens or extends the time. A reply must not reargue propositions presented in the motion or present matters that do not reply to the response.

(b) *Determination of a Motion for a Procedural Order.* A motion for a procedural order -- including any motion under Rule 26(b) -- may be acted upon at any time without awaiting a response thereto. A court may, by rule or by order in a particular case, authorize the clerk to dispose of motions for specified types of procedural orders. A party adversely affected by the court's, or the clerk's, disposition may file a motion requesting reconsideration, vacation, or modification of such action. Timely opposition to a motion that is filed after the motion is granted in whole or in part does not constitute a request for reconsideration, vacation, or modification of the disposition.

(c) *Power of a Single Judge to Entertain a Motion.* A single judge of a

court of appeals may act on any request for relief that under these rules may properly be sought by motion, but a single judge must not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

(d) *Form of Papers, Page Limits, and Number of Copies.*

(1) *In Writing.* A motion must be in writing unless the court permits otherwise.

(2) *Format.*

(A) A motion, response, or reply may be produced by any duplicating or copying process that produces a clear black image on white paper. The paper must be opaque, unglazed paper, 8-1/2 by 11 inches. Carbon copies must not be used without the court's permission except by pro se persons proceeding in forma pauperis.

(B) The text must not exceed 6-1/2 by 9-1/2 inches and must be double spaced. Quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single spaced.

(C) The pages must be stapled or bound at the upper-left-hand corner.

(D) A cover is not required but there must be 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 motion and identifying the party or parties for whom it is filed.

(3) *Page limits.* A motion or a response to a motion must not exceed twenty pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. A reply to a response must not exceed ten pages.

(4) *Number of Copies.* An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

(e) *Oral Argument.* A motion will be decided without oral argument unless the court orders otherwise.

Committee Note

The rule has been entirely rewritten.

Subdivision (a). Paragraph (1) retains the language from the old rule

indicating that an application for an order or other relief is made by filing a motion unless another form is required by some other provision in the rules.

Paragraph (2) outlines the content of a motion. It begins with the general requirement from the old rule that a motion must state with particularity the grounds supporting it and the relief requested. It adds a requirement that all legal arguments should be presented in the body of the motion; a separate brief or memorandum supporting or responding to a motion must not be filed. The Supreme Court uses this single document approach. Sup. Ct. R. 21.1. In furtherance of the requirement that all legal argument must be contained in the body of the motion, paragraph (2) also states that an affidavit that is attached to a motion should contain only factual information and not legal argument.

Paragraph (2) further states that whenever a motion requests substantive relief, a copy of the lower court opinion or agency decision must be attached.

Although it is common to present a district court with a proposed order along with the motion requesting relief, that is not the practice in the courts of appeals. A proposed order is not required and is not expected or desired. Nor is a notice of motion required.

Paragraph (3) continues the provisions of the old rule concerning the filing of a response to a motion. Although not directly addressed in the rule, a party filing a response in opposition to a motion may also request affirmative relief. It is the Committee's judgment that it is permissible to combine the response and the new motion in the same document. Indeed, because there may be substantial overlap of arguments in the response and in the request for affirmative relief, a combined document may be preferable. If a request for relief is combined with a response, the caption of the document should alert the court to the request for relief. The time for a response to such a new request and for reply to that response are governed by the general rules regulating responses and replies.

Paragraph (4) is new. It permits the filing of a reply to a response. Two circuits currently have rules authorizing a reply. If there is urgency to decide the motion, the moving party may waive the right to reply or may file the reply very quickly.

Subdivision (b). This subdivision remains substantively unchanged except to clarify that one may file a motion for reconsideration, etc., of a disposition by either the court or the clerk. A new sentence is added indicating that if a motion is granted in whole or in part before the filing of timely opposition to the motion,

the filing of the opposition is not treated as a request for reconsideration, etc. A party wishing to have the court to reconsider, vacate, or modify the disposition must file a new motion that addresses the order granting the motion.

Subdivision (c). The changes in the subdivision are stylistic only. No substantive changes are intended.

Subdivision (d). This subdivision has been substantially revised. Paragraph (1) states that a motion must be in writing unless the court permits otherwise. The writing requirement has been implicit in the rule; the Committee decided to make it explicit. There are, however, instances in which a court may permit oral motions. Perhaps the most common such instance would be a motion made during oral argument in the presence of opposing counsel; for example, a request for permission to submit a supplemental brief on an issue raised by the court for the first time at oral argument. Rather than limit oral motions to those made during oral argument or, conversely, assume the propriety of making even extremely complex motions orally during argument, the Committee decided that it is better to leave the determination of the propriety of an oral motion to the court's discretion. The provision also would not disturb the practice in those circuits that permit certain procedural motions, such as a motion for extension of time for filing a brief, to be made by telephone and ruled upon by the clerk.

The format requirements have been moved from Rule 32(b) to this rule. No cover is required, but a caption is needed as well as a descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed.

Paragraph (3) establishes page limits; twenty pages for a motion or a response, and ten pages for a reply. Three circuits have established page limits by local rule. The rule does not establish special page limits for those instances in which a party combines a response to a motion with a new request for affirmative relief. Because a combined document most often will be used when there is substantial overlap in the argument in opposition to the motion and in the argument for the affirmative relief, twenty pages may be sufficient in most instances. If it is not, the party may request additional pages. If ten pages is insufficient for the original movant to both reply to the response, and respond to the new request for affirmative relief, two separate documents may be used or a request for additional pages may be made.

Paragraph (4) is unchanged.

Subdivision (e). This new provision makes it clear that there is no right to oral argument on a motion. Seven circuits have local rules stating that oral argument of motions will not be held unless the court orders it.

Rule 28. Briefs.

* * * * *

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

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

~~(i)~~ (h) *Briefs in cases involving multiple appellants or appellees.*-- In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

~~(j)~~ (i) *Citation of supplemental authorities.*-- When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Committee Note

Subdivision (g). The amendment deletes former subdivision (g) that limited a principal brief to 50 pages and a reply brief to 25 pages. The length limitations have been moved to Rule 32. Rule 32 deals generally with the format for a brief or appendix.

Former subdivisions (h) through (j) have been redesignated as subdivisions (g) through (i). New subdivision (g) has been amended to require the appellee's brief to comply with (a)(1) through (7) with regard to a cross-appeal. The addition of a separate paragraph requiring a summary of argument increased the relevant paragraphs of subdivision (a) from (6) to (7).

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

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

(1) *In General.* ~~Briefs and appendices~~ A brief may be produced by ~~standard typographic~~ typing, printing, or by any duplicating or copying process ~~which~~ that produces a clear black image on white paper with a resolution of 300 dots per inch or more. The paper must be opaque, unglazed paper; both sides of the paper may be used if the resulting document is clear and legible. Carbon copies ~~of briefs and appendices~~ must ~~may~~ not be ~~submitted~~ used without the court's permission ~~of the court~~, except ~~in behalf of parties allowed to proceed~~ by pro se persons proceeding in forma pauperis. ~~All printed matter must appear in at least 11 point type on opaque, unglazed paper. Briefs and appendices produced by the standard typographic process shall be bound in volumes having pages 6 1/8 by 9 1/4 inches and type matter 4 1/6 by 7 1/6 inches. Those produced by any other process shall be bound in volumes having pages 8 1/2 by 11 inches and type matter not exceeding 6 1/2 by 9 1/2 inches. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents.~~

(2) *Typeface.* Either a proportionately spaced typeface or a monospaced typeface may be used in a brief, but a proportionately spaced typeface is preferred.

(A) "A proportionately spaced typeface" is one in which the individual characters have individual advance widths. The design must be of a serifed, roman, text style. Examples are the Roman family of typefaces, Garamond, and Palatino.

(B) "A monospaced typeface" is a typeface in which all characters have the same advance width and there are no more than 11 characters to an inch. Examples are Pica type, and a 12 point Courier font.

(3) *Paper Size, Margins, and Line Spacing.* A brief must be on either 8-1/2 by 11 inch paper or 6-1/8 by 9-1/4 inch paper.

(A) A brief on 8-1/2 by 11 inch paper must be double spaced, but quotations more than two lines long may be indented and single-spaced, and headings and footnotes may be single-spaced. In addition,

(i) if a proportionately spaced typeface is used, the side margins must be 1-1/4 inch, and the top and bottom margins must be 1 inch; and

(ii) if a monospaced typeface is used, the side margins must be 1 inch, and the top and bottom margins must be 1-1/4 inch.

(B) A brief on 6-1/8 by 9-1/4 inch paper must be single spaced or its equivalent in leading, must use proportionately spaced typeface, and must have typeface not exceeding 4-1/6 by 7-1/6 inches.

(4) *Boldface.* A brief may use boldface only for covers, headings, and captions.

(5) *Case Names.* Case names must be underlined unless a distinct italic typeface is used.

(6) *Length.* Except by permission of the court, a principal brief must not exceed 12,500 words and a reply brief must not exceed 6,250 words, and in either case there must be on average no more than 280 words per page including footnotes and quotations. The word count does not include the corporate disclosure statement, table of contents, table of citations, certificate of service and any addendum containing statutes, rules regulations, etc. The brief must be accompanied by a certification of compliance with the word limits of this paragraph. In preparing this certificate, a party

may rely upon the word count of the word processing system used to prepare the brief. No certificate is required if the brief is

(A) in at least a 12 point proportionately spaced typeface and does not exceed

(i) 30 pages for a principal brief; or

(ii) 15 pages for a reply brief; or

(B) in a monospaced typeface and does not exceed

(i) 40 pages for a principal brief; or

(ii) 20 pages for a reply brief.

(7) *Appendix.* An appendix must be in the same form as a brief, but when an appendix is bound in volumes having pages 8-1/2 by 11 inches, it may include a legible photocopy of any document found in the record or of a published court or agency decision.

~~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.~~

(8) *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 addresses , and telephone number of counsel representing the

party ~~on whose behalf~~ for whom the document is filed.

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

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

Committee Note

Subdivision (a). A number of stylistic and substantive changes have been made in subdivision (a). The rule permits the use of both sides of the paper if the resulting document is clear and legible. Because photocopying is inexpensive and widely available, the exception allowing a person to file carbon copies has been limited to pro se persons proceeding in forma pauperis.

New paragraphs have been added governing the printing of a brief or appendix. The old rule simply stated that a brief or appendix produced by the standard typographic process must be printed in at least 11 point type or, if produced in any other manner, the lines of text must be double spaced. Today few briefs are produced by commercial printers or by typewriters; most are produced on and printed by computers. The availability of computer fonts in a variety of sizes and styles has given rise to local rules limiting type styles. The Advisory Committee believes that some standards are needed both to ensure that all litigants have an equal opportunity to present their material and to ensure that the documents are easily legible.

The rule provides two options. The text can be prepared using a proportionately spaced typeface or a monospaced typeface. "A monospaced typeface is defined as one in which all characters have "the same advance width." That means that each character is given the same horizontal space on the line. A

wide letter such as a capital "m" and a narrow letter such as a lower case "i" are given the same space. In contrast "a proportionately spaced typeface" gives a different amount of horizontal space to characters depending upon the need of the character. A capital "m" would be given more horizontal space than a lower case "i."

Additional requirements are imposed. "A proportionately spaced typeface," as further defined by the rule, must be "serifed." Serifs are the small strokes at the top or bottom of a character. Serifs give a horizontal emphasis to a line of text and make continuous text easier to read. The typeface must be a roman style, again because roman style typefaces are easier to read. The Roman family of typefaces, Garamond, and Palatino are all serifed, roman style typefaces. Lastly, the typeface must be a text typeface rather than a display or script typeface.

"A monospaced typeface" within the meaning of this rule must have not only the same advance width for each character, but there must not be more than 11 characters per inch. The latter requirement is to ensure that the typeface is of sufficient size for easy legibility. A typewriter with Pica type produces a monospaced typeface with no more than 11 characters per inch, as does a computer with Courier font in 12 point.

The rule continues to authorize pamphlet size briefs on 6-1/8 by 9-1/4 inch paper; the size used by commercial printers. Although commercially printed briefs are not common, they are favored by judges; and technology is progressing to the point where production of such briefs "in house," that is using equipment in a lawyer's own office, may soon be possible. Such briefs must be single spaced and use proportionately spaced typeface.

A brief produced on 8-1/2 by 11 inch paper generally must be double spaced. For 8-1/2 by 11 inch briefs, the margins differ depending upon whether a monospaced or proportionately spaced typeface is used. The side margins must be wider and the tops and bottom margins must be smaller when a proportionately spaced typeface is used than when a monospaced typeface is used. Again the differences are aimed at increasing ease of legibility.

The amendments include a length limitation based on the number of words per brief rather than the number of pages. This gives every party the same opportunity to present an argument without regard to the typeface used and eliminates any incentive to use footnotes or typographical "tricks" to squeeze more material onto a page. The rule imposes not only an overall word limit, but also

limits the average number of words per page. The reason for the limit on the average number of words per page as well as the limit on the total number of words is to ensure legibility. The limitation on the average number of words per page is an important element in guaranteeing that any proportionately spaced typeface used is of sufficient size to be easily legible. The specification of both the margins and the average number of words per page will ensure that the typeface is of sufficient size to be easily legible.

The rule requires a certification of compliance with both word limits and permits the party to rely upon the word count of the word processing system used to prepare the brief. However, the rule provides safe harbors as to which no such certification is necessary.

The rule recognizes that an appendix is virtually always produced by photocopying existing documents.

The rule requires a brief or appendix to be bound or stapled in any manner that is secure, does not obscure the text, and that permits the document to lie flat when open. Many judges and most court employees do much of their work at computer keyboards and a brief that lies flat when open is significantly more convenient. The Federal Circuit already has such a requirement, and the Fifth Circuit rule states a preference for it. While a spiral binding would comply with this requirement, it is not intended to be the exclusive method of binding. Center stapling, such as used on a pamphlet brief, also satisfies this requirement.

The rule requires that the number of the case be centered at the top of the front cover of a brief or appendix. This will aid in identification of the document and again the idea was drawn from a local rule. The rule also requires that the title of the document identify the party or parties on whose behalf the document is filed. When there are multiple appellants or appellees, this information is necessary to the court. If, however, the document is filed on behalf of all appellants or all appellees it may so indicate. Further it may be possible to identify the class of parties on whose behalf the document is filed. Otherwise, it may be necessary to name each party. The rule also requires that attorneys' telephone numbers appear on the front cover of a brief or appendix.

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

inefficiencies local variations create for national practitioners.

Subdivision (b). The old rule required a petition for rehearing to be produced in the same manner as a brief or appendix. The new rule also requires that a suggestion for rehearing in banc and a response to either a petition for panel rehearing or a suggestion for rehearing in banc be prepared in the same manner but the length limitations of paragraph (a)(6) are not applicable, the sheets may be attached at the left margin, and a cover is not required if a caption is used that provides all the information needed by the court to properly identify the document and the parties for whom it is filed.

Former subdivision (b) stated that 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." That alternative is not eliminated because (a)(2)(B) permits the preparation of documents with standard pica type. The only change is that the rule now specifies margins for these typewritten documents.

GAP REPORT
CHANGES MADE AFTER PUBLICATION

Rules 21, 25, and 32 were previously published. The Advisory Committee is not requesting that these rules be forwarded to the Judicial Conference. Therefore, a GAP Report technically may not be required. This segment of the report, however, will summarize the changes made since publication. Such a summary should facilitate the discussion of the changes.

Because the proposed amendments to Rules 26, 27, and 28 have not been previously published, they are not treated in this portion of the report or the succeeding portions.

1. Rule 21.
   a. The major change recommended is to permit the trial court judge to respond only when the court of appeals orders the judge to do. Three of the commentators on the proposed rule opposed the provision giving the trial court judge the option to file a response to a petition for a writ of mandamus or prohibition. The primary reason for the opposition was that the judge's participation puts the judge in an adversarial posture with a litigant.
   b. Because the change described above eliminates the judge's discretionary right to respond, the requirements that the trial court judge be provided an information copy of a petition and of an order directing the respondents to answer the petition also have been deleted. The published rule required the information copies so that the judge would be aware of the proceedings and able to exercise his or her right to respond.
   c. Another change permits the court of appeals to request that an amicus curiae prepare a response to the petition.
   d. The caption to subdivision (a) and the first sentence of subdivision (a) have been amended to state that it covers a writ of mandamus or prohibition directed "to a court." This distinguishes (a) from (c). Subdivision (c) governs other extraordinary writs, including mandamus or prohibition directed to an administrative agency.

2. Rule 25
   a. The major change recommended is to make the mailbox rule applicable not only when a brief or appendix is deposited in the United States Mail but also when it is delivered to an "equally reliable commercial carrier" for delivery to the clerk.

b. In addition, the proposed amendments require that if the timeliness of a brief or appendix is dependent upon the mailbox rule, the document must be accompanied by a certification that it was mailed or delivered to the commercial carrier on or before the day for filing.

c. The authorization for service by facsimile, a proposed amendment to subdivision (c), has been deleted. That change is in accord with the decision of the Standing Committee at its January 1994 meeting.

d. Authorization to make service on a party by "equally reliable commercial carrier" has been added to subdivision (c).

e. A requirement that, when feasible, service on a party be accomplished in a manner at least as expeditious as the manner of filing, has been added to subdivision (c).

3. Rule 32

Several significant changes have been made in Rule 32 since publication.

a. The major change recommended concerns "typeface" issues. The testimony presented to the Committee made it clear that specifying a minimum point size for a proportionately spaced typeface would not guarantee that the typeface would be of uniform size or easily legible. Therefore, the rule now relies upon the combination of required margins, a limitation of the overall number of words in a brief, and a limitation on the average number of words per page, to arrive by "default" at a typeface of sufficient size to be easily legible. A proportionately spaced typeface also must have serifs, be roman style, and text style (as distinguished from script or display style). The rule continues to authorize monospaced typefaces such as Pica type and Courier. As in the published rule, a monospaced typeface must have no more than 11 characters per inch.

b. All references to standard typographic printing have been deleted. The experts who testified stated that term has no continuing vitality.

c. The overall length of a brief is no longer expressed in pages but is determined by a maximum number of words.

d. Compliance with the words per brief and average number of words per page limitations must be certified unless the brief falls within one of the safe harbors specified.

e. The typeface requirements, etc. are not applicable to an appendix. The rule recognizes that an appendix is most often produced by photocopying existing documents.

f. The rule no longer requires covers for any document other than a brief or appendix.

SUMMARY
OF COMMENTS RECEIVED ON PROPOSED AMENDMENTS TO RULES 21, 25, AND 32

1. **Rule 21.** Seven commentators responded to the proposed amendments to Fed. R. App. P. 21. Rule 21 governs petitions for mandamus and prohibition and other extraordinary writs. The proposed amendments provided that the trial judge should not be named in a petition for mandamus or prohibition and should not be treated as a respondent. The amendments, however, permitted the judge to appear to oppose issuance of the writ if the judge chooses to do so, or if the court of appeals orders the judge to do so.

   Four of the commentators express some discomfort with giving the trial judge the option to respond to a petition for mandamus. Two of those commentators (D.C. Bar Section on Courts, Lawyers, and Administration and Mr. Lacovara) oppose giving the trial court judge the option to participate in the proceeding. Another (Judge Weinstein) expresses a preference for allowing the judge to participate only when ordered to do so by the court of appeals. A fourth commentator (Judge Garth) provided a copy of an opinion discussing the fact that a judge's active participation in a mandamus proceeding can make the judge appear to align with one side in litigation pending before the judge. A fifth commentator (Mr. McGarr) indicates no opposition to the judge responding to a petition for mandamus but states that someone else should represent the judge because the judge should not personally respond.

   One commentator states that many courts of appeal convert, *sua sponte*, an interlocutory appeal that does not constitute a final order into an application for a writ of mandamus. The commentator notes that the trial court judge might be unaware of such a conversion and, as a consequence, lose the opportunity to obtain representation or to respond as permitted by the proposed amendment.

   Two commentators support the amendments.

2. **Rule 25.** Six comments upon the proposed amendments to Fed. R. App. P. 25 were received. The proposed amendment to Rule 25 provides that in order to file a brief or appendix using the mailbox rule, the brief must be

filed by first-class mail.

Three of the commentators suggest that the mailbox rule, making a brief or appendix timely filed if deposited in the United States Mail on or before the last day for filing, should apply when a party delivers a brief or appendix to a private overnight courier service.

Two of the commentators oppose the provision that when the timeliness of a brief or appendix depends upon the mailbox rule, the mailing must be postmarked on or before the last day for filing. A third commentator does not oppose the postmark requirement but recommends amending it so that it does not preclude the use of an office postage meter.

3. **Rule 32.** Eight written comments were received, and oral testimony was presented by three persons concerning the proposed amendments to Fed. R. App. P. 32. Rule 32 governs the form of briefs or appendices.

Four commentators oppose the detailed printing provisions in the published amendments and all of the alternatives presented in the footnote published with the proposed amendments.
- One of them suggests that the rule simply require that the brief be prepared using no less than 12 point type.
- Another suggests that it would be sufficient to require 11 pitch or 11 point type, and opposes any word count because of uncertainty regarding the counting of citations and the time and energy that would be expended counting words.
- A third suggests that it would be sufficient to specify format requirements such as margins, type size, and line spacing.
- The fourth believes that the problem does not justify imposing the burden of detailed printing provisions, but of the alternatives presented in the rule or outlined in the footnote, the commentator prefers the 300 word per page limit.

Two of these commentators suggest that if a word limit per page is imposed, a safe harbor provision should be included.

One commentator favors a limit on the total number of characters per brief. That commentator opposes a limitation on the number of characters per inch or the number of words per page if the circuits are permitted to reduce the maximum page limits under Rule 28(g). Another commentator states that local rules reducing the number of pages allowed in a brief below the number authorized in FRAP should be forbidden. That same

commentator said that FRAP should prohibit local rules that impose additional or different requirements for the format of a brief or that any such local rule may be adopted only with permission of the Judicial Conference.

Three commentators, the printing experts, said that the level of detail included in the published rule was insufficient and recommended even more detailed and technical requirements to ensure both that the length limitations are uniform and that the documents are easily legible.

One commentator suggests that the rule should permit use of both sides of the paper and another commentator states that the rule should clarify whether briefs should be single or double sided.

One commentator opposes the provision requiring the cover of a petition for rehearing or of a suggestion for rehearing in banc and the response to them to be the same color as the party's principal brief.

One commentator opposes inclusion in the national rule of details such as the placement of the case number and the type of binding.

LIST OF COMMENTATORS
SUMMARY OF THEIR INDIVIDUAL COMMENTS

Rule 21

There were seven commentators

1. District of Columbia Bar
Section on Courts, Lawyers, and the Administration of Justice
Anthony C. Epstein, Esquire
Jenner & Block
601 Thirteenth Street, N.W.
Washington, D.C. 20005

The Section supports the amendments treating a mandamus proceeding as an adversary proceeding between the parties but opposes giving the district judge the option to participate in the proceeding. The Section states that the judge's participation is inconsistent with the basic thrust of the proposed amendment. The Section suggests that if the opposing party does not adequately defend the challenged decision, the court of appeals should appoint an amicus curiae. Alternatively, if the district judge has not adequately explained the challenged ruling, the court of appeals may remand for further explanation.

The Section suggests that the rules should be amended to require a court of appeals to issue a published opinion or explanatory memorandum for each dispositive ruling and to permit every such ruling to be cited as precedent. In short, it recommends abolition of unpublished decisions.

2. Honorable Leonard I. Garth
United States Circuit Judge
Room 429, Post Office Building and Courthouse
Newark, New Jersey 07101

Judge Garth is concerned about the use of the term "extrinsic" in the third sentence of the second paragraph of the Committee Note. He suggests that the meaning is unclear and that the commentary should be refined. He is concerned that it might imply extrajudicial conduct. (By that I

assume he meant something like the "extrajudicial" factor discussed by the Supreme Court in its recent decision construing § 455(a), Liteky vs. United States, 62 U.S.L. W. 4161 (March 7, 1994).)

Judge Garth also forwarded a copy of the slip opinion in Alexander v. Primerica Holdings, Inc., in which a writ of mandamus was issued when a district court judge refused to recuse himself under § 455(a) because of the appearance of partiality. The third circuit held that the appearance of partiality arose from, among other things, a letter response written by the district court judge to the petitioner for mandamus; the letter response was not filed with the court. The third circuit previously had held that the prevailing party in a challenged decision should answer the petition for mandamus and that the judge should not be entangled in the mandamus proceeding as an active party to the litigation. The court said that the judge may appropriately supplement the original opinion or, if none was ever filed, he could file a memorandum supporting and explaining his action. But when a judge responds to the party's petition for mandamus, especially in an unfiled letter, that participation can be seen as aligning, at least temporarily, with one side in the pending litigation.

3. Philip Allen Lacovara, Esquire
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1882

Mr. Lacovara supports the proposal "to alter the status of the district judge in mandamus proceedings from respondent to interested observer." Mr. Lacovara opposes, however, the provision in subdivision (b) that gives the judge the option to file a response if the judge chooses to do so. He does so for the following reasons:

a. It is inconsistent with the predicate for the revision -- that the lawsuit is between the parties and not between the party and the judge. Mr. Lacovara also states that if a judge were to respond it "would undermine the judge's role (in what is presumably an ongoing proceeding) [and] cast the judge -- or allow the judge to cast himself or herself -- as an adversary of one of the parties before the court of appeals.
b. Under the adversary process, one of the litigants should defend a ruling that another litigant is seeking to challenge by mandamus.
c. The rationale for the ruling should appear on the record. The trial

judge should not be able to offer a defense of a ruling that was not placed on the record contemporaneously with the ruling.

d. In those instances in which a court of appeals needs to hear from the judge, the rule gives the court authority to order the judge to respond.

e. The language stating that a judge need not respond unless the judge "chooses to do so" is "insensitively cavalier" and implies a haughtiness and condescension that Mr. Lacovara believes was unintended. The provision also provides no guidance for the judge in determining whether to "choose" to assert an interest in the ruling being challenged.

If the provision is retained Mr. Lacovara suggests that it be rephrased. He suggests dropping the phrase "if the judge chooses to do so." Alternatively, he suggests substituting language that indicates the instances in which a response from the trial judge would be appropriate, such as "if no respondent has opposed the petition" or "if the petition constitutes a personal attack on the judge."

4. Frank J. McGarr, Esquire
Pope, Cahill & Devine, LTD.
311 South Wacker Drive
Suite 4200
Chicago, Illinois 60606-6693

Mr. McGarr's comments were submitted by the Judiciary Committee of the American College of Trial Lawyers.

Mr. McGarr notes that there will be circumstances in which a judge will want to respond to a petition for mandamus and that the published rule permits the judge to do so. Mr. McGarr asks who will represent the judge. Mr. McGarr states that the judge should not personally respond and should not be required to pay counsel or to impose on a lawyer to represent the judge pro bono. Mr. McGarr suggests that the U.S. attorney might represent the judge.

5. National Association of Criminal Defense Lawyers
1627 K. Street, N.W.
Washington, D.C. 20006

Approves the proposed amendments.

6. Honorable J. Clifford Wallace
Chief Judge, United States Circuit Court
United States Courthouse
San Diego, California 92101-8918

Supports the amendments. Chief Judge Wallace comments only that the ninth circuit's General Order 6.8(a) requires that an application for a writ not bear the name of the district judge but that the district court should be named respondent. He believes that the General Order complies with the spirit of the amendments and recommends no changes in the rule or, as an alternative, adoption of the ninth circuit approach. He states a preference for the amendments because they treat all other parties to the proceeding below as respondents, thus, identifying them.

7. Honorable Jack B. Weinstein
United States District Judge
225 Cadman Plaza East
Brooklyn, New York 11201

Judge Weinstein states that many federal circuit courts of appeals convert, *sua sponte*, an interlocutory appeal that does not constitute a final order into an application for a writ of mandamus. Judge Weinstein notes that in such an instance, the trial judge would not be served by the appellant/petitioner as required by the amendments and the judge would not have notice of the proceedings or have an opportunity to obtain representation or to respond as permitted by the rule.

Judge Weinstein suggests three ways to deal with the problem:
1. amend Rule 21 to require that the rule's procedures be followed before any writ of mandamus is issued, even when the court converts an appeal to a petition for the writ;
2. amend Rule 21 to state that a court of appeals has power to convert an appeal to a writ of mandamus and has discretion to decide whether to notify the trial judge; and
3. amend Rule 21 to permit a trial court judge to participate only if requested to do so by the court of appeals.

He expressed a preference for the third approach.

Rule 25

There were six commentators

1. Richard Bisio, Esquire
Honigman Miller Schwartz and Cohn
2290 First National Building
Detroit, Michigan 48226-3583

Mr. Bisio notes that under the proposed rule the timeliness of a brief deposited in the mail is determined by the postmark; he believes that may cause difficulty. He notes that a party who delivers an item to the post office does not control when the post office affixes the postmark. A party may deliver an item to the post office one day, but the postmark may not be affixed until the following day. He suggests that the words "bears a postmark" be replaced by "includes a certificate of mailing."

2. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1882

Mr. Lacovara says that limiting the mailbox rule to the use of first-class mail "overlooks an alternative that is widely used for virtually all other forms of important written communication and that offers at least equal likelihood of timely receipt: use of overnight courier services." He suggests that if the rules permit timely filing by use of an overnight courier service, the rules should require that copies of the brief be served in the same manner. He notes that the amendment of Fed. R. Civ. P. 4(d)(2)(B), effective December 1, 1993, provides that the notice to an adversary of the filing of a lawsuit which requests waiver of formal service of process may be "dispatched through first-class mail or other reliable means."

3. Gordon MacDougall, Esquire
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Opposes the requirement in the published rule that if the timeliness of a brief or appendix depends upon the mailbox rule, it must be postmarked no later than the last day for filing. He notes that many offices have postage meters as to which the date is set by the office. He further notes

that the date of the postmark may differ from the date of deposit in a mailbox.

4. Alan B. Morrison, Esquire
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D. C. 20036

Public Citizen also suggests that the rule should mention service and filing by overnight mail services. Such couriers are commonly used and Public Citizen believes that their use should be covered in a clear and uniform fashion by the basic appellate rules and not left to the various circuit courts which treat them in a variety of ways. Public Citizen takes no particular position as to how overnight delivery should be treated but urges the Committee to address the matter and forbid local courts from adopting variations.

5. National Association of Criminal Defense Lawyers
1627 K Street, N.W.
Washington, D.C. 20036

The association approves the change to "first-class mail" and suggests that the words "or priority mail" might be added to correspond to Post Office usage for heavier parcels. The association also suggests that the postmark requirement should be clarified so as not to exclude the use of office postage meters. Alternatively, the association suggests a reference to the Internal Revenue Service's regulations on the timeliness of filings with it.

6. Honorable J. Clifford Wallace
Chief Judge, United States Court of Appeals
San Diego, California 92101-8918

Chief Judge Wallace also questions the limitation to first-class mail. He states that the rule appears to give the United States Postal Service an unfair advantage. He also states that the practical effect is that a brief sent by Federal Express, which arrives two or three days in advance of first class mail, would not be timely filed, but a brief deposited in the U.S. mail which arrives three days later would be.

Rule 32

Eight written comments were received, and oral testimony was presented by three persons.

The written comments were as follows:

1. Lawrence A. G. Johnson, Esquire
2535 East 21st Street
Tulsa, Oklahoma 74114

Mr. Johnson opposes all variations of the printing provisions suggested in the amendment or the footnote thereto, including number of characters per inch or line, number of characters per brief, or number of words per page. He suggests that the rule simply state that a brief may be prepared using no less than 12 point type. He states that such a requirement would leave sufficient flexibility to prepare attractive, legible briefs.

Mr. Johnson also suggests that the rule should permit the scanning of photographs or important documents into the body of the brief, making cumbersome turning to the appendix unnecessary. He also suggests that the Rule should permit printing on both sides of paper in order to conserve weight and bulk in a brief.

2. Arnold D. Kolikoff, Esquire
10 Plaza Street, 9J
Brooklyn, New York 11238

Mr. Kolikoff opposes the provision that a brief "contain on average no more than 300 words per page, including footnotes and quotations." Mr. Kolikoff believes that formatting requirements with regard to margin, type size, line-spacing, etc. is sufficient to prevent an attorney from circumventing the length limitation. Mr. Kolikoff states that "on average" is ambiguous and may require an attorney to do a word count of a brief and that counsel should not be put to the burden of performing such a tedious task. Mr. Kolikoff also opposes use of any of the alternatives set forth in the footnote to the published rule; he believes that the Committee's objective can be satisfied with format restrictions.

3. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1882

Mr. Lacovara supports the goal of standardizing the format for briefs and appendices but offers several suggestions:

a. Paragraph (a)(3) specifies the typeface and line spacing for both briefs and appendices. The rule should make it clear that those format requirements do not apply to documents that are legible photocopies of documents of record.

b. Paragraph (a)(4) requires that quotations and footnotes be in the same size type as the text. That would prohibit the use of larger size type than required in the text and the use of smaller size for footnotes even if the size used for footnotes were at or above the minimum size set in the rule for text. He suggests that it should be permissible to use smaller typeface for footnotes than is used in the text as long as the footnote typeface satisfies the minimum size permitted for the text.

c. Paragraph (a)(3) presents a substantial obstacle to the use of the most legible equivalent to typographic printing -- desk-top publishing using scalable fonts and proportionate spacing. He does not support the 300 word per page approach, not only because of its formalism, but also because of the uncertainty of word counts in briefs that must include citations. He suggests that neither lawyers, judges, nor clerks should be forced to spend time determining the number of words in a lengthy citation, or on each page of a 50 page brief.

Mr. Lacovara suggests that there need be only two choices, typeface of 11 pitch or 11 points. In the alternative, he suggests that if the Committee retains some limit on the number of words in a brief that it should include a safe harbor provision similar to one in the D.C. Cir. R. 28(d)(1) which states that counsel using a word processing system may rely on the "word count reported by" the system.

4. Gordon MacDougall, Esquire
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. MacDougall opposes national rules for stylistic features such as where the case number should be placed on the cover of a brief, and whether spiral binding should be required.

5. Alan B. Morrison, Esquire
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036

Public Citizen supports the changes with the exception of the printing provisions. Public Citizen's basic position is that the general burdens imposed are not justified by the problem. Assuming the worst case possible, Public Citizen does not believe that anyone could add more than 10 pages to a brief, and that assumes that lawyers do not get the message that efforts to evade the spirit of the rule are frowned upon and may exact a cost. Public Citizen suggests that the Committee not include any of the anti-cheating provisions and instead simply authorize the courts of appeals to require the re-filing of briefs that flagrantly disregard the intent of the rule.

If the detailed requirements are imposed, Public Citizen suggests a safe harbor: if a brief has 10% fewer pages than the limit, no certification should be required; the assumption being that if a brief is not within 5 pages of the 50 page limit, the lawyer is not truly worried about the brief being too long.

Of all the printing options offered by the Committee, Public Citizen prefers the 300 word per page approach. Assuming that a no-footnote page would have about 250 words, approximately 1/6 of each page could be footnotes. Because it is unlikely that the ratio of footnotes to text would be that high and, as a result, most pages would not be close to 300 words per page, the various ways that word processing packages count words would not be of grave consequence.

In addition to the printing provisions, Public Citizen offers a number of other suggestions:

a. Local rules reducing the number of pages allowed in a brief below the number authorized in FRAP should be forbidden.

b. The rule should clarify
- whether briefs should be single or double-sided,
- what color supplemental briefs should be,
- whether the summary of the argument counts toward the page limits,
- whether the cover stock on a petition for rehearing should be the

same as that of the briefs and appendices.

c. FRAP should prohibit the circuits from imposing, by local rule, additional or different requirements for the format and length of briefs. Or, alternatively, FRAP should require that any such local rule may be adopted only with permission of the Judicial Conference.

6. National Association of Criminal Defense Lawyers
1627 K Street, N.W.
Washington, D.C. 20006

The association has no objection to an amendment that would prohibit manipulation of typography in order to exceed the 50 page limit. If brief length is the problem, it suggests that the rule should limit a brief to approximately 100,000 characters (or bytes). It opposes a limitation framed in terms of the number of characters per inch or the number of words per page, if the circuits are permitted under FRAP 28(g) to reduce the maximum page limits. The association strongly opposes any reduction from the traditional standard of 50 typed pages. The association approves the requirement that a brief be bound so that it will lie flat when open.

7. Honorable Helen W. Nies
Chief Judge, United States Court of
Appeals for the Federal Circuit
Washington, D.C. 20439

Chief Judge Nies opposes the proposed amendment that would require the cover of a petition for rehearing or a suggestion for rehearing in banc, or any response to them, to be the same color as the party's principal brief. The Federal Circuit favors its current practice of requiring yellow and brown covers which avoids the possibility of confusing a petition with a brief. The different colors also alert the judges to the need to read the document immediately or, alternatively, of the need to vote. Also, their practice allows easy identification of the party who carries the burden on the petition or suggestion.

Chief Judge Nies favors the proposed amendment limiting a brief to an average of no more than 300 words per page, but would extend the limit to briefs produced by standard typographic printing on the assumption that there should be no difference between printed and other briefs in term of word count.

8. Honorable J. Clifford Wallace
Chief Judge, United States Court of Appeals
San Diego, California 92101-8918

Chief Judge Wallace suggests that the rule should be easy to enforce by deputy clerks. Therefore, the Ninth Circuit suggests something along the lines of
- a specified number of character per inch
- 28 lines per page
- margins as currently stated
- a declaration by counsel that the brief conforms to FRAP and Circuit Rules

On April 25, 1994, three persons appeared before the Committee to testify about the proposed amendments to Rule 32. The three persons were:

Mr. William Davis
Monotype Typography Inc.
53 West Jackson Boulevard
Chicago, Illinois 60604

Paul F. Stack, Esquire
Stack, Filipi & Kakacek
140 South Dearborn Street
Chicago, Illinois 60603-5298

Ms. Sarah C. Leary
Microsoft Corporation
One Microsoft Way
Redmond, Washington 98052-6399

They made a joint presentation. After explaining a number of typography terms, they presented exhibits showing that point size is not a uniform standard and that a rule specifying only that a brief must be prepared in at least 11 point type does not guarantee either a legible typeface or even a typeface large enough to be easily legible.

They presented a draft rule for the Committee's consideration. A copy of their draft rule is attached to the minutes of the meeting. The draft contained definitions of a "monospaced typeface" and a "proportionately spaced typeface" that are similar to those in the revised draft for which the Advisory Committee

requests publication. In order to ensure a typeface sufficiently large for easy legibility, the draft suggested that a proportionately spaced typeface must have minimum x-height and em-width. Because of the technical nature of such requirements, the revised draft does not contain any such requirements. Their draft would have limited a principal brief to no more than 14,000 words and a reply brief to 7,000 words. One of their exhibits stated that a typical 50 page brief in Courier 12 point with no hyphenation had 12,317 total words, with hyphenation it had 12,428 words, and in Courier 11 point it had 13,600 words. Therefore, their draft recommended that a principal brief should be limited to 14,000 words and a 50 page monospaced brief should be presumed to be within the word limit. Their draft would require that a brief be accompanied by a declaration of compliance with the rule.

NINTH CIRCUIT RULE 22

Five Attorneys General from capital states in the ninth circuit wrote to Chief Justice Rehnquist claiming that the new ninth circuit procedures for death penalty cases, 9th Cir. R. 22, conflict with federal law. The Attorneys General requested that the Judicial Conference use its statutory authority to modify or abrogate circuit rules that are inconsistent with federal.

Chief Justice Rehnquist referred the matter to the Standing Committee on Rules. The Chair of the Standing Committee requested that the Advisory Committee on Appellate Rules review the ninth circuit procedures and formulate a recommendation for consideration by the Standing Committee.

The Advisory Committee discussed the matter extensively at its April 1994 meeting. For a summary of that discussion, please see pages 86 through 97 of this report, which are the relevant pages of the draft minutes of that meeting. (The minutes are included in part III of this report.)

The Advisory Committee decided the following:

1. Local rules that do not violate federal law should not be voided by the Judicial Conference. However, the Judicial Conference should remain mindful of the fact that it can recommend adoption of a national rule that would have the effect of voiding or preempting a local rule that it finds troublesome.

2. The Advisory Committee was asked to present the Standing Committee with the Advisory Committee's best judgment about the consistency of the local rules with federal law. The Advisory Committee decided that in those instances in which it has questions about the consistency of the rules, it is the Advisory Committee's responsibility to report its views to the Standing Committee.

3. The Advisory Committee took a vote on each of the issues raised by the Attorneys General which in the opinion of the Advisory Committee raised serious consistency questions.

    a. Ninth Circuit Rule 22-4(e)(4) permits a limited in banc review followed by a full in banc review if a full in banc review is requested by an active judge. A motion to recommend abrogating the dual in banc procedure was defeated by a vote of 3 to 4 with 2 abstentions.

b. Ninth Circuit Rule 22-4(e)(2) permits a single judge to convene an in banc court. A motion to recommend voiding the power of a single judge to convene an in banc court was defeated by a vote of 2 to 4 with 2 abstentions.

The Attorneys General challenged the power of a single judge to convene an in banc court as violative of the statutory requirement that a majority of the active judges must approve an in banc hearing. The ninth circuit's defense of the provision is that a majority of the circuit judges have voted to approve the local rule. A majority has in effect cast standing votes that a death penalty case should be heard in banc whenever a single active judge determines that the case merits in banc review.

Some members of the Advisory Committee expressed agreement with the ninth circuit's defense but noted that the validity of the procedure depends upon the support of a persistent current active majority of the court. The procedure may need periodic reaffirmation by a majority of the court, especially when the composition of the court changes.

A motion was made to recommend that the provision be permitted to stand, but that the Judicial Conference be informed of the Advisory Committee's concern that the procedure is valid only if it has the continuing support of a majority of the court. The motion passed by a vote of 4 to 2 with 2 abstentions.

c. Ninth Circuit Rule 22-3(c) provides that a certificate of probable cause and a stay of execution will be automatically granted on appeal from a first habeas petition. A motion to recommend abrogation of that provision was defeated by a vote of 1 to 3 with 4 abstentions.

A motion was made to recognize that this procedure is in effect a standing order by a single judge to grant a certificate of probable cause and a stay of execution in every first petition in a death penalty case. Viewing the rule in this light, the procedure is valid subject to the same qualification noted earlier. There must continue to be a circuit judge who "leaves" such a standing order. The motion passed by a vote of 5 to 0 with 3 abstentions.

d. The ninth circuit death penalty procedures apply to related civil proceedings. 9th Cir. R. 22-1. The Attorneys General challenge the provisions in the ninth circuit rule authorizing a stay of execution in non-habeas civil cases. The Supreme Court, in connection with the McFarland case, is currently considering the authority of a federal judge to grant a stay of execution when a habeas petition is not pending before that judge. Because the question is currently before the Supreme Court, the Advisory Committee voted unanimously to make no recommendation concerning the validity of the procedures as applied to non-habeas cases.

The Advisory Committee discussed two other issues but took no votes because the challenged provisions did not appear to be inconsistent with federal law. First, the ninth circuit rule authorizes a single judge to grant a temporary stay. No vote was taken on that issue because a single circuit judge may grant a temporary stay in almost any kind of case. Second, the Attorneys General claim that the ninth circuit rule countenances inappropriate ex parte communication with a single judge of the circuit. The Advisory Committee concluded that the rule attempts to reduce ex parte communication.

Two members of the Advisory Committee requested that this report make it clear that the recommendations to the Standing Committee are based upon the information available. In their opinion the materials presented to the Advisory Committee by both the Attorneys General and the ninth circuit were not adequate to reach the merits of the issues. Their votes not to invalidate a challenged portion of the ninth circuit rule were based upon the fact that the provisions had not been shown to be invalid.

The two members who consistently abstained were the member from the ninth circuit and the representative from the Department of Justice. The Chair only voted to break ties.

II. The status of proposed amendments under consideration by the Advisory Committee on Appellate Rules is summarized on the attached table of agenda items.

Advisory Committee on the Federal Appellate Rules
Table of Agenda Items -- Revised May 1994

FRAP Item	Proposal	Source	Current Status
86-19	Amendment of Rule 38 to afford appellant opportunity to respond to proposed award of damages or costs.	Standing Committee & Chicago Council of Lawyers	Drafts considered by Committee, Chair to contact Circuits re current practices and possible possible committee action 10/89 Further research requested 10/90 Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94
86-23	Accommodation by rule the difficulty prisoners have in receiving notice of a magistrate's report in time to file their objection.	Hon. Dolores Sloviter (CA-3)	Under study by reporter Held over for further discussion 10/92 Draft to be sent to Chief Judges, Committee of Staff Attorneys, and Committee of Defenders 4/93 No further action deemed appropriate 4/94
86-24	Rule to permit sanctioning of attorneys for bringing frivolous appeals.	Chief Justice Vincent McKusick (ME)	See notes under item 86-19 and 92-8 Subcommittee appointed to monitor; no need for action at this time 4/93 C.J. Breyer's suggestion submitted to sub-committee 9/93, see item 93-9

FRAP Item	Proposal	Source	Current Status
89-5	Amendment of FRAP 35(c).	Mr. Robert St. Vrain (CA-8)	Under study by reporter Discussion with Supreme Court Clerk to precede any further action 10/90 Additional drafts requested 12/91 Approved for submission to Standing Committee 4/92 Standing Committee requested that Advisory Committee reconsider 6/92 Draft approved for submission to Standing Committee 4/93. Check all other FRAP for cross-references to "suggestions" for rehearing in banc Approved by Standing Committee for publication to bench and bar 6/93 Publication delayed pending completion of Items 91-25 and 92-4, 9/93
90-1	Amend FRAP 35(b) and (c) to change "suggestion" for an in banc to a "petition" for an in banc.	Hon. Jon Newman (CA-2) Mr. St. Vrain (CA-8)	Under study See notes under item 89-5
91-2	Amend rules 40(a) and 41(a) to lengthen time for filing a petition for rehearing in civil cases involving the U.S.	Solicitor General, Kenneth Starr	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to the Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94
91-3	Final decision by rule/expanding interlocutory appeal by rule.	Federal Courts Study Committee Judicial Improvement Act of 1990, P.L. No. 101-650; and Federal Courts Administration Act of 1992, P.L. No. 102-572	Discussion on-going 4/91 Consideration of interlocutory review of rulings on class certification. Referral from Civil Rules Committee 6/93

FRAP Item	Proposal	Source	Current Status
91-4	Typeface, re: rule 32.	Mr. Greacen (CA-5)	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 11/92 Approved by Standing Committee for publication to bench and bar 12/92 Advisory Committee approved new drafts for submission to Standing Committee for re-publication 5/93 Standing Committee approved new draft for re-publication 6/93 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republication 4/94
91-5	Use of special masters in courts of appeals.	Hon. Kenneth Ripple Hon. Gilbert Merritt Hon. Delores Sloviter	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to the Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94
91-8	Amendment of Rule 25 so that whenever service is accomplished by mailing, the proof of service shall include the addresses to which the papers were mailed.	Local Rules Project	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94

FRAP Item	Proposal	Source	Current Status
91-9	Amendment of Rule 32(a) to require counsel to include their telephone numbers on the covers of briefs and appendices.	Local Rules Project	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94
91-11	Amendment of Rule 25 re: authority of clerks to return or refuse documents that do not comply with federal or local rules.	Local Rules Project	Reporter asked to prepare draft 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94
91-12	Amendment of Rule 33.	Local Rules Project	Judge Hall, Judge Logan, Mr. Kopp, & Reporter asked to develop drafts 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94

FRAP Item	Proposal	Source	Current Status
91-13	Amendment of Rule 41 to provide a uniform standard for granting a stay of a mandate.	Local Rules Project	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94
91-14	Amendment of Rule 21 so that a petition for mandamus does not bear the name of the district judge and the judge is represented pro forma by counsel for the party opposing the relief unless the judge requests an order permitting the judge to appear.	Local Rules Project	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Standing Committee referred the proposal back to to Advisory Committee for further consideration 12/92 New draft approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republication 4/94
91-17	Uniform plan for publication of opinions.	Local Rules Project & Federal Courts Study Committee	Further study recommended 12/91

FRAP Item	Proposal	Source	Current Status
91-22	Amend Rule 9(a) or (b) to specify the type of information that should be presented to a court in bail matters.	CA-5 in response to Local Rules Project	Adopted in substance, Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94
91-24	Page limits for and contents of amicus briefs.	CA-5 in response to Local Rules Project	For future discussion 12/91 Approved in substance; Reporter to prepare new draft 9/93
91-25	Amendment of Rule 35 to specify contents of suggestions for rehearing in banc.	CA-5 in response to Local Rules Project	For future discussion 12/91 Approved in substance; Reporter to prepare new draft 9/93
91-26	Amendment of Rule 28 to require a summary of argument, any claim for attorney's fees with statutory basis & amendment of Rule 32	Advisory Committee in response to Local Rules Project	For future discussion 12/91 Mr. Kopp and Mr. Strubbe asked to assist reporter 12/91 Summary of argument -- approved for submission to Standing Committee 10/92 Attorney fees -- no further action deemed appropriate 10/92 Summary of argument -- approved by Standing Committee for publication 12/92 Approved for resubmission to Standing Committee 4/93 Summary of argument amendment -- approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94

FRAP Item	Proposal	Source	Current Status
91-27	Number of copies.	Local Rules Project	Reporter asked to draft language 12/91 Mr. Kopp, Mr. Strubbe, & Mr. Spaniol asked to study chart question 12/91 Approved for submission to Standing Committee 10/92 Approved by Standing Committee for publication to bench and bar 12/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee for submission to Judicial Conference 6/93 Approved by Judicial Conference 9/93 Forwarded to Congress by Supreme Court 4/94
91-28	Updating Rule 27	Advisory Committee	Mr. Kopp asked to prepare memo 12/91 Held over 10/92 Subcommittee appointed 4/93 Approved in substance; subcommittee to prepare new draft 9/93 Approved for submission to Standing Committee 4/94
92-1	Amendment of Rule 47 to require that local rules follow uniform numbering system and delete repetitious language.	Standing Committee	Draft requested 1/92 Approved for submission to Standing Committee 4/92 Standing Committee referred to Committee of Reporters 6/92 New draft approved 10/92 Uniform language developed by Standing Committee--referred to Advisory Committee for incorporation 12/92 Approved by Advisory Committee for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Approved for resubmission to Standing Committee 4/94

FRAP Item	Proposal	Source	Current Status
92-2	Amendment permitting technical amendments without full procedures.	Standing Committee	Draft requested 1/92 Draft discussed 4/92; discussion ongoing New draft approved 10/92 Uniform language developed by Standing Committee--referred to Advisory Committee for incorporation 12/92 Approved by Advisory Committee for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 4/93 Published 11/93 Approved for resubmission to Standing Committee 4/94
92-4	Amendment of Rule 35 to include intercircuit conflict as ground for seeking in banc.	Solicitor General Starr	Subcommittee consisting of Judges Logan and Williams and Mr. Kopp to consult with Reporter Report from FJC pending 1/93 On hold pending views of Solicitor General 4/93 Approved in substance; subcommittee to prepare new draft 9/93
92-5	Amendment of Rule 25 re "most expeditious form . . . except special delivery".	Advisory Committee	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republication 4/94
92-8	Amendment of Rule 38 re: 1) defining "frivolous"; 2) whether responsibility falls on the client or the attorney; 3) requiring a court to state reasons.	Alan B. Morrison, Esq.	Subcommittee appointed to monitor; no need for action at this time 4/93

FRAP Item	Proposal	Source	Current Status
92-9	Amendment of Rule 10(b)(1) to conform to 4(a)(4).	Advisory Committee on Bankruptcy Rules	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Approved for resubmission to Standing Committee 4/94
92-10	Reconsideration of some of the language of amended Rule 4(a)(4).	Standing Committee	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication to bench and bar 6/93 Published 11/93 Approved for resubmission to Standing Committee 4/94
92-11	Consideration of local rules that do not exempt government attorneys from being required to join court bar or from paying admission fees.	Attorney General Barr and Standing Committee	On hold pending views of Solicitor General 4/93
93-1	Conflict between Civil Rule 9(h) & 28 U.S.C. § 1292(a)(3) re: interlocutory appeal of admiralty cases with non-admiralty claims.	Hon. Edward Becker (CA-3)	Awaiting initial Committee discussion Referred to Advisory Committee on Civil Rules 4/94
93-2	Amend Rule 8(c) re: cross-reference to Crim. R. 38.	Department of Justice	Approved for submission to Standing Committee 4/93 Approved by Standing Committee for publication 6/93 Published 11/93 Approved for resubmission to Standing Committee 4/94

FRAP Item	Proposal	Source	Current Status
93-3	Amend Rule 41 re: 7-day period for issuance of mandate.	Advisory Committee	Awaiting initial Committee discussion
93-4	Amend Rule 40 re: length of time for stay of mandate.	Advisory Committee	Awaiting initial Committee discussion
93-5	Amend Rule 26.1 to delete use of term "affiliate."	Mr. Joseph Spaniol	Awaiting initial Committee discussion
93-6	Amend Rule 41 re: effective date of mandate	Solicitor General Days	Awaiting initial Committee discussion
93-7	The Houston v. Lack problem in the context of a petition for review of an agency decision	Mr. Munford	Awaiting initial Committee discussion No further action deemed appropriate 4/94
93-8	Fax Filing	Judicial Conference	Initial discussion 9/93 Amendment of Rule 25(c) published 11/93 Subcommittee appointed to draft model local rules 9/93 No further action needed
93-9	Means short of sanctions to reprimand attorneys	Hon. S. Breyer (CA-1)	Referred to Judge Boggs subcommittee on sanctions 9/93 Subcommittee reported 4/94
93-10	Applicability of Rule 26.1 to trade assoc.	Advisory Committee	Awaiting initial Committee discussion
93-11	Rule permitting party to submit draft opinions as appendix to brief	Hon. E. Peterson (Sup. Ct. OR)	Awaiting initial Committee discussion