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, 1997

SUBJECT: June 1997 Meeting

INTRODUCTION

In April 1996 the Advisory Committee, with the approval of Standing Committee, published a packet of proposed amendments to the Federal Rules of Appellate Procedure. The packet consisted of proposed revisions to each of the Federal Rules of Appellate Procedure. The revisions were developed using the Guidelines for Drafting and Editing Court Rules developed by the Standing Committee's consultant, Brian Garner, Esquire, and the Standing Committee's Style Subcommittee. (The packet is the product of what has become commonly known as the style project.) The comment period closed on December 31, 1996. The Advisory Committee met on April 3 and 4, 1997, in Washington, D.C. The Advisory Committee considered the public comments on the proposed amendments to the Appellate Rules. After making several changes to the proposed amendments, the Advisory Committee approved them for presentation to the Standing Committee for final approval.

In August 1996 the Advisory Committee, with the approval of the Standing Committee, published proposed amendments to Federal Rules of Appellate Procedure 5 and 5.1 and to Form 4. The period for public comment closed on February 15, 1997. At the Advisory Committee's April meeting, the Committee considered all the comments on the proposed amendments. After making additional changes to the proposed amendments, the Advisory Committee approved them for presentation to the Standing Committee for final approval.

The amendments to Rules 5 and 5.1 were not developed as part of the style project and the proposed amendments were not published as part of the style packet. If the amendments are approved by the Standing Committee, they will continue through the rest of the approval process simultaneously with the style packet. Therefore, this report incorporates the most recent revisions of Rules 5 and 5.1 into the style packet.

The Advisory Committee requests that the Standing Committee approve the entire packet of rules and the revised Form 4 for submission to the Judicial Conference at its fall meeting.

I. ACTION ITEMS

A. Proposed style revisions of Rules 1 through 48 of the Federal Rules of Appellate Procedure and additional proposed amendments to Rules 5, 5.1, 26.1, 27, 28, 29, 32, 35, and 41.

The proposed style revisions and the proposed amendments to Rules 27, 28, and 32 were published for comment by the bench and bar in April 1996. The comment period closed on December 31, 1996. Thirty-nine letters were received from commentators. The reaction to the project was overwhelmingly favorable although there were numerous suggestions to revise specific rules.

Due to the scope of this project, this report will be organized differently than is customary. This portion of the report is organized by rule number and contains:

1. a general summary of the comments submitted on each rule;
2. a summary of the individual comments on each rule; and
3. a Gap Report indicating the changes made after publication.

The text of the rules themselves follows in a later portion of this report. To allow you to easily identify each change made after publication, a hand-marked copy of the rules is included. It is followed by a clean version of the rules as finally approved by the Advisory Committee.

1. Synopsis of Proposed Amendments

It is customary for this report to include a synopsis of the proposed amendments. Again, because of the scope of this project, this report will summarize only the proposed amendments that involve substantial substantive amendments.

Substantive amendments to four rules were separately published in September 1995. The period for public comment closed in March 1996 and, as is usual, the Advisory Committee met and approved additional refinements. At its June 1996 meeting, the Standing

Committee tentatively approved the rules as revised. The Standing Committee did not forward the rules to the Judicial Conference last fall because additional style revisions of these same rules were included in the packet published in April 1996. Only very minor changes have been made in any of these rules on the basis of comments submitted during this latest publication period.

(a) **Rule 26.1** has been divided into three subdivisions to make it more comprehensible. The rule continues to require disclosure of a party's parent corporation but the proposed amendments delete the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. The amendments, however, add a requirement that a party list all its stockholders that are publicly held companies owning 10% or more of the party's stock.

(b) **Rule 29** has been entirely rewritten and several significant changes are proposed.

- The provision in the former rule granting permission to conditionally file an amicus brief with the motion for leave to file is changed to require that the brief accompany the motion. In addition to identifying the movant's interest and stating the general reasons why an amicus brief is desirable, the amended rule requires that the motion state the relevance of the matters asserted to the disposition of the case.
- The contents and form of the brief are specified.
- The amended rule limits an amicus brief to one-half the length of a party's principal brief.
- An amicus brief must be filed no later than 7 days after the principal brief of the party being supported.
- An amicus is not permitted to file a reply brief.

(c) **Rule 35** is amended to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of a court of appeals' judgment and extend the period for filing a petition for a writ of certiorari. The sentence in the existing rule stating that a request for rehearing en banc does not suspend the finality of the judgment or stay the mandate is deleted. In keeping with the intent to treat a request for a panel rehearing and a request for a rehearing en banc similarly, the term "petition for rehearing en banc" is substituted for the term "suggestion for rehearing en banc." The amendments also require each petition for en banc consideration to begin with a statement concisely demonstrating that the case meets the criteria for en banc consideration. Intercircuit conflict is cited as an example of a proceeding that might involve a question of

"exceptional importance"—one of the traditional criteria for granting an en banc hearing. The amendments limit a petition for en banc review to 15 pages.

(d) **Rule 41** is amended so that the filing of either a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari will delay the issuance of the mandate until the court disposes of the petition or motion. The amended rule also makes it clear that a mandate is effective when issued. The presumptive period for a stay of mandate pending petition for a writ of certiorari is extended to 90 days.

In addition to those four rules, substantive amendments to Rules 27, 28, and 32 were in progress at the same time as preparation of the style packet for publication. Those rules, with extensive proposed substantive amendments were published as part of the style packet.

(e) **Rule 27** is entirely rewritten. As amended, Rule 27 contains the form requirements that previously appeared at Rule 32(b). Rule 27 also provides that:

- any legal argument necessary to support the motion must be contained in the motion, no separate brief is permitted;
- the time for responding to a motion is expanded from 7 days to 10 days;
- a reply to a response may be filed within 7 days after service of the response;
- a motion or a response to a motion must not exceed 20 pages and a reply must not exceed 10 pages;
- a motion will be decided without oral argument unless the court orders otherwise.

(f) **Rule 28** is amended to conform to proposed amendments to Rule 32. The page limitations for a brief are deleted from 28(g). Rule 28 is also amended to require a brief to include a certificate of compliance with the length limitations established in Rule 32.

(g) **Rule 32** is amended in several significant ways.

- A brief may be on "light" paper, not just "white" paper. Cream and buff colored paper, including recycled paper, are acceptable.
- The provision for pamphlet-sized briefs have been deleted.
- All references to use of carbon copies have been deleted.
- A brief may be produced using either a monospaced typeface or a proportionally-spaced typeface.
- The rule establishes new length limitations for briefs. If page

counting is used to measure the length of a brief, a principal brief may not exceed 30 pages, and a reply brief may not exceed 15 pages. Other counting methods that approximate the former 50 page limit are, however, permitted.

- A brief may have a total of 14,000 words.
- A brief using monospaced typeface may have 1,300 lines of text.

- The rule requires a certificate of compliance with the length limitations.
- The treatment of an appendix is in its own subdivision.
- A brief that complies with the national rules is acceptable in every court. Local rules may not impose form requirements that are not in the national rule. Local rules may, however, move in the other direction; they can authorize non-compliance with certain of the national norms.

In addition to those seven rules, amendments to Rules 5 and 5.1 were published in August 1996. The comment period closed February 15, 1997. Eight comments were received. Four commentators expressed general support for the proposed changes; none expressed general opposition.

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

B. Proposed amendments to Form 4

Form 4 is substantially revised to conform with new statutory provisions in the *Prison Litigation Reform Act* and to obtain more detailed information needed to assess a party's eligibility to proceed in forma pauperis.

Proposed Form 4 was published in August 1996. The period for public comment closed on February 15, 1997. Five comments were submitted. Two commentators generally endorsed the proposed changes and two

opposed them because of the expended and detailed nature of the information requested. The Advisory Committee approved only minor post-publication changes. The Committee believes that the expanded scope of the form is appropriate and that many of the provisions as to which objections were raised are statutorily mandated.

II. INFORMATION ITEMS

A. Minutes

Draft minutes of the Advisory Committee meeting held April 3 and 4 in Washington, D.C. are attached to this report. The minutes have not yet been approved by the Advisory Committee.

B. Committee Agenda

Attached to this report is a copy of the Advisory Committee's Table of Agenda Items which indicates the status of proposed amendments under consideration by the Committee.

General Comments on the Proposed Style Amendments

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

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

One of the 16 supporters of the project urges that once the comprehensive revision is complete, that there be restraint in proposing further amendments unless there is a strong and demonstrable need.

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

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

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

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

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

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

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

Professor Rowe generally approves the restyling.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The committee fully supports the nonsubstantive style revisions.

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

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

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

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

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

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

16. Professor Thomas E. Baker
Alvin A. Allison Professor
Texas Tech University School of Law
Lubbock, Texas 79409-004

Professor Baker supports the proposed revisions stating the they are "self-evidently an improvement on the existing language."

17. Professor Joseph Kimble
The Thomas M. Cooley Law School
217 South Capitol Avenue
Lansing, Michigan 48901

Professor Kimble expressed strong support for the proposed revisions calling the proposed appellate rules and the drafting guidelines "the biggest breakthrough in legal drafting in 30 years." He says that "[e]ven changing from *shall* to *must* is significant."

Comments on Proposed Amendments to Rule 1

I. General Summary of Public Comments on Rule 1

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

II. Summary of Individual Comments on Rule 1

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

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

Gap Report

There are no post-publication changes in Rule 1.

Comments on the Proposed Amendment to Rule 2

I. General Summary of Public Comments on Rule 2

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

II. Summary of Individual Comments on Rule 2

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

Mr. Wilson suggests amending Rule 2 to state:

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

Gap Report

One stylistic change is made. In line 3, the words "suspend the provisions of any of these rules" is changed to "suspend any provision of these rules".

Comments on the Proposed Amendments to Rule 3

I. General Summary of the Public Comments on Rule 3

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

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

Another commentator suggests a stylistic change.

II. Summary of Individual Comments on Rule 3

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

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

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

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

conjunctive. The committee believes that this could cause confusion.

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

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

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

The committee comments on two substantive changes in Rule 3.

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

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

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

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

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

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

Gap Report

The Advisory Committee approved one major change in Rule 3 and several minor changes.

1. The major change is to incorporate the sole remaining paragraph of Rule 3.1 as subparagraph (a)(3) and to move existing subparagraph (3) to subparagraph (4). The *Federal Courts Improvement Act of 1996* repealed paragraphs (4) and (5) of 28 U.S.C. § 636(c). That statutory change made the continued separate existence of Rule 3.1 unnecessary. With the abrogation of Rule 3.1, paragraph (b) of that rule is moved to 3(a)(3).
2. In 3(b)(1), the word "persons" is replaced with "parties".
3. Rule 3(b)(2) is altered to say that "appeals may be joined or consolidated by the court of appeals." The published version required a court "order" for consolidation. Omission of that requirement reflects the Advisory Committee's conclusion that consolidation could appropriately be accomplished by court rule as well as by court order.
4. In 3(d)(2) and (3) the references to the "clerk" is clarified by changing both references to "district clerk". Also in 3(d)(3) the word "notwithstanding" is changed to "despite".
5. The Committee Note is amended to conform to the changes noted above and to

remove potentially misleading language about the distinctions between consolidated and joint appeals.

Comments on Proposed Amendments to Rule 3.1

None

Gap Report

Section 207 of the *Federal Courts Improvement Act of 1996* abolished the first appeal to a district court followed by a discretionary appeal to the court of appeals. As a result of the statutory amendments, subdivision (a) of Rule 3.1 is no longer needed. Since Rule 3.1 existed primarily because of the provisions in subdivision (a), subdivision (b) was moved to Rule 3(a)(3) and Rule 3.1 has been abrogated.

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

I. General Summary of Public Comments on Rule 4

Nine comments on Rule 4 were received.

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

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

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

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

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

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

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

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

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

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

II. Summary of Individual Comments on Rule 4

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

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

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

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

from."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

of her sentence.

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

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

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

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

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

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

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

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

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

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

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

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

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

Gap Report:

Several changes are recommended.

1. A cross-reference to (a)(1)(B) is included in (a)(1)(A).

2. The caption to (a)(3) is changed from "Notice of Cross-Appeal" to "Multiple Appeals" which is more accurate.

3. In (a)(4)(A)(vi), language is added making it clear that Fed. R. Civ. P. 6(a) applies for purposes of computing the 10-day period within which the making of a Rule 60 motion extends the time for filing a notice of appeal.

4. In (a)(5)(A)(i) the phrase "within 30 days" is changed to "no later than 30 days". The "no later than" formula is correct because extensions, especially for good cause, could appropriately be applied for prior to expiration of the prescribed time for filing a notice of appeal.

5. Rule 4(b)(1)(B)(ii) is changed back to the language in the existing rule so that it says the government may appeal within 30 days after entry of judgment or "the filing of a notice of appeal by any defendant". The published rule would have permitted the government to appeal within 30 days after "the filing of the last defendant's notice of appeal". The published version eliminated an ambiguity created by the term in the existing rule—"any defendant." Requiring the government to appeal within 30 days after the filing of a notice by "any defendant" could mean that the government may file its notice of appeal as to all defendants as late as 30 days after the last notice is filed by any defendant. Conversely, it may mean that the government must file its notice within 30 days after the first defendant files a notice of appeal. The published version, however, created its own problems. One of the commentator's pointed out that a co-defendant can plead guilty and begin serving time perhaps a year or more prior to the sentencing of another co-defendant. The published language could allow the government to appeal both sentences if the second defendant appeals. The government's appeal from the first sentence could, therefore, be filed long after the first defendant began serving time.

   The Advisory Committee considered several alternatives before it decided to return to the existing language. Resolution of the issue is complex and the Advisory Committee concluded that in the context of the style project, it would be better to retain the existing language. Resolution of the issue has been placed on the Advisory Committee's agenda for further study.

6. The Committee Note is amended to conform to changes made in the text.

7. Several stylistic changes are made.

a. In (a)(1)(B), the last word "entry" was stricken and replaced by "the judgment or order appealed from is entered".

b. In (a)(4)(A)(iii), the phrase "extends the time for appeal" is changed to "extends the time to appeal".

c. In (a)(4)(B)(ii), language is altered to help clarify the meaning. The opening phrase ("To challenge an order disposing of the motion, or a judgment altered or amended upon such a motion, a party must file a notice of appeal") is changed to say: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal."

d. In (a)(6)(A), "such entry" is changed to "the entry".

e. In (b)(5), "Federal Rule of Criminal Procedure" is spelled out.

Comments on Proposed Amendments to Rule 5

There were no comments on the Proposed Amendments to Rule 5 as published in the style packet.

As previously noted, however, in August 1996 the Advisory Committee published proposed amendments to Rules 5 and 5.1. The proposed amendments combine both rules into a new Rule 5. Rule 5.1 was largely repetitive of Rule 5, and Rule 5.1 has become obsolete since the enactment of the *Federal Courts Improvement Act of 1996*.

I. General Summary of Comments on Proposed Rule 5

Eight comments on proposed Rule 5 were received.

Four commentators express general support for the proposed rule; two of them also offer suggestions for further improvement. None of the commentators express general opposition to the proposed rule.

Two commentators are concerned that 7 days is a short time to prepare and submit opposition to a petition or a cross-petition. One of those commentators suggests extending the "mailbox rule" so that a response or cross-petition is timely if mailed or delivered to a commercial carrier within the 7-day period. The other commentator recommends a 14-day period for responding.

One commentator suggests amending (a)(3) so that it explicitly says that a district court "may amend" an order that a party wishes to appeal and the amendment may be undertaken either in response to a party's request or *sua sponte*.

One commentator suggests deleting the word "in the opinion of the petitioner" from (b)(1)(D).

One commentator says that the term "cost bond" in (d)(1)(B) is too vague.

One commentator suggests that because most appeals by permission are interlocutory the rule should require expedited treatment of them. The commentator suggests adding another subparagraph to 5(d), or creating paragraph 5(e) that would require expedited treatment for appeals under § 1292(b), (c)(1), or (d) as well as when permission to appeal is granted under § 1292(e). The same commentator suggests that at some later time the Advisory Committee consider according such expedited treatment to other kinds of interlocutory appeals.

II. Summary of Individual Comments on Proposed Rule 5

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

Professor Rowe notes that in 5(b)(1)(D) the continued use of the words "in the opinion of the petitioner" reads jarringly and may be in tension with the standard rules about the irrelevance of an advocate's opinion. He notes that new Rule 5(b)(1)(C) refers to giving "the reasons why," without reference to anyone's opinion. If it is necessary to avoid complete elimination of the old Rule 5(b), he suggests replacing "in the opinion of the petitioner" with"the petitioner contends" or a similar formulation.

2. Christopher S. Underhill, Esquire
Hartman Underhill & Brubaker
Lancaster, Pennsylvania 17602-2782

Mr. Underhill supports the proposed changes; he says they simplify and clarify two rules that were wordy and confusing.

3. Jack E. Horsley, Esquire
Craig and Craig
1807 Broadway Avenue
P.O. Box 689
Mattoon, Illinois 61938-0689

Mr. Horsley criticizes the use of the term "cost bond" in (d)(1)(B) as vague. He suggests instead that the rule state:

> (B) file a cost bond <u>including all printing costs, filing fees, reimbursement for sanctions which have been reversed and any other costs or expenses,</u> if required under Rule 7.

4. Ronald F. Waterman, Esquire
Gough, Shanahan, Johnson & Waterman
33 South Last Chance Gulch
Helena, Montana 59601

He generally supports the proposed amendments because they substantially clarify the language of the rule. In 5(b)(1)(B) he would strike the word "itself"

and replace it with the word "presented" making it internally consistent and consistent with 5(b)(1)(A).

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

The Committee generally supports the amendments. However, the Committee suggests that the period for filing an answer or cross-petition should be 10, rather than 7, days. The Committee states that there generally is a 10-day period for filing a petition for permission to appeal, and that a 10-day period for filing and answer or cross-petition would be more appropriate.

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

Public Citizen suggests amending (a)(3) to make explicit that the district court "may amend" the original order that a party wishes to appeal either in response to a request from one or both parties, or *sua sponte*. The first sentence of (a)(3) would then read:

> If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either sua sponte or in response to a motion by a party, to include the required permission or statement.

Because 7 days is a short period within which to prepare and submit opposition to a petition or a cross-petition, Public Citizen would make the mailbox rule applicable so that the response or cross-petition is timely if mailed or delivered to a commercial carrier within the 7-day period established in (b)(2). Public Citizen also suggests that the rule should state whether reply memoranda will be accepted in the absence of leave of court.

Public Citizen notes that most appeals by permission are interlocutory and concern issues that need to be resolved before the litigation still pending in the district court can be completed. Public Citizen suggests that if permission to appeal is granted, it warrants expedited treatment. Public Citizen suggests the following addition either in 5(d)(4) or 5(e).

> **Expedition of Interlocutory Appeals by Permission.** When permission for appeal has been granted under 28 U.S.C. § 1292(b), 1292(c)(1), or 1292(d), the case shall be set for oral argument as soon as possible after briefing has been completed. In circuits where the briefing schedule is set based on the oral argument date, that date shall be set as soon as practicable. The same provisions of expedition shall apply to interlocutory appeals by permission granted under 28 U.S.C. § 1292(e), unless the rule authorizing such appeals provides otherwise.

Public Citizen urges the Advisory Committee whether to accord similar expedition to other kinds of interlocutory appeals which, although not subject to a grant of permission, nevertheless delay the litigation of matters that remain in the district court, for example appeals of qualified immunity under the collateral order doctrine.

7. George E. Tragos, Esquire
Chair, Florida Bar Association, Federal Court Practice Committee's Subcommittee on Criminal Rules
600 Cleveland Street
Clearwater, Florida 34615

The Board of Governors of the Florida Bar Association adopted the subcommittee's position and authorized its communication. The Florida Bar says that 5(b)(2) is an attempt to change a time limitation from 14 to 7 days. Seven days is too short to file an answer in opposition to a petition or to file a cross petition. The Florida Bar recommends that the 14-day period for responding be maintained.

8. Dana E. McDonald
President, Federal Bar Association
1815 H. Street, N.W.
Washington, D.C. 20006-3697

The Federal Bar Association endorses the proposed amendments.

Gap Report

Several changes are recommended:

1. In (a)(3), language is added to make it clear that a district court may, either on

its own or in response to a party's motion, amend its order to grant permission to seek appeal or to state that the necessary conditions for seeking appeal are present.

2. The words "oral argument" are added to the caption to subdivision (b).

3. In (b)(1)(D) two changes are made. First, the words "in the opinion of the petitioner" are omitted. Second, the phrase "including reasons that the appeal is within the grounds, if any established by the statute or rule claimed to authorize the appeal" is shortened to "and is authorized by a statute or rule". As amended (D) requires a petition to include: "the reasons why the appeal should be allowed and is authorized by a statute or rule".

4. The Committee Note is altered to reflect the changes made in the text and to note that the passage of the *Federal Court Improvements Act of 1996* made Rule 5.1 obsolete.

5. Stylistic changes are made:
   a. in (b)(1)(E)(ii), the phrase "finding that the necessary conditions to appeal are met" is changed to "finding that the necessary conditions are met".
   b. in (c), the language governing the number of copies is changed so that it is identical to the language used elsewhere in the rules.
   c. in (d)(2), the compound sentence is broken into two sentences by deleting the word "but" and inserting a period.

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

There were no comments submitted on Rule 5.1 as published in the style packet.

In August 1996 the Advisory Committee published proposed amendments that would combine Rules 5 and 5.1 and abrogate Rule 5.1. Those comments are summarized and discussed in this report under Rule 5.

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

I. General Summary of Public Comments on Rule 6

Three comments on Rule 6 were received.

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

Two of the commentators suggest stylistic revisions.

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

II. Summary of Individual Comments on Rule 6

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

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

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

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

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

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

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

Gap Report

Three minor stylistic changes are made:

1. In (b)(1), the word "three" is replaced by the arabic numeral.
2. In (b)(2)(C), the word "must" is replaced by "will".
3. In the caption of (b)(2)(D), the word "of" is deleted.

Comments on Proposed Amendments to Rule 7

None

Gap Report

No post-publication changes recommended.

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

I. General Summary of the Public Comments on Rule 8

Three comments on Rule 8 were received.

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

Two of the commentators suggest stylistic revisions.

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

II. Summary of Individual Comments on Rule 8

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

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

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

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

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

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

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

Gap Report

Two stylistic changes are made.

1. The first sentence of (b) is moved to make it new subparagraph (a)(2)(E). Accordingly, the headings of (a)(2) and (b) are amended to reflect the change.
2. In (a)(1)(C), the phrase "during the pendency of an appeal" is changed to "while an appeal is pending".

Comments on Proposed Amendments to Rule 9

I. General Summary of the Public Comments on Rule 9

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

II. Summary of Individual Comments on Rule 9

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

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

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

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

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

Gap Report

Two changes are recommended.

1. As published the last sentence of (a)(1) said that an appellant must file a transcript or "explain why a transcript was not obtained". To make it clear that the explanation should be written and filed, the sentence is changed to state that an appellant must "file a transcript of the release proceedings or an explanation of why a transcript was not obtained".
2. In (a)(3), the phrase "[t]he court of appeals or a circuit judge may order" release is changed to "the court of appeals or one of its judges may order" release.

Comments on Proposed Amendments to Rule 10

None

Gap Report

Minor style changes are recommended.

1. In (b)(1)(B), the language is changed from "if no transcript is ordered, file a certificate to that effect" to "file a certificate stating that no transcript will be ordered".
2. In (b)(2), the phrase "any such finding" is changed to "that finding".

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

I. General Summary of Comments on Rule 11

Three comments on Rule 11 were received.

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

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

Two of the commentators suggest stylistic revisions.

II. Summary of Individual Comments on Rule 11

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

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

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

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

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

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

(2) District Clerk's Duty to Forward

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

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

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

Gap Report

Minor style changes are recommended.

1. In (b)(2), the word "must" is changed to "will".
2. In (c), the sentence is altered to state that the parties may stipulate, or the district court on motion may order "that the district clerk retain the record temporarily."
3. The caption of (g) is altered from "Record for Preliminary Hearing in the Court of Appeals" to "Record for a Preliminary Motion in the Court of Appeals". The first sentence of (g) is also amended to make it clear that the subdivision refers to the making of the enumerated motions in the court of appeals.

Comments on Proposed Amendments to Rule 12

None

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Rule 13

None

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Rule 14

None

Gap Report

No post-publication changes recommended.

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

I. General Summary of Comments on Rule 15

Three comments on Rule 15 were received.

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

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

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

Two of the commentators suggest stylistic revisions.

II. Summary of Individual Comments on Rule 15

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

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

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

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

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

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

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

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

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

Gap Report

1. Existing Rule 15(c)(1) requires service "at or before the time of filing a petition for review." The published rules said that a petitioner must already have served a copy on other parties at the time of filing. Because the change was unintended, (c)(1) is altered to state that service must occur at or before the time of filing.
2. Several punctuation changes and minor word changes are made.
   a. In (a)(2)(A), a long dash is inserted before the phrase "using such terms as".
   b. In (a)(4), a comma is inserted after the word "commission". In the same paragraph, the comma following the word "officer" is deleted along with the word "and"; both are replaced with a semicolon.
   c. In (b)(2), the words "the date when" are omitted from the first sentence. In the same sentence, a comma is inserted after the word "filed".

Comments on Proposed Amendments to Rule 15.1

None

Gap Report

No post-publication changes recommended.

Comments on the Proposed Amendments to Rule 16

I. General Summary of the Comments on Rule 16

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

II. Summary of the Individual Comments on Rule 16

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

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

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Rule 17

I. General Summary of Public Comments on Rule 17

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

II. Summary of Individual Comments on Rule 17

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

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

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Rule 18

I. General Summary of Public Comments on Rule 18

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

II. Summary of Individual Comments on Rule 18

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

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

Gap Report

One minor word change is recommended. The last word of (a)(2)(A)(ii) — "actions"— is changed from plural to singular.

Comments on Proposed Amendments to Rule 19

None

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Rule 20

None

Gap Report

No post-publication changes recommended.

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

I. General Summary of Public Comments on Rule 21

Three comments on Rule 21 were received.

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

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

II. Summary of the Individual Comments on Rule 21

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

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

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

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

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

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

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

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

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

Gap Report

Several changes are recommended:

1. In 21(b)(4) the phrase indicating that a trial-court judge may "respond" only if invited to do so by the court of appeals was changed because it might cause confusion by implying that the trial judge would then be a respondent. The word "respond" was deleted and changed to say that a trial judge, if invited to do so, could "address the petition".
2. Minor style changes are recommended:
   a. The phrase "trial-court judge" is hyphenated throughout the rule;
   b. In (c) the word "An" is inserted at the beginning of the text; the words "of those" are omitted from the first sentence; and the word "such" is replaced with "the" in the second sentence.
   c. In (d) the word "three" is replaced with the arabic numeral.

Comments on the Proposed Amendments to Rule 22

I. General Summary of Public Comments on Rule 22

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

II. Summary of the Individual Comments on Rule 22

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

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

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

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

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

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

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

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

Gap Report

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

Rule 22. Habeas Corpus and Section 2255 Proceedings

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

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

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

Although the "marked" version of the published rule is available for your reference, it is probably easier to use the "marked" version of the Congressionally amended rule. It is included in the same section of the report at pages 62A through 62D.

Several changes to the Congressionally amended rule are recommended:

1. In subdivision (a), the last word is changed from "writ" to "application". The district court order denies the "application" not the "writ". The other recommended changes are stylistic. "Shall" is changed to "must" wherever it appears. The third sentence is changed to active voice. The fourth sentence is amended by:
   a. changing "pursuant to section 2253 of title 28, United States Code" to "under 28 U.S.C. § 2253";
   b. the word "appropriate" is deleted; and
   c. the phrase "order of the district court" is changed to "district court's order".
2. In Subdivision (b) three substantive changes are made:
   a. It is made applicable to § 2255 proceedings. This brings the rule into conformity with 28 U.S.C. § 2253 as amended by the *Anti-Terrorism and Effective Death Penalty Act of 1996*.
   b. The rule states that a certificate of appealability may be issued by a "circuit justice or a circuit or district judge." The reference to the circuit justice is added; this change also brings the rule into conformity with section 2253. The language continues to state that in addition to the circuit justice, both a circuit and a district judge may issue a certificate of appealability. The language of section 2253 is ambiguous; it states that a certificate of appealability may be issued by "a circuit justice or judge." Since the enactment of the *Anti-Terrorism and Effective Death Penalty Act*, three circuits have held that both district and circuit judges, as well as the circuit justice, may issue a certificate of appealability. The amended language is consistent with those decisions.
   c. Since the rule applies to § 2255 proceedings, the rule is amended to provide that when the United States or its representative appeals, a certificate of appealability is not required.
3. In addition several style changes are made in subdivision (b):
   a. It is divided into three subparagraphs.
   b. The second and third sentences in (b)(1) are changed from passive to active voice.
   c. Minor word changes are made to make the style consistent with the rest

of the rules.

Comments on Proposed Amendments to Rule 23

I. General Summary of Public Comments on Rule 23

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

II. Summary of Individual Comments on Rule 23

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

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

Gap Report

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

Comments on Proposed Amendments to Rule 24

There were no public comments.

Gap Report

The term "prescribed in" is changed to "prescribed by" at two placed in (a)(5). This makes (a)(5) consistent with 24(b).

Comments on Proposed Amendments to Rule 25

I. General Summary of Public Comments on Rule 25

Three comments on Rule 25 were received.

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

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

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

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

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

II. Summary of Individual Comments on Rule 25

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

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

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

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

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

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

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

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

Gap Report

Only one post-publication change is recommended. The version of Rule 25(a)(2)(B)(ii) that became effective on December 1, 1996, said that a brief or appendix would be timely filed "if on or before the last day for filing, it is . . . dispatched to the clerk for delivery within 3 calendar days by a third-party commercial carrier." (Emphasis added.) The restyled version suggested that the word "calendar" be deleted. The Advisory Committee decided to reinsert the word "calendar" because under Rule 26(a)(2), the 3-day period could become 6 days if a document is dispatched on a Friday before a 3-day weekend. The omission of the word "calendar" had been motivated by

a fear that it could be difficult on a Friday preceding a three-day weekend to get a commercial carrier to commit to delivery to the court within 3 calendar days, i.e., to delivery when the court is closed. Rule 26(a)(3) should cure that problem. Rule 26(a)(3) says that the last day of a period is not counted if it is a Saturday, Sunday, or legal holiday.

The Committee Note is amended to make it consistent with the change in the text of the rule.

Comments on the Proposed Amendments to Rule 26

I. General Summary of Public Comments on Rule 26

Three comments on Rule 26 were received.

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

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

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

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

II. Summary of Individual Comments on Rule 26

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

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

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

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

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

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

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

Gap Report

One post-publication change is recommended. Rule 26(a)(2) is amended so that when a period is "stated in calendar days," Saturdays, Sundays, and legal holidays are not excluded for purposes of computing time. The Committee Note is amended to discuss this change.

Comments on Proposed Amendments to Rule 26.1

None

Gap Report

1. The only post-publication change is to substitute the arabic numeral for the word "three" in subdivision (c) of this rule.

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

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

3. The Committee Note developed in connection with the September 1995 publication of this rule is substituted for the Committee Note used in the style packet. The 1995 Committee Note is inserted into the "marked" and "clean" rules portions of this report. There are minor changes in the Committee Note to make it consistent with the rest of the notes in the style packet.

Excerpts from June 1996 Report to the Standing Committee

Gap Report on Rule 26.1

Rule 26.1. Corporate Disclosure Statement

(a) *Who Shall File.* ~~Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. The statement must be filed with a party's~~ Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying all its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

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

(c) *Number of Copies.* ~~Whenever~~ If the statement is filed before ~~a party's~~ the principal brief, the party must file an original and three copies, ~~of the statement must be filed~~ unless the court requires ~~the filing of~~ a different number by local rule or by order in a particular case. ~~The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed.~~

Committee Note

The rule has been divided into three subdivisions to make it more comprehensible.

Subdivision (a). The amendment deletes the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. Although several circuit rules require identification of such entities, the Committee believes that such disclosure is unnecessary.

A disclosure statement assists a judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case. Given that purpose, disclosure of entities that would not be adversely affected by a decision in the case is unnecessary.

Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. The rule requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well. For example, if a party is a closely held corporation, the majority shareholder of which is a corporation

formed by a publicly traded corporation for the purpose of acquiring and holding the shares of the party, the publicly traded grandparent corporation should be disclosed. Conversely, disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation.

The amendment, however, adds a requirement that the party list all its stockholders that are publicly held companies owning 10% or more of the stock of the party. A judgment against a corporate party can adversely affect the value of the company's stock and, therefore, persons owning stock in the party have an interest in the outcome of the litigation. A judge owning stock in a corporate party ordinarily recuses himself or herself. The new requirement takes the analysis one step further and assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal. The 10% threshold ensures that the corporation in which the judge may own stock is itself sufficiently invested in the party that a judgment adverse to the party could have an adverse impact upon the investing corporation in which the judge may own stock. This requirement is modeled on the Seventh Circuit's disclosure requirement.

Subdivision (b). The language requiring inclusion of the disclosure statement in a party's principal brief is moved to this subdivision because it deals with the time for filing the statement. No substantive change is intended.

Subdivision (c). The amendments are stylistic and no substantive changes are intended.

Public Comments on Rule 26.1

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

The comments were as follows:

1. Robert L. Baechtol, Esquire
Chair, Rules Committee
The Federal Circuit Bar Association
1300 I Street, N.W.
Suite 700
Washington, D.C. 20005-3315

The Association agrees that recusal will rarely be required based on a judge's ownership of stock in a litigant's subsidiary or affiliate; but states that "rarely" does not mean "never." The Association urges that the rule continue to require disclosure of subsidiaries and affiliates because it does not impose a significant burden and not requiring it risks adverse reflection on the court's neutrality when a judge would have elected recusal had the facts been disclosed.

2. Robert S. Belovich, Esquire
5638 Ridge Road
Parma, Ohio 44129

The rule will not assure disclosure of publicly held corporations which may be a joint venture partner of a party to an appeal, or of a publicly traded corporation which is a grandparent or great grandparent of a party to an appeal. He gives as an example a party that is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the majority shares of the party. The publicly traded corporation's disclosure would not be required under a strict reading of the rule.

3. Donald R. Dunner, Esquire
Chair, Section of Intellectual Property Law
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Mr. Dunner submitted comments prepared by two of the section's committees:

a. One committee says that the amendments appear reasonable.

b. Another committee says that the proposed deletions from the rule are well-advised but the committee has two concerns about requiring a party to disclose any publicly-held company owning 10% or more of the party's stock. First, it implies that a judge who owns any stock in a company that owns 10% of the stock in a party should recuse himself or herself; the committee thinks this "over-extends an assumption of disqualification in some circumstances" and that the provisions may prevent a judge from using mutual funds to avoid the appearance of impropriety. Second, the committee thinks that compliance with the disclosure requirement could be burdensome and that the burden is not justified by the indirect and potentially extremely minimal ownership interests it addresses.

4. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments of Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section of the Federal Bar Association. Mr. Laponsky thinks the changes generally make the rule more comprehensible but questions whether the new rule will generate adequate information. Substituting "stockholders that are publicly traded companies" for "affiliates" is helpful, but limiting disclosure to stockholders with 10% or greater interest in the party may cause difficulties in obtaining the requisite information from a corporate client. Although he does not disagree that a 10% threshold will identify stockholders whose interests are most likely to be affected by litigation, he thinks it would be easier for the corporation to simply identify all publicly traded stockholders.

5. Jack E. Horsley, Esquire
Craig & Craig
1807 Broadway Avenue
Post Office Box 689
Mattoon, Illinois 61938-0689

Attorney Horsley makes two comments:

a. He suggests that the rule be expanded to require the filing of a statement by the Chief Executive Officer and by members of the Board of Directors of the company.

b. He suggests amending lines 23-28 to state: "If the statement is filed before the principal brief, the party shall file an original and at least three copies, unless the court requires the filing of a ~~different~~ reasonable number by local rule or by order in a particular case."

6. Heather Houston, Esquire
Gibbs Houston Pauw
1111 Third Avenue, Suite 1210
Seattle, Washington 98101
on behalf of the Appellate Practice Committee of the Federal Bar Association for the Western District of Washington

It is not always clear whether a particular corporation is "publicly held." The committee suggests that the rule refer to companies "that have issued shares that are traded on exchanges or markets that are regulated by the Securities and Exchange Commission."

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

Agrees with eliminating the need to identify a party's subsidiaries or affiliates; but suggests amending lines 12-14 as follows:
"listing any stockholder[s] that is a [are] publicly held company[ies] and that owns[ing] 10% or more of the party's stock."
The changes are intended to make it clear that the rule does not call for identifying public companies that, collectively, might own a total of 10% of the party's stock.

Even though there are other forms of financial involvement other than "stock" that could be effected by a decision for or against a party, e.g. convertible notes and debentures, Attorney Lacovara says that the difficulties of defining a broader category of investments and in tracking the identity of the investors

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

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

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

Committee Note

Rule 29 is entirely rewritten.

Subdivision (a). The major change in this subpart is that when a brief is filed with the consent of all parties, it is no longer necessary to obtain the parties' written consent and to file the consents with the brief. It is sufficient to obtain the parties' oral consent and to state in the brief that all parties have consented. It is sometimes difficult to obtain all the written consents by the filing deadline and it is not unusual for counsel to represent that parties have consented; for example, in a motion for extension of time to file a brief it is not unusual for the movant to state that the other parties have been consulted and they do not object to the extension. If a party's consent has been misrepresented, the party will be able to take action before the court considers the amicus brief.

The District of Columbia is added to the list of entities allowed to file an amicus brief without consent of all parties. The other changes in this material are stylistic.

Subdivision (b). The provision in the former rule, granting permission to conditionally file the brief with the motion, is changed to one requiring that the brief accompany

make the focus on "stock" reasonable.

8. Don W. Martens, Esquire
President
American Intellectual Property Law Association
2001 Jefferson Davis Highway, Suite 203
Arlington, Virginia 22202

The AIPLA supports the additional requirement of listing owners of more than 10% of the stock of the party to the appeal, but it questions the need to delete the identification of subsidiaries and affiliates. Although it is unlikely that a subsidiary or affiliate would be affected by the outcome of the appeal, it may be and the judges should have that information as well.

9. Honorable A. Raymond Randolph
Chair, Committee on Codes of Conduct of the
Judicial Conference of the United States
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

The Committee supports the proposed revisions. Disclosure of only parent companies and public companies owning more than 10 percent of the party's stock should be adequate to ensure that the judges are made aware of parties' corporate affiliations and are able to make informed decisions about the need to recuse.

10. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

Notes only that the proposed amendment brings the Federal Rule in accordance with its Seventh Circuit analogue.

11. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

In addition to the comments submitted during the publication period, Judge James A. Parker wrote to Judge Logan after last summer's Standing Committee meeting. He was concerned that Rule 26.1 is too narrow because it deals only with corporations. Corporations are not the only form of organization that has numerous diverse owners. Judge Parker notes by way of example that the rule does not require a corporation that is a general or limited partner to disclose its interest in a limited partnership in which a judge may also be a limited partner. Judge Parker recommends broadening the language of Rule 26.1 to require identification of all types of organizations in which a party may have an interest that would create a conflict for a judge.

Gap Report on Rule 26.1

Changes were made at lines 11 and 12. Mr. Lacovara's suggestion was adopted so that it is clear the rule applies only when a single corporate stockholder owns at least 10% of a party's stock. And at line 11, the rule now requires disclosure of "all" of a party's parent corporations, rather than "any" parent corporation. The intent of the change is to require disclosure of grandparent and great-grandparent corporations. The Committee Note explains that change.

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

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

I. General Summary of Public Comments on Rule 27

Eight comments on Rule 27 were received.

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

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

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

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

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

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

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

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

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

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

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

II. Summary of Individual Comments on Rule 27

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

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

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

Agrees with the proposed amendments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Gap Report

1. Rule 27(a)(3)(A) is amended to clarify that if a court intends to grant a motion authorized by Rules 8, 9, 18, or 41, but the court does not want to await a response to such a motion, the court must give reasonable notice to the parties before the court grants the motion.

2. Rule 27(a)(4) is amended by expanding the time for a reply from 5 to 7 days. The language is also amended to remove the implication that there is an absolute right to file a reply before the court acts. The introductory phrase, "[t]he moving party may reply to a response within 5 days" is changed to "[a]ny reply to a response must be filed within 7 days." Conforming amendments are made to the Committee Note.

3. In (d)(1)(A), the third sentence is changed from "[t]he paper must be opaque, unglazed paper" to "[t]he paper must be opaque and unglazed."

4. The Committee Note to subdivision (d) is amended to say that spiral binding and stapling satisfy the binding requirement.

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

I. General Summary of Public Comments on Rule 28

Seven comments on Rule 28 were received.

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

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

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

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

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

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

One commentator makes stylistic suggestions.

II. Summary of the Individual Comments on Rule 28

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

Mr. Waterman agrees with the proposed amendments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Gap Report

No post-publication changes are recommended.

Comments on Proposed Amendments to Rule 29

I. General Summary of Public Comments on Rule 29

Three comments on Rule 29 were received.

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

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

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

One commentator suggests stylistic revisions.

II. Summary of Individual Comments on Rule 29

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

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

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

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

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

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

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

Gap Report

1. There is only one post-publication substantive change. In (c)(3), language is added that requires an amicus to state the source of its authority to file. There are two other minor post-publication changes. In the second sentence of (e), the phrase "[a]n amicus curiae who does not support either party" is changed to "[a]n amicus curiae that does not support either party". In subdivision (f) the phrase "an amicus curiae may not file" is changed to "an amicus curiae is not entitled to file".

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

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

3. The Committee Note developed in connection with the September 1995

publication of this rule is substituted for the Committee Note used in the style packet. The 1995 Committee Note is inserted into the "marked" and "clean" rules portions of this report. There are minor changes in the Committee Note that make it consistent with the rest of the notes in the style packet.

Excerpts from June 1996 Report to the Standing Committee

Gap Report on Rule 29

Rule 29. Brief of an Amicus Curiae

~~A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.~~

(a) **When Permitted.** The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-

curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

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

(1) the movant's interest;

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

(c) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following:

(1) a table of contents, with page references;

(2) a table of authorities — cases

(alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited;

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

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

(d) **Length.** Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

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

the motion. Sup. Ct. R. 37.4 requires that the proposed brief be presented with the motion.

The former rule only required the motion to identify the applicant's interest and to generally state the reasons why an amicus brief is desirable. The amended rule additionally requires that the motion state the relevance of the matters asserted to the disposition of the case. As Sup. Ct. R. 37.1 states:

> "An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored."

Because the relevance of the matters asserted by an amicus is ordinarily the most compelling reason for granting leave to file, the Committee believes that it is helpful to explicitly require such a showing.

Subdivision (c). The provisions in this subdivision are entirely new. Previously there was confusion as to whether an amicus brief must include all of the items listed in Rule 28. Out of caution practitioners in some circuits included all those items. Ordinarily that is unnecessary.

The requirement that the cover identify the party supported and indicate whether the amicus supports affirmance or reversal is an administrative aid.

Subdivision (d). This new provision imposes a shorter page limit for an amicus brief than for a party's brief. This is appropriate for two reasons. First, an amicus may omit certain items that must be included in a party's brief. Second, an amicus brief is supplemental. It need not address all issues or all facets of a case. It should treat only matter not adequately addressed by a party.

Subdivision (e). The time limit for filing is changed. An amicus brief must be filed no later than 7 days after the principal brief of the party being supported is filed.

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

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

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

The former rule's statement that a court may, for cause shown, grant leave for later filing is unnecessary. Rule 26(b) grants general authority to enlarge the time prescribed in these rules for good cause shown. This new rule, however, states that when a court grants permission for later filing, the court must specify the period within which an opposing party may answer the arguments of the amicus.

Subdivision (f). This subdivision generally prohibits the filing of a reply brief by an amicus curiae. Sup. Ct. R. 37 and local rules of the D.C., Ninth, and Federal Circuits state that an amicus may not file a reply brief. The role of an amicus should not require the use of a reply brief.

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

Public Comments on Rule 29

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

The comments were as follows:

1. Chicago Council of Lawyers
One Quincy Court Building
Suite 800
220 S. State Street
Chicago, Illinois 60604

The Council generally agrees with the proposed amendment but suggests amending subpart (d) so that the court has discretion to permit a longer brief. The Council suggests that (d) should read as follows:

> An amicus brief may be no longer than one-half the maximum length of a party's principal brief unless the Court grants the amicus leave to file a longer brief for good cause.

2. Donald R. Dunner, Esquire
Chair, Section of Intellectual Property Law
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Mr. Dunner submits comments from two of the section's committees:

One committee makes no substantive comment.

Another committee offers several suggestions:

a. that the District of Columbia should be added to the list of entities allowed to file an amicus brief without consent;

b. insert the word "or" at the end of subparagraph (a)(1), for clarity;

c. the rule should not require submission of the brief along with a motion for leave to file, instead the rule should require that the motion concisely state the arguments that will be made in the brief;

d. the late filing of an amicus brief should be permitted by stipulation of all parties;

e. subparagraph (f) is unclear; it may leave ambiguity as to whether an amicus may request leave to file a reply;

f. an amicus should be allowed to participate in oral argument if the party supported grants a portion of that party's allotted time to the amicus and the court is so informed.

3. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments to two different persons.

a. Sydney Powell, Esquire, the Chair of Appellate Law and Trial Practice Committee of the Federal Litigation Section. Attorney Powell suggests:

- It would be simpler to limit an amicus brief to 25 pages rather than "no more than one-half the maximum length of a party's principal brief." Currently it is not clear if "maximum" means maximum length "allowed" for a party's principal brief. She further notes that if a party is granted permission to file a longer brief, the rule appears to give the amicus one-half the expanded length. In which case, what happens if there are two appellants and one is allowed additional pages and the other is not? What happens when permission to file a longer brief is granted to the party very close to or contemporaneous with the deadline for filing the party's brief?
- It would be better to allow the filing of the motion and the brief within 15 days after the filing of the principal brief of the party whose position as to affirmance or reversal the amicus brief will support. The amicus can make an informed decision regarding whether it supports either party and can avoid repetition of the party's arguments. Ms. Powell concedes that special provision would need to be made to allow an appellant to respond to a brief in support of an appellee.

b. Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section of the Federal Bar Association. Mr. Laponsky supports the amendments including specifically the requirement that the brief be submitted with the motion and the limit on the length of the brief.

4. Jack E. Horsley, Esquire
Craig & Craig
1807 Broadway Avenue
Post Office Box 689
Mattoon, Illinois 61938-0689

Attorney Horsley suggests that the language at lines 53-55 be made mandatory so that a summary of argument is required, not optional.

5. Heather Houston, Esquire
Gibbs Houston Pauw
1111 Third Avenue, Suite 1210
Seattle, Washington 98101
on behalf of the Appellate Practice Committee of the Federal Bar Association for the Western District of Washington

The committee agrees that an amicus brief is most helpful when it does not unnecessarily repeat the arguments and authorities relied upon by the parties. But in order to avoid such repetition, an amicus must be familiar with the party's arguments and authorities well before the time the amicus must file its brief.

- Because the proposed rule requires an amicus to file its brief at the same time as the party being supported, an amicus will rarely have an adequate opportunity to review the party's brief before filing its own.
- In addition to the fact that a draft of the party's brief may not be available until a few days before the filing deadline, the party being supported is not always willing to cooperate with the amicus. If the amicus does not support the position of either party, the amicus brief is due within the time allowed the appellant. An amicus who does not support either party is especially unlikely to receive the cooperation of the parties' counsel and the amicus cannot possibly be confident that it is not repeating the respondent's arguments.

The committee recommends that the brief of an amicus curiae be due within the time that a reply brief may be filed. The amicus would have an opportunity to review the parties' principal briefs. If a party believes additional briefing is necessary to respond to an amicus, a motion for leave to file such a brief should be permitted.

Alternatively the committee suggests:

a. Before the appellant's brief is due, an amicus should be permitted to file a motion for leave to file a brief and the motion need not be accompanied by the brief. If the brief does not accompany the motion, the amicus must indicate whether any of the parties have consented to the participation of the amicus and, if any have consented, the amicus must describe the information it has received from the parties regarding their arguments. The amicus also must state whether it has had an adequate opportunity to review the parties' arguments in the trial court and how much time it needs to prepare its brief. Based on that information, the court will set a deadline for the amicus to file its brief.

b. If an amicus supports neither party, it may file its brief within the time allowed the respondent. If an amicus needs more time to prepare an adequate brief, it may file a motion without the brief and explain why it requires more time. If the parties have consented, the court will determine only whether the extra time will be allowed; if they have not, the court will rule on the motion for leave to file as well as on the request for extra time.

6. Miriam A. Krinsky, Esquire
Assistant United States Attorney
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Opposes the requirement that a motion for leave to file an amicus brief be accompanied by the brief; the requirement puts the parties and the court in the uncomfortable position of having to disregard the substance of the brief if the request is denied.

If that provision is not changed, she suggests that (e) be amended to require the court to promptly decide the request so that the opposing party is able to respond in its later brief to the arguments made in the amicus brief.

She also suggests that the rule provide for the filing of a short responsive brief if an amicus brief is filed in opposition to a request for rehearing en banc.

7. William J. Genego and Peter Goldberger, Esquires
Co-Chairs, National Association of Criminal
Defense Lawyers, Committee On Rules of Procedure
1627 K. Street, N.W.
Washington, D.C. 20006

The Association makes three suggestions:

a. It opposes limiting an amicus brief to 25 pages under present rules, or 20-22 pages under pending proposals. The Association files amicus briefs for three reasons:

i) to show the flag, such briefs are rare and may be quite short;

ii) when an issue in the case has important ramifications beyond the facts of the particular party's situation; and

iii) when the issue is a good one but the association knows, or suspects, that the skills of the lawyer on the case are not really up to the task, in such cases the Association files an entire "shadow" brief with a full statement of the case and parallel argument.

The Association believes that an amicus brief of the third variety can be very helpful to the court and can "correct the defects in our adversary process that occasionally result from a mismatch of ability between counsel, where important rights hinging on the resolution of difficult issues are at stake." (But in such cases the Association would not be inclined to state for the record the real reason it feels the need to file.) Briefs in the latter two categories often demand more than 25 pages to fulfill their mission.

The Association prefers that an amicus have the same limitations as a party but if something shorter is thought to be necessary, it urges a rule in the 70-80% range so that an amicus has about 35 pages when the party's limit is 50.

b. Consent of parties. NACDL suggests that a representation by amicus counsel located and clearly labeled within the brief itself, that the parties have authorized counsel to state that they consent to the filing should be sufficient.

c. Time for filing. NACDL suggests that the presumptive time for filing an amicus brief should be within 10 days after the filing of the principal brief of the party supported and that the opposing party should have the normal period of time to respond, measured from the filing of the amicus brief.

8. Bert W. Rein, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
January 18, 1996
on behalf of 6 attorneys in the firm

They do not oppose the shorter page limits for an amicus brief but note that there is "considerable tension" between the "emphasis on brevity and non-repetition, on the one hand, and the requirement that an amicus brief be submitted within the time allowed for the party being supported, on the other." They assert that it is not justified to assume that an amicus is in a position to coordinate its efforts with the party it is supporting or that the amicus will receive an advance copy of the party's brief well before the filing date. As to the latter, they point out that because appeals often address unpublished district court opinions, even a diligent amicus may not learn of the case until the briefing schedule is underway, making it quite difficult to comply with a contemporaneous filing requirement.

They recommend adopting the Fifth Circuit's local rule 29.1 under which an amicus submits its brief

> "within 15 days after the filing of the principal brief of the party whose position . . . the amicus will support."

Because FRAP 31(a) provides only 14 days for an appellant to file a reply brief, they further suggest amending rule 29(e) to read:

> An amicus curiae shall file its brief, accompanied by a motion for filing when necessary, within 15 days after the filing of the principal brief of the party being supported when that party is the appellant, or within 7 days after the filing of the principal brief of the party being supported when that party is the appellee.

9. Kent S. Scheidegger, Esquire
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
on behalf of the Criminal Justice Legal Foundation, the American Alliance for Rights and Responsibilities, and the Institute for Justice

The organizations make several suggestions:

a. They object to limiting the length of an *amicus* brief to one-half the length of a party's principal brief. They argue that in the courts of appeals amicus briefing is the exception rather than the rule and is likely to be in cases of greater complexity than average and a 25 page

limit will result in routine motions to exceed the limits or in briefs of reduced usefulness to the court. In circuits such as the Ninth, which limits a principal brief to 35 pages, an amicus brief will be limited to even less than 25 pages. They suggest the following:

> (d) Length. An amicus brief may be no more than 35 pages, except by permission of the court or as specified by local rule.

b. The rule requires written consent of the parties or a motion. With the decline in professional courtesy, counsel for a party increasingly fail to return written consent even though they have no particular objection. The organizations suggest a new subpart (b) with the present subparts (b)-(g) redesignated:

> (b) Consent by Default. When a party fails to respond in writing to a written request for consent to file an amicus brief within two weeks of the request, that party shall be deemed to have consented. A declaration of counsel for amicus setting forth the requisite facts may accompany the brief in lieu of the written consent.

c. The comment to subdivision (e) implies that an amicus brief may be permitted in support of a petition for rehearing; that should be reflected in the body of the rule.

d. The requirement for a formal corporate disclosure statement will very often be unnecessary. They suggest adding a sentence to Rule 26.1 stating: "If the amicus is a nonprofit corporation with no stockholders, a statement to that effect is sufficient.

10. Benjamin G. Shatz, Esquire
Crosby, Heafey, Roach & May
700 South Flower Street, Suite 2200
Los Angeles, California 90017
on behalf of the Appellate Courts Committee of the Los Angeles County Bar Association

The committee opposes limiting the length of an amicus brief to one-half the length of a party's principal brief. An amicus brief can assist the court by compensating for a party's inadequate presentation of an issue, by analyzing the broader impact of a position, and by presenting alternative viewpoints. That may require more than one-half the length allowed the party.

11. Reagan Wm. Simpson, Esquire
Fulbright & Jaworski
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
on behalf of the Tort & Insurance Practice Section (TIPS) of the American Bar Association

TIPS opposes three aspects of the amendments:

a. An amicus brief should not be required to accompany the motion for leave to file. Such a requirement causes a potential amicus to incur the cost of preparing a brief before it knows whether it can be filed.

b. The page limit is too restrictive.

c. The rule should not ban any reply brief by an amicus

12. Arthur B. Spitzer, Esquire
Legal Director
American Civil Liberties Union of the National Capital Area
1400 20th Street, N.W.
Washington, D.C. 20036

The ACLU of the National Capital Area makes two suggestions:

a. Consent of parties. The ACLU suggests that the rule be modified to provide that an amicus brief may be filed if "it is accompanied by a written representation that all parties consent." The D.C. Cir. Rule 29 so provides. The ACLU points out that it is not unusual for an amicus to become aware of a pending appeal in a court of appeal just before briefs are due. It may be difficult to obtain written consents in a very short time. It is common practice for counsel to represent, in a motion or notice, that counsel for other parties have consented to a given matter — for example, an extension of time or a brief exceeding page limits. If a party's consent to file is misrepresented, the party will have time to correct the error before the amicus brief is considered by the court.

b. Filing brief with motion. The ACLU opposes the requirement that the proposed amicus brief be presented with the motion for leave to file. There are two reasons why it is desirable to file the motion for leave to file in advance of the brief. First, filing a notice (when all parties consent) or a motion (when all parties do not consent) in advance allows all potential amici to become known to each other and allows the preparation of a joint amicus brief by those on the same side. That would not be possible if the brief must be filed with the motion. Second, a potential amicus may know that there will be opposition to its motion. It is less wasteful to file the motion and obtain the ruling before writing the brief.

13. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

The proposed amendments reflect a welcome simplification and unification of appellate practice. In particular, the statement as to why an amicus brief is desirable and that the matters asserted are relevant to the case should be helpful.

14. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

15. Hugh F. Young, Jr.
Executive Director
Product Liability Advisory Council
1850 Centennial Park Drive, Suite 510
Reston, Virginia 22091

The PLAC supports the effort to establish uniformity in determining the length of briefs and believes that 25 pages should be sufficient in virtually every instance. But PLAC points out that the Ninth Circuit limits a party's principal brief to 35 pages, and the D.C. Circuit limits a principal brief to 12,500 words. PLAC suggests that the rule should make it clear that an *amicus* brief may be no more than one-half the maximum length of a principal brief or 25 pages whichever is longer. Also, if a party is granted permission to file a longer principal brief, the *amicus* should automatically be entitled to one-half of the enlarged length.

PLAC also urges that the rule or Committee Note make it clear that an *amicus* may seek leave to file a longer brief.

Gap Report on Rule 29

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

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

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

In subdivision (d) the limit on the length of an amicus brief is unchanged except to provide 1) that permission granted to a party to file a longer brief has no effect upon the length of an amicus brief, and 2) that a court may grant an amicus permission to file a longer brief.

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

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

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

Stylistic changes also were made.

Comments on Proposed Amendments to Rule 30

I. General Summary of Public Comments on Rule 30

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

II. Summary of Individual Comments on Rule 30

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

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

Gap Report

There is one substantive change. Rule 30(a)(3) is amended to make it consistent with Rule 31(b) so that an unrepresented party proceeding in forma pauperis need only file four copies of the appendix. There is one style change. In (a)(3), the arabic numeral is substituted for the word "ten". The Committee Note is amended to reflect the substantive change.

Comments on the Proposed Amendments to Rule 31

I. General Summary of Public Comments on Rule 31

Three comments on Rule 31 were received.

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

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

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

II. Summary of Individual Comments on Rule 31

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

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

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

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

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

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

Gap Report

There are two post-publication changes. First, in subdivision (b), the phrase "unless the court requires a different number by local rule or by order in a particular case" is moved to the end of the subdivision and is altered to become a separate, complete sentence. This change makes it clear that the court's authority to alter the number applies to unrepresented parties proceeding in forma pauperis. Second, the second sentence is amended to require an unrepresented party proceeding in forma pauperis to file 4 legible copies of the brief. The published version said "an original and 3 legible copies" but that is inconsistent with the first sentence of the rule in which the general rule requires only the filing of 25 copies and makes no mention of "an original".

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

I. General Summary of Public Comments on Rule 32

Thirteen comments on Rule 32 were received.

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

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

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

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

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

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

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

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

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

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

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

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

One commentator suggests style revisions.

II. Summary of Individual Comments on Rule 32

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

promote.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Gap Report

Several substantive amendments are recommended.

1. The typeface provision in (a)(5)(A) is simplified by deleting the provision allowing footnotes to be in 12 point type.
2. The type style provision in (a)(6) is simplified by deleting the restrictions on the use of boldface and all capitals. The first sentence of that paragraph is amended to say that both italics and boldface may be used for emphasis.
3. The type-volume limitations in (a)(7)(B)(i) are simplified in two ways:
   a. The character counting method is deleted because some word processing programs treat spaces and punctuation as characters while other programs do not.
   b. The limitation on the average number of words (or characters) per page is deleted. If the word counting method is used, the motivation to crowd too much material onto a page is eliminated.

   There are conforming amendments in (a)(7)(B)(iii) and (a)(7)(C).

Several style changes are recommended.

a. In the title of the rule, the words "Brief" and "Appendix" are made plural.
b. Throughout subdivision (a) the word "brief" is substituted for the word "document".
c. In (a)(4), the arabic numeral is substituted for the word "two".

Conforming amendments are made in the Committee Note. The Committee Note is also expanded to provide more explanatory information and examples concerning typefaces and type styles.

Comments on Proposed Amendments to Rule 33

None

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Rule 34

I. General Summary of Public Comments on Rule 34

Five comments on Rule 34 were submitted.

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

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

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

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

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

II. Summary of Individual Comments on Rule 34

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Gap Report

The Advisory Committee recommends dividing subdivision (a) into two separate paragraphs. The first paragraph deals with a party's statement regarding oral argument. The second paragraph deals with standards for granting oral argument. A change is recommended in paragraph (a)(1). The change permits a court to require by local rule that a party file a statement explaining why oral argument should, or need not, be permitted.

Comments on the Proposed Amendments to Rule 35

I. General Summary of Public Comments on Rule 35

Four comments on Rule 35 were submitted.

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

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

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

Two commentators suggest stylistic changes.

II. Summary of Individual Comments on Rule 35

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

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

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

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

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

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

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

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

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

Gap Report

1. There is one substantive post-publication change and three minor post-publication language changes. The substantive change is in subdivision (f) which governs voting on petitions for en banc hearing or rehearing. The first sentence, which instructs the clerk to distribute the petition, is deleted. Which judges should receive a copy of a petition is a matter of internal concern to the court and need not be in a rule. The second sentence deals with "calling" for a vote on a petition. The language approved by the Standing Committee last June was: "But a vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge requests a vote." Minor word changes are recommended in that sentence so that it will say: "A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote."

   The three additional minor language changes are recommended:

   a. In paragraph (b)(1)(B) the phrase "an issue as to which" is changed to "an issue on which".
   b. In that same paragraph "federal court of appeals" is changed to "United States Court of Appeals".
   c. The caption to subdivision (c) is changed from "Time for Petition" to "Time to Petition".

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

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

3. The Committee Note developed in connection with the September 1995 publication of this rule is substituted for the Committee Note used in the style packet. The 1995 Committee Note is inserted into the "marked" and "clean" rules portions of this report. There are minor changes in the Committee Note

to make it consistent with the rest of the notes in the style packet.

Excerpts from June 1996 Report to the Standing Committee

Gap Report on Rule 35

Rule 35. ~~Determination of Causes by the Court In Banc~~ En Banc Determination

(a) **When Hearing or Rehearing ~~in~~ En Banc ~~will~~ May Be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals ~~in~~ en banc. ~~Such a~~ An en banc hearing or rehearing is not favored and ordinarily will not be ordered ~~except~~ unless:

(1) ~~when~~ en banc consideration ~~by the full court~~ is necessary to secure or maintain uniformity of the court's ~~its~~ decisions ~~;~~ : or

(2) ~~when~~ the proceeding involves a question of exceptional importance.

(b) ~~Suggestion of a party~~ Petition for Hearing or Rehearing ~~in~~ En Banc. A party may ~~suggest the appropriateness of~~ petition for a hearing or rehearing ~~in~~ en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States

Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other federal court of appeals that has addressed the issue.

(2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages,

excluding material not counted under Rule 28(g).

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately unless separate filing is required by local rule.

~~No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.~~

(c) Time for ~~suggestion of a party~~ Petition for Hearing or Rehearing ~~in~~ En Banc. ~~; suggestion does not stay mandate. If a party desires to~~

~~suggest that~~ A petition that an appeal be heard initially ~~in~~ en banc ~~, the suggestion~~ must be ~~made~~ filed by the date ~~on which~~ when the appellee's brief is ~~filed~~ due. A ~~suggestion~~ petition for a rehearing ~~in~~ en banc must be ~~made~~ filed within the time prescribed by Rule 40 for filing a petition for rehearing. ~~, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.~~

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

(e) **Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response.

(f) **Voting on a Petition.** The clerk must forward any such petition to the judges of the court who are in regular active service and, with respect to a

petition for rehearing, to any other members of the panel that rendered the decision sought to be reheard. But a vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge requests a vote.

Committee Note

One of the purposes of the amendments is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and extend the period for filing a petition for writ of certiorari. Companion amendments are made to Rule 41.

Subdivision (a). The title of this subdivision is changed from "When hearing or rehearing in banc will be ordered" to "When Hearing or Rehearing En Banc May Be Ordered." The change emphasizes the discretion a court has with regard to granting en banc review.

Subdivision (b). The term "petition" for rehearing en banc is substituted for the term "suggestion" for rehearing en banc. The terminology change is not a necessary part of the changes that extend the time for filing a petition for a writ of certiorari when a party requests a rehearing en banc. The terminology change reflects, however, the Committee's intent to treat similarly a petition for panel rehearing and a request for a rehearing en banc.

The amendments also require each petition for en banc consideration to begin with a statement concisely demonstrating that the case meets the usual criteria for en banc consideration. It is the Committee's hope that requiring such a statement will cause the drafter of a petition to focus on the narrow grounds that support en banc consideration and to realize that a petition should not be filed unless the case meets those rigid standards.

Intercircuit conflict is cited as one reason for asserting

that a proceeding involves a question of "exceptional importance." Intercircuit conflicts create problems. When the circuits construe the same federal law differently, parties' rights and duties depend upon where a case is litigated. Given the increase in the number of cases decided by the federal courts and the limitation on the number of cases the Supreme Court can hear, conflicts between the circuits may remain unresolved by the Supreme Court for an extended period of time. The existence of an intercircuit conflict often generates additional litigation in the other circuits as well as in the circuits that are already in conflict. Although an en banc proceeding will not necessarily prevent intercircuit conflicts, an en banc proceeding provides a safeguard against unnecessary intercircuit conflicts.

Some circuits have had rules or internal operating procedures that recognize a conflict with another circuit as a legitimate basis for granting a rehearing en banc. An intercircuit conflict may present a question of "exceptional importance" because of the costs that intercircuit conflicts impose on the system as a whole, in addition to the significance of the issues involved. It is not, however, the Committee's intent to make the granting of a hearing or rehearing en banc mandatory whenever there is an intercircuit conflict.

The amendment states that "a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other federal court of appeals that has addressed the issue." That language contemplates two situations in which a rehearing en banc may be appropriate. The first is when a panel decision creates a conflict. A panel decision creates a conflict when it conflicts with the decisions of all other circuits that have considered the issue. If a panel decision simply joins one side of an already existing conflict, a rehearing en banc may not be as important because it cannot avoid the conflict. The second situation that may be a strong candidate for a rehearing en banc is one in which the circuit persists in a conflict created by a pre-existing decision of the same circuit and no other circuits have joined on that side of the conflict. The amendment states that the conflict must be with an "authoritative" decision of another circuit. "Authoritative" is used rather than "published" because in some circuits unpublished opinions may be treated as authoritative.

Counsel are reminded that their duty is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of subdivision (a) of this Rule and even then the granting of a petition is entirely within the court's discretion.

Paragraph (2) of this subdivision establishes a maximum length for a petition. Fifteen pages is the length currently used in several circuits. Each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. The extraordinary nature of the issue or the threat to uniformity of the court's decision can be established in most cases in less than fifteen pages. A court may shorten the maximum length on a case by case basis but the rule does not permit a circuit to shorten the length by local rule. The Committee has retained page limits rather than using a word count similar to that in proposed Rule 32 because there has not been a serious enough problem to justify importing the word count and typeface requirements that may become applicable to briefs into other contexts.

Paragraph (3), although similar to (2), is separate because it deals with those instances in which a party files both a petition for rehearing en banc under this rule and a petition for panel rehearing under Rule 40.

To improve the clarity of the rule, the material dealing with filing a response to a petition and with voting on a petition have been moved to new subdivisions (e) and (f).

Subdivision (c). Two changes are made in this subdivision. First, the sentence stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate is deleted. Second, the language permitting a party to include a request for rehearing en banc in a petition for panel rehearing is deleted. The Committee believes that those circuits that want to require two separate documents should have the option to do so.

Subdivision (e). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b). The only changes are stylistic; no substantive changes are intended.

Subdivision (f). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b).

Because of the discretionary nature of the en banc procedure, the filing of a suggestion for rehearing en banc has not required a vote; a vote is taken only when requested by a judge of the court or by a judge who was a member of the panel that rendered the decision sought to be reheard. It is not the Committee's intent to change the discretionary nature of the procedure or to require a vote on a petition for rehearing en banc. The rule continues, therefore, to provide that a court is not obligated to vote on such petitions. It is necessary, however, that each court develop a procedure for disposing of such petitions because they will suspend the finality of the court's judgment and toll the time for filing a petition for certiorari.

Public Comments on Rule 35

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

The comments were as follows:

1. Peter H. Arkison, Esquire
Suite 502
103 East Holly Street
Bellingham, Washington 98225-4728

Points out that there is an unnecessary double negative in both 35(b)(2) and (3) ("excluding material not counted"). The paragraphs are also unnecessarily wordy because they repeat "petition for rehearing and a petition for rehearing en banc." He also suggests excluding "except by the court's permission" because it is in Rule 28(g).

He suggests:

35(b)(2) "Rule 28(g) shall apply with a page limit of 15 pages for a petition."

35(b)(3) "For purposes of Rule 35(b)(2), a petition for panel rehearing and a petition for rehearing en banc shall be considered a single document regardless of whether they are filed separately."

2. Robert L. Baechtol, Esquire
Chair, Rules Committee
The Federal Circuit Bar Association
1300 I Street, N.W.
Suite 700
Washington, D.C. 20005-3315

The Association suggests that 35(b)(1)(B) should be expanded to include an additional consideration:

> . . . or involves an issue which is one of first impression or on which the prior law was unsettled in the circuit.

3. Donald R. Dunner, Esquire
Chair, Section of Intellectual Property Law
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Mr. Dunner submits comments from two of the section's committees:

One committee states that the 15-page limit "may be a bit too restrictive, especially where both a petition for en banc review and a petition for panel rehearing are filed. Perhaps 35(b)(3) could be further amended to provide for additional pages upon leave of court." The committee states that the remaining amendments "appear to be acceptable."

Another committee agrees that the distinction between a petition for rehearing and a petition for rehearing en banc should be abolished but disagrees that a panel decision needs to conflict with every other federal court of appeals in order to "present a question of exceptional importance." If a split is significant and the panel decision illuminates or heightens the conflict, the proceeding may present a question of exceptional importance warranting en banc treatment even when the decision joins one side of a preexisting conflict.

4. William J. Genego and Peter Goldberger, Esquires
Co-Chairs, National Association of Criminal
Defense Lawyers, Committee On Rules of Procedure
1627 K Street, N.W.
Washington, D.C. 20006

NACDL welcomes the elimination of the distinction between a petition for rehearing and a suggestion for rehearing en banc and approves expansion of the grounds for rehearing to include intercircuit conflicts. It does not oppose imposition of a uniform page length. But it does not see the point of changing the spelling of "in banc" which conforms to the statutory usage.

5. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments of Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section of the Federal Bar Association. Mr. Laponsky endorses the proposed amendments.

6. Miriam A. Krinsky
Assistant United States Attorney
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

"Wholeheartedly endorse[s]" the change so that a request for rehearing en banc suspends the finality of a judgment and extends the time for filing a petition for a writ of certiorari; the change eliminates a trap that is based upon an ill-advised distinction.

Urges consideration of an amendment that clarifies the precedential value of a panel opinion after rehearing en banc is granted. Most circuits either automatically, or usually, vacate the panel opinion when en banc review is granted; but the Ninth and Tenth Circuits presume that the three-judge panel opinion remains in effect pending disposition of the case by the en banc court. It may be undesirable to have, during the time the case is awaiting en banc resolution, a number of district court judgments handed down based on a panel decision that is likely to be modified.

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

Supports the change in terminology from "suggestion" to "petition" for rehearing en banc. But objects to two features of the proposed amendments to subpart (b).

a. Requiring in (b)(1) that the petition must explain that either the panel decision conflicts with other decisions or involves a question of exceptional importance implies that these are the only grounds for en banc treatment. The circuits have used en banc rehearings when a majority of the active judges believe that a panel decision is simply wrong. Mr. Lacovara says that the rule should not purport to deprive the circuits of this error-correcting capacity, even if the circuits are not often inclined to use it.

He suggests deleting "either" from line 18 and "or" from line 27 on page 17; striking the period on line 39 and inserting "or" and then adding the following:

"(C) there are other specific and compelling reasons for the court en banc to consider the matter."

b. Subsection (b)(1)(B) may imply that a circuit should not bother with a decision unless it is out of line with "every other" circuit. That test is too demanding and does not represent current, sound appellate practice. It is the prerogative of the full court to have the opportunity to decide, where there is otherwise an intercircuit conflict, whether to align itself with the other side of the split—or to adopt another approach—rather than acquiesce in the position taken by the panel. He suggests amending lined 36-39 to read:

"decisions of [every] other federal courts of appeals that have[as] addressed the issue . . . ."

Mr. Lacovara also questions the assertion in the Committee Note that, in order for a "petition" for rehearing en banc to extend the time for petitioning for certiorari, the Supreme Court would have to amend its Rule 13.3. At most, the commentary should indicate that it is not clear what effect the Supreme Court would extend to the new characterization.

8. Mr. John Mayer
3821 North Adams Road
Bloomfield Hills, Michigan 48304

Suggests using the plain English term "full court" rather than *in banc* or *en banc*.

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

Chief Judge Newman opposes three aspects of the proposed revisions.

a. He recommends deleting that portion of 35(b) which relates the existence of a question of exceptional importance to a conflict among circuits.
   - He believes that the proposed wording states a bias in favor of an in banc rehearing whenever the panel decision conflicts with a decision of another circuit and it is "not the business of national rule-makers to construe the phrase 'exceptional importance,' which has been one of the two criteria" for a full court rehearing for decades.
   - "[T]he rule invokes its new test of importance whenever a decision conflicts with the decision of just one other circuit." Whether a court should rehear such a case in banc is best left to the sound judgment of each court of appeals.

b. The amendment of 35(c) will create confusion by dropping the sentence that makes it clear a suggestion for a rehearing in banc does not stay the issuance of the mandate or affect finality. He suggests that the Committee try to coordinate the effective date of the proposed amendment to Rule 35(c) to coincide with an amendment to Supreme Court Rule 13.3, or provide that the amendment to Rule 35(c) does not become effective unless and until a corresponding change is made in Supreme Court Rule 13.3

c. Chief Judge Newman states that the change in spelling from "in banc" to "en banc" is extremely ill-advised. He would retain "in banc" because it conforms to the spelling used in the statute, 28 U.S.C. § 46(c), and there should be a compelling reason supporting any such variation. Second, "in banc" is a phrase of English words. Third, no rule change should be made unless there are significant reasons for it. The only reason given for the change is in the summary prepared by the Administrative Office; the summary says that "en banc" is in "much wider usage among the courts." That is not a substantial reason.

10. Honorable Jerry E. Smith
United States Circuit Judge
12621 United States Courthouse
515 Rusk
Houston, Texas 77002-2598

Urges the committee to use a word count similar to that in proposed in Rule 32 rather than a page limit. He says that attorneys circumvent the page limits

by using small typeface and single-spaced footnotes, etc. and that the problem is serious enough to warrant attention in the rules.

Judge Smith suggests either that 40(b) require petitions to be in the form prescribed in Rule 32(a) (with a corresponding changed to FRAP 32(b)) or that the rule could permit circuits to implement a local rule to control the use of compressed devices so as not to defeat the intent of the 15 page limit. He further states that it is incongruous to retain restrictions for petitions for panel rehearing but not for rehearing in banc.

11. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

Favors adoption of the changes and notes that Supreme Court Rule 13.3 will need to be conformed so that a "petition" for rehearing en banc will extend the time for filing a petition for certiorari.

12. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

13. Hugh F. Young, Jr.
Executive Director
Product Liability Advisory Council
1850 Centennial Park Drive, Suite 510
Reston, Virginia 22091

The PLAC suggests clarification of 35(b)(1)(b) on two points:

a. that intercircuit conflicts are not the only questions of exceptional importance that warrant *en banc* review; and
b. that a panel decision should not be required to conflict with <u>every</u> other circuit.

14. Michael Zachary, Esquire
Supervisory Staff Attorney
United States Court of Appeals
United States Courthouse
40 Foley Square
New York, New York 10007

Says it is unclear whether the language in (b)(1)(B) concerning a panel decision that creates a split among the circuits (a) gives an example of a proceeding that presents a question of exceptional importance and that the courts are free to grant en banc consideration in other circumstances presenting questions of exceptional importance; or (b) represents the only circumstance in which a question will be deemed of such exceptional importance as to warrant en banc consideration. He suggests that the Committee Note implies that the latter is true. Mr. Zachary does not state a preference for one approach over the other, however, he suggests that the Committee's intent should be clarified.
He also suggests that the Committee Note is unclear whether the intercircuit conflict language applies only to (b)(1)(B) or also to (b)(1)(A). He suggests that a sentence in the comment be amended as follows:

> The second situation that may be a strong candidate for a rehearing en banc is one in which the circuit persists in an intercircuit conflict created by a pre-existing decision of the same circuit . . . .

Gap Report on Rule 35

Two changes were made in the language of (b)(1)(B).

1. The discussion of intercircuit conflict is labeled as an example of a question of exceptional importance to avoid the implication that intercircuit conflict is the only circumstance in which a question is deemed of exceptional importance. In keeping with that change, the parenthetical (appearing in the published draft) requiring citation to conflicting cases was deleted.
2. The rule attempts to eliminate any suggestion that a court should grant en banc reconsideration whenever there is an intercircuit conflict. New language emphasized that a party may assert that the existence of intercircuit conflict gives rise to a question of exceptional importance.

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

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

Stylistic changes were also made.

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

Comments on Proposed Amendments to Rule 36

I. General Summary of Public Comments on Rule 36

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

II. Summary of Individual Comments on Rule 36

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

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

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

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

Gap Report

The title of Rule 36 is amended to reflect the fact that the rule governs not only entry of judgment but also notice of entry of judgment. The recommended title is "Entry of Judgment; Notice".

Comment on Proposed Amendments to Rule 37

I. General Summary of Public Comments on Rule 37

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

II. Summary of Individual Comments

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

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

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

Gap Report

No post-publication changes recommended.

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

I. General Summary of Public Comments on Rule 38

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

II. Summary of Individual Comments on Rule 38

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

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

Gap Report

No post-publication changes recommended.

Comments on Proposed Amendments to Rule 39

I. General Summary of Public Comments on Rule 39

Two comments on Rule 39 were received.

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

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

II. Summary of Individual Comments on Rule 39

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

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

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

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

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

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

Gap Report

There are two post-publication changes recommended. In (a)(4), the word "modified" is added, making the paragraph applicable if a judgment is "affirmed in party, reversed in part, modified, or vacated". In subdivision (c), the phrase "copies of a brief, appendix, or record authorized by Rule 30(f) " is changed to "copies of a brief or appendix, or copies of records authorized by Rule 30(f)". The change is necessary because Rule 30(f) applies only to copies of records and not to copies of a brief or appendix as the published language would suggest.

Comments on Proposed Amendments to Rule 40

I. General Summary of Comments on Rule 40

There were two comments on Rule 40.

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

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

II. Summary of Individual Comments on Rule 40

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

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

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

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

Gap Report

The only post-publication change recommended is to amend the rule so that it consistently refers to "panel rehearing" rather than simply to "rehearing".

Comments on Proposed Amendments to Rule 41

None

Gap Report

1. There is only one post-publication change recommended. Rule 41(d)(2)(B) provides that if a party who obtained a stay later files a petition for a writ of certiorari, the party must notify the circuit clerk within the period of the stay. The change requires the notice to be in writing.

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

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

3. The Committee Note developed in connection with the September 1995 publication of this rule is substituted for the Committee Note used in the style packet. The 1995 Committee Note is inserted into the "marked" and "clean" rules portions in this report. There are minor changes in the Committee Note to make it consistent with the rest of the notes in the style packet.

Excerpts from June 1996 Report to the Standing Committee

Gap Report on Rule 41

Rule 41. ~~**Issuance of Mandate; Stay of Mandate**~~ **Mandate: Contents; Issuance and Effective Date; Stay**

(a) ~~**Date of Issuance**~~ **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) **When Issued.** ~~The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue.~~ The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing or rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) **Effective Date.** The mandate is effective when issued.

~~(b) Stay of Mandate Pending Petition for Certiorari. A party who filed a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must~~

(d) **Staying the Mandate.**

(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) **Pending Petition for Certiorari.**

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and

must show that ~~a petition for certiorari~~ the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay ~~cannot~~ must not exceed ~~30~~ 90 days, unless the period is extended for good cause ~~shown~~, or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk during the period of the stay. ~~unless during the period of the stay, a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ in which~~ In that case, the stay ~~will~~ continues until ~~final disposition by~~ the Supreme Court's final disposition.

(C) The court may require a bond or

other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. ~~The court may require a bond or other security as a condition to the grant or continuance of a stay of the mandate.~~

Committee Note

The rule has been restructured to add clarity.

Subdivision (a). The sentence describing the contents of a mandate has been rewritten and moved to the beginning of the rule; the substance remains unchanged from the existing rule.

Subdivision (b). The existing rule provides that the mandate issues 7 days after the time to file a petition for panel rehearing expires unless such a petition is timely filed. If the petition is denied, the mandate issues 7 days after entry of the order denying the petition. Those provisions are retained but the amendments further provide that if a timely petition for rehearing en banc or motion for stay of mandate are filed, the mandate does not issue until 7 days after entry of an order denying the last of all such requests. If a petition for rehearing or a petition for rehearing en banc is granted, the court enters

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

Subdivision (c). Subdivision (c) is new. It provides that the mandate is effective when the court issues it. A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed. This amendment is intended to make it clear that the mandate is effective upon issuance and that its effectiveness is not delayed until receipt of the mandate by the trial court or agency, or until the trial court or agency acts upon it. This amendment is consistent with the current understanding. Unless the court orders that the mandate issue earlier than provided in the rule, the parties can easily calculate the anticipated date of issuance and verify issuance with the clerk's office. In those instances in which the court orders earlier issuance of the mandate, the entry of the order on the docket alerts the parties to that fact.

Subdivision (d) Amended paragraph (1) provides that the filing of a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari stays the issuance of the mandate until the court disposes of the petition or motion. The provision that a petition for rehearing en banc stays the mandate is a companion to the amendment of Rule 35 that deletes the language stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate. The Committee's objective is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and extend the period for filing a petition for writ of certiorari. Because the filing of a petition for rehearing en banc will stay the mandate, a court of appeals will need to take final action on the petition but the procedure for doing so is left to local practice.

Paragraph (1) also provides that the filing of a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari stays the mandate until the court disposes of the motion. If the court denies the motion, the court must issue the mandate 7 days after entering the order denying the motion. If the court grants the motion, the mandate is stayed according to the terms of the order granting

the stay. Delaying issuance of the mandate eliminates the need to recall the mandate if the motion for a stay is granted. If, however, the court believes that it would be inappropriate to delay issuance of the mandate until disposition of the motion for a stay, the court may order that the mandate issue immediately.

Paragraph (2). The amendment changes the maximum period for a stay of mandate, absent the court of appeals granting an extension for cause, to 90 days. The presumptive 30-day period was adopted when a party had to file a petition for a writ of certiorari in criminal cases within 30 days after entry of judgment. Supreme Court Rule 13.1 now provides that a party has 90 days after entry of judgment by a court of appeals to file a petition for a writ of certiorari whether the case is civil or criminal.

The amendment does not require a court of appeals to grant a stay of mandate that is coextensive with the period granted for filing a petition for a writ of certiorari. The granting of a stay and the length of the stay remain within the discretion of the court of appeals. The amendment means only that a 90-day stay may be granted without a need to show cause for a stay longer than 30 days.

Subparagraph (C) is not new; it has been moved from the end of the rule to this position.

Public Comments on Rule 41

Seven letters were received which comment upon the proposed amendments to Rule 41. Two of the letters from A.B.A. sections, however, contained comments from two of the sections' committees. There were therefore nine commentators. Six of the commentators approved the amendments without reservation. Two other commentators suggested revisions. One commentator made no substantive comments. None of them expressed general disapproval of the proposed changes.

1. Donald R. Dunner, Esquire
   Chair, Section of Intellectual Property Law
   American Bar Association
   750 N. Lake Shore Drive
   Chicago, Illinois 60611

Mr. Dunner submitted the comments of two of the section's committees.

One committee makes no substantive comments.

Another committee says that the rule should state when a court's mandate will issue if a petition for rehearing or rehearing en banc is granted. The committee also suggests that in subpart (b) the party, and not the Clerk of the Supreme Court, should have the burden of filing notice that the party has obtained a stay.

2. William J. Genego and Peter Goldberger, Esquires
Co-Chairs, National Association of Criminal
Defense Lawyers, Committee On Rules of Procedure
1627 K Street, N.W.
Washington, D.C. 20006

Thanks the committee for responding to NACDL's suggestions to conform the presumptive duration of a stay of mandate to the 90-day period allowed for filing a petition for a writ of certiorari.

3. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments of two different persons.

a. Sydney Powell, Esquire, the Chair of the Appellate Law and Trial Practice Committee of the Federal Litigation Section. Ms. Powell commends the committee for clarifying that "the mandate is effective when issued."

b. Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section. Mr. Laponsky approves the proposed amendments.

4. Miriam A. Krinsky
Assistant United States Attorney
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Supports the proposed changes and in particular the amendment to subpart (b) that changes the presumptive period for a stay to 90 days.

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

Approves enlarging the stay-of-mandate period to 90 days in most cases. Suggests language changes in lines 59-61 on page 29 to return to the existing language ("unless during the period of the stay, a notice from the clerk of the Supreme Court is filed showing . . . .") or to substitute new language ("If, however, during the period of the stay, the clerk of the court of appeals receives a notice from the clerk of the Supreme Court indicating that . . . .") Either formulation avoids the inaccurate implication that the Clerk of the Supreme Court files papers in a court of appeals (that is the responsibility of the clerk of the court of appeals; the Supreme Court Clerk does his filing at the Supreme Court).

6. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

Recommends adoption of the proposed amendments because they mesh with the Supreme Court rules and assist counsel and eliminate unnecessary motion practice.

7. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

Gap Report on Rule 41

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

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

certiorari.

Comments on Proposed Amendments to Rule 42

None

Gap Report

No post-publication changes are recommended.

Comments on Proposed Amendments to Rule 43

There were no public comments.

Gap Report

There is only one minor change recommended. In the heading for (c)(2) the term "Office-Holder" is changed to "Officeholder".

Comments on Proposed Amendments to Rule 44

I. General Summary of Public Comments on Rule 44

Two comments on Rule 44 were received.

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

The other commentator suggests stylistic revisions.

II. Summary of Individual Comments on Rule 44

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

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

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

Mr. Fleischer suggests rewriting the first sentence as follows:

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

Gap Report

No post-publication changes are recommended.

Comments on Proposed Amendments to Rule 45

I. General Summary of Public Comments on Rule 45

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

II. Summary of Individual Comments on Rule 45

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

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

Gap Report

Only one minor language change is recommended. In (b)(2), "[u]nder the court's direction" is substituted for "[u]nder the direction of the court".

Comments on the Proposed Amendments to Rule 46

I. General Summary of Public Comments on Rule 46

Four comments on Rule 46 were submitted.

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

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

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

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

II. Summary of Individual Comments on Rule 46

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

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

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

Mr. Fleischer suggests amending the first sentence to read:

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

eligibility for membership.

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

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

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

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

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

4. Gary S. Chilton, Esquire
Andrews Davis Legg Bixler Milsten & Price
500 West Main
Oklahoma City, Oklahoma 73102-2275
Mr. Chilton's letter (to Mr. Fisher, Clerk of the Tenth Circuit) agrees with the proposed word change from "demean" to "conduct" in the attorney oath.

Gap Report

A number of style changes are recommended.

1. In (a)(2), language stating that a court approved form would be "furnished by the clerk" was deleted as unnecessary. In the same paragraph, the language requiring an applicant for admission to subscribe "at the foot of the application" was deleted as unnecessary and the language requiring an applicant to "take" the oath was deleted as redundant in light of the fact that the applicant is required to subscribe to the oath.
2. The opening sentence of (a)(3) was rewritten to make it consistent with the style conventions.
3. Subdivision (b) was divided into 3 paragraphs and paragraph (b)(1) was further

subdivided into two subparagraphs.

4. In 46(c), the caption and the first sentence were rewritten to make them consistent with the style conventions.

Comments on Proposed Amendments to Rule 47

I. General Summary of Public Comments on Rule 47

Three comments on Rule 47 were received.

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

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

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

II. Summary of Individual Comments on Rule 47

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

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

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

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

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

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

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

Gap Report

1. In the second sentence of (a)(1) the phrase "a generally applicable direction to a party or a lawyer" is changed to "a generally applicable direction to parties or lawyers". If a directive is addressed to a specific party or a specific lawyer, it may well be in the form of an order. It is only when the requirements are intended to affect the class of "parties" or "lawyers" that Rule 47 appropriately insists that the requirements be embodied in formal local rules.

2. Rule 47(b) is amended to allow the courts of appeals to regulate practice in a particular case "in any manner consistent with federal law, these rules, and local rules of the circuit." Although "federal law" could be construed to include the federal rules and local rules, the specification is in the current rule,

has been helpful to practitioners, and should be continued lest its deletion be understood as a substantive change.

Comments on Proposed Amendments to Rule 48

None

Gap Report

One minor language change is recommended. In the first sentence of subdivision (a), the phrase "make recommendations about" is changed to "recommend".

Comments on Proposed Amendments to Form 4

I. General Summary of Public Comments on Form 4

Five comments on Form 4 were submitted.

Two commentators endorse the proposed changes. Two commentators oppose the proposed changes because of the expanded and detailed nature of the information requested. One of them says that the "penalty of perjury" clause obviates the need for collection of any detailed information.

Two commentators question the provisions requiring a prisoner to attach a certified statement of his or her institutional account for the last six months. The commentators note that a prisoner will not have control over obtaining a timely response to a request for such a statement. A third commentator focuses on the difficulty a prisoner would have in obtaining timely statements from previous institutions if the prisoner has lived in more than one institution during the relevant six-month period. That commentator suggests amending the form to require a certified statement from the institution in which the prisoner currently resides and the name of any other institutions in which the prisoner has had accounts during the same six-month period. Alternatively, the commentator suggests authorizing a court, with the prisoner's consent, to extrapolate from the statement obtained from the prisoner's current institution. If the prisoner refuses consent, the prisoner would be required to obtain statements from all relevant institutions.

Two commentators object to requiring an applicant to state the issues that the applicant wishes to pursue on appeal.

One commentator asks whether it is fair to treat the assets of the applicant's spouse as available to the petitioner because they may not be available to the applicant.

One commentator suggests that the form should make it clear that although a prisoner is required to pay the full filing fee even if IFP status is granted, the fee may be paid in installments from his/her institutional account if the prisoner does not presently have sufficient funds.

The same commentator also suggests that the form should reflect the fact that IFP status may apply not only to filing fees or the cost of bond for fees, but also to other costs such as preparation of the transcript.

One commentator suggests that there should be a specific time limit on employment history.

II. Summary of Individual Comments on Form 4

1. Bennet Boskey, Esquire
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Mr. Boskey says that the proposed revision "is an overreaction against the present lack of specificity."

He asks whether it is fair to treat the petitioner and the petitioner's spouse always as one. Even if it normally would be fair, shouldn't the form take into account that they may be separated, either by living apart or in their financial arrangements, and that the petitioner may not have any real access to the spouse's assets.

He questions the provision requiring prisoners to attach a certified statement of their receipts, expenditures and balances during the last six months in their institutional accounts. He asks whether timely response to such requests can be obtained.

2 Mr. Clayton R. Jackson 06751-097
Mr. Richard Arrota
Mr. Roscoe Foreman
C.S. 4500
North Las Vegas, Nevada 89036-4500

They suggest striking the last sentence of question four ("If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account."). They suggest replacing it with the following:

> "If you have multiple accounts, attach one certified statement of each account. If you have had an account at more than one institution during the past six months, attach a certified statement of your account at your current institution (indicating the number of months this account has been active), and the name of any other institutions in which you have had accounts during the balance of the same six-month period."

They note that an incarcerated person is able to obtain a statement from his/her

current institution. But if one has been at multiple institutions during the relevant six-month period, serious difficulties will arise in attempting to comply with the published language.

They propose another alternative -- permitting the court, with the permission of the prisoner, to extrapolate for the six-month period based upon the certified balance of the reported period. If the prisoner refuses to consent, the prisoner would be required to obtain certified statements from every institution in which he/she resided during the six-month period.

3. David C. Long, Esquire
The State Bar of California
555 Franklin Street
San Francisco, California 94101-4498

The Board of Governors of the State Bar of California voted to oppose the proposed changes to Form 4. The decision was based upon recommendation of four State Bar Committees (Administration of Justice, Appellate Courts, and Legal Services Section, and the Litigation Section)

The bar committees and sections object to the requirement that prisoners provide certified statements from prison officials regarding their institutional accounts because prison officials are then in control of a prisoner's ability to obtain IFP status. That control may permit prison officials to effectively block a prisoner's appeal. They also note that obtaining the forms in time to meet the deadline for filing a notice of appeal will be especially difficult.

The committees also objected to the expanded and detailed nature of the information requested, noting that the burden of providing such information may serve as a deterrent to obtaining access to the appellate process.

The committees note that the form asks the applicant to list the issues on appeal. The subject matter of the appeal has no relevance to a motion for IFP status.

One committee says that the inclusion of the "penalty of perjury" clause obviates the need for Form 4 in its entirety.

4. Carol A. Brook, Esquire
William J. Genego, Esquire
Peter Goldberger, Esquire
Co-Chairs, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
1627 K Street, N.W.
Washington, D.C. 20006

The Committee notes that modification of Form 4 is necessary in light of the amendments to 28 U.S.C. § 1915. The Committee says that the proposed form is an improvement in many respects, but suggests a number of additional changes.

1. The form should make it clear that although § 1915(b)(1) requires a prisoner who files an appeal IFP to pay the full filing fee, the fee may be paid in installments from his/her institutional account if the prisoner does not presently have the funds to do so. The form also should inform prisoners that this requirement does not apply to habeas corpus of § 225 proceedings.
2. The form should reflect the fact that it applies to items other than payment of docket fees or a bond for fees. A litigant who is able to pay the filing fee, may not be able to pay other costs that are covered by § 1915, such as transcript preparation and, in certain circumstances, having the record on appeal printed.
3. The committee suggests deleting the portion of the form asking the applicant to state the issues on appeal.
   The form does not explain why an applicant should be required to state his or her issues on appeal. If the purpose is to aid in determining whether the appeal is "frivolous" under § 1915(d), it is not an effective, or fair, method to obtain that information. The applicant is not given notice that the response will be used to determine whether the appeal is frivolous, and thus whether IFP status will be granted.
   In addition, the form does not encourage full and complete statement of the issues -- the form suggests that a perfunctory statement, without supporting facts or other relevant information, is sufficient.
4. It would be helpful to include a specific time limit for employment history.

5. Dana E. McDonald
President, Federal Bar Association
1815 H. Street, N.W.
Washington, D.C. 20006-3697

The Federal Bar Association endorses the proposed amendments; indeed says, "Proposed Form 4 should be adopted without change."

Gap Report

The following changes are recommended.

1. The employment history for the applicant and the applicant's spouse is required for only the preceding two years.
2. The statutory requirement that a prisoner attach a statement of the balances in the prisoner's institutional accounts applies only when the prisoner is seeking to appeal a judgment in a civil action or proceeding. The instruction is amended accordingly.

COPY

Preliminary Draft of Proposed Revision of the Federal Rules of Appellate Procedure Using Guidelines for Drafting and Editing Court Rules

and

Preliminary Draft of Proposed Amendments to Appellate Rules 27, 28, and 32

Request for Comment

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Preliminary Draft of Proposed Revision of the Federal Rules of Appellate Procedure Using Guidelines for Drafting and Editing Court Rules

and

Preliminary Draft of Proposed Amendments to Appellate Rules 27, 28, and 32

Request for Comment

PUBLIC HEARINGS WILL BE HELD ON THESE PROPOSALS IN:

- Washington, D.C. on July 8, 1996; and
- Denver, Colorado on August 2, 1996.
- *Requests to testify must be submitted at least 30 days before the hearing.*

Please Submit Written Comments by December 31, 1996

Address all communications on rules to
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, DC 20544

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

April 1996

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

April 1, 1996

TO THE BENCH, BAR, AND PUBLIC:

The Judicial Conference Advisory Committee on Federal Rules of Appellate Procedure has completed its style revision of the entire set of Appellate Rules using uniform drafting guidelines. It has requested that the proposed revision be circulated to the bench, bar, and public generally for comment.

The style revision of the Appellate Rules is part of a comprehensive effort to clarify and simplify the language of all the Federal Rules of Practice and Procedure. The changes here proposed are intended to be nonsubstantive. In the course of reviewing the rules, however, existing ambiguities and inconsistencies surfaced, and the committee decided that a few substantive revisions were necessary. These limited changes have been specifically identified in the Committee Notes.

The advisory committee has also been considering substantive amendments to Appellate Rules 27, 28, and 32. Proposed amendments to these three rules were published last year and were revised in light of comment received. Rather than publish these revisions separately, we have included them as part of this packet. Accompanying Committee Notes explain the substantive changes.

We request that all suggestions and comments, whether favorable, adverse, or otherwise, be placed in the hands of the Secretary as soon as convenient and, in any event, **no later than December 31, 1996**. All communications should be addressed to the Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544. Comments received become part of the official record and are available for public inspection.

To provide individuals and organizations an opportunity to comment orally on the proposed amendments, hearings are scheduled to be held in Washington, D.C. on July 8, 1996, and in Denver, Colorado on August 2, 1996. Those wishing to testify should contact the Secretary of the Committee at the above address at least 30 days before the hearing.

The Advisory Committee on Appellate Rules will review all timely received comments and will take a fresh look at the proposals in light of the comments. If the advisory committee approves the changes, they and any revisions, as well as a summary of all comments received, will then be considered by the Standing Committee.

The Judicial Conference Standing Committee on Rules of Practice and Procedure has not approved these proposals, except to authorize their publication for comment. These proposed amendments have not been submitted to nor considered by the Judicial Conference of the United States or the Supreme Court.

Alicemarie H. Stotler
Chair

Peter G. McCabe
Secretary

ADVISORY COMMITTEE ON APPELLATE RULES
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

The Federal Rules of Appellate Procedure were enacted more than twenty-five years ago. The rules have been amended on twelve occasions since then by committees and reporters who have had no drafting guidelines to direct them. Without uniform drafting guidelines, inconsistencies in language and ambiguities in the rules have surfaced. Changes in committee membership and reporters, who produce initial drafts, have added to the unevenness in the rules.

In 1991, the Standing Committee on Rules of Practice and Procedure embarked on a style project to promote uniformity among the different sets of rules (i.e., appellate, bankruptcy, civil, and criminal procedural rules) and to simplify and clarify them. Bryan A. Garner, a respected legal-writing scholar, has led the style project under the auspices of the Committee's Subcommittee on Style. The advisory rules committees have used the uniform drafting guidelines, which were developed by Mr. Garner, in drafting individual proposed rules amendments.

When the Standing Committee on Rules of Practice and Procedure recommended that the advisory rules committees consider revising entire sets of rules using uniform drafting guidelines, the Advisory Committee on Appellate Rules welcomed the opportunity. A review of the Appellate Rules discloses obvious drafting problems and unclear provisions that can be improved. The rules often contain long narrative passages with few section dividers and headings to aid readers. There are inconsistencies in the general format of the rules.

The changes proposed in these revisions are intended to be non-substantive. The advisory committee is keenly aware that seemingly minor changes can unintentionally result in substantive changes. The committee refrained from making stylistic improvements if they resulted in substantive changes unless otherwise necessary. Revisions were approved only after the completion of an elaborate review process.

Inevitably, some substantive changes had to be made. These changes are identified by the committee and explained in the accompanying Notes to the rules. Although the committee devoted much time to identifying the substantive changes, we hope that this comment period and the widespread review afforded by it will capture any that we inadvertently missed. We also hope to receive comments on the uniform drafting guidelines, which can be obtained on request from the Secretary to the Committee.

The proposed revision of the Federal Rules of Appellate Procedure using uniform drafting guidelines is set out in the right-hand column of the accompanying side-by-side comparison. The text in the left-hand column contains the existing rule. Text italicized in the left-hand column identifies proposed rules amendments that were earlier published for comment with prospective effective dates either of December 1, 1996, or December 1, 1997.

James K. Logan
Chair

BACKGROUND NOTE

The Federal Rules of Practice and Procedure are respected for their clarity and simplicity and serve as working models for many state and local court rules. Some of the brightest legal minds have participated in the rulemaking process, drafting and revising the various sets of rules beginning in the 1930's. Yet the rules suffer from a shortcoming inherent in their development. Each set of rules — Appellate, Bankruptcy, Civil, Criminal, and Evidence — was prepared by a separate committee with its own set of consultants and drafters and its own set of stylistic preferences that have changed over time. Too often the rules now contain different phrases and words intended to mean the same thing, leading to unnecessary ambiguity and the loss of simplicity.

In 1991, the Judicial Conference Committee on Rules of Practice and Procedure, under the leadership of its chair, Judge Robert E. Keeton, established a Subcommittee on Style tasking it to clarify, simplify, and eliminate inconsistencies in proposed rules amendments. That charge was later expanded to include a review of the entire set of Appellate Rules. A list of the members on the Subcommittee on Style follows. The subcommittee's first chair was one of the country's premier experts on legal procedure, Professor Charles Alan Wright. One of Professor Wright's first actions was to request Bryan A. Garner, a leading legal-writing scholar, to assist the subcommittee in its work.

Bryan Garner prepared drafting guidelines setting out a common set of style preferences from which the style subcommittee began its work. The guidelines have been published as the *Guidelines for Drafting and Editing Court Rules*. They are also available on request from the Secretary to the Committee on Rules of Practice and Procedure. The guidelines are intentionally flexible and recognize the need to accept exceptions on occasion to accommodate certain entrenched traditions. We would be pleased to receive comment on this publication also.

In 1994, after nearly six months of intensive work, Bryan Garner finished revising the entire set of the Federal Rules of Appellate Procedure. The draft went to the Subcommittee on Style and was considered by the Judicial Conference Advisory Committee on Appellate Rules at its October 1994 meeting, after the committee divided itself into several subcommittees to review individual rules. The advisory committee later devoted most of its April and October 1995 three-day meetings to the draft. During that period, the Subcommittee on Style was reviewing the same draft and the advisory committee's modifications to it. At its October 1995 meeting, the advisory committee reviewed the recommendations of the Subcommittee on Style and made its final changes to the draft. It recommended that the draft be published for public comment for an extended time beginning in April 1996 and ending nine months later on December 31, 1996.

The Committee on Rules of Practice and Procedure reviewed the proposed revision at its January 1996 meeting and approved the advisory committee's recommendation to publish it. The attached draft is the product of this effort. It is being circulated widely and has been made available to legal online services and publishers. Public hearings have also been scheduled. We

hope to receive substantial feedback.

At the end of the comment period, the advisory committee will review all comments received and decide on appropriate modifications. Assuming the bench, bar, and public reaction is generally favorable, the set of rules as revised will be submitted to the Committee on Rules of Practice and Procedure at its summer 1997 meeting. Action on the proposal could then be taken by the Judicial Conference at its September 1997 session and later by the Supreme Court. If approved by the Court, it would be transmitted to Congress by May 1, 1998, and would take effect on December 1, 1998, unless Congress acted otherwise.

We recognize that a comprehensive change of established and well-known legal usages may cause transitional difficulties, and we did not undertake this revision lightly. We believe that even a cursory examination of the side-by-side comparison between the existing and proposed rules will disclose their manifest superiority. And we hope that present and future generations of lawyers and jurists will benefit from today's careful efforts to revise the rules for clarity and consistency.

THE SUBCOMMITTEE ON STYLE OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Professor Charles Alan Wright, chair (1991— 1993);
Judge George C. Pratt, member (1991— 1993), chair (1993 — 1995);
Judge Alicemarie H. Stotler, member (1991 — 1993);
Joseph F. Spaniol, Jr., consultant (1991 — present);
Bryan A. Garner, consultant (1991 — present);
Judge Robert E. Keeton, *ex officio* (1991 — 1993);

Judge James A. Parker, member (1993 — 1995), chair (1995 — present);
Professor Geoffrey C. Hazard, Jr., member (1993 — present); and

Judge William R. Wilson, Jr., member (1995 — present).

Federal Rules of Appellate Procedure

Revised by
The Advisory Committee on the
Federal Rules of Appellate Procedure of the
Judicial Conference of the United States
Using
Guidelines for Drafting and Editing Court Rules

April 1996

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RULES

TITLE I. APPLICABILITY OF RULES	TITLE I. APPLICABILITY OF RULES
Rule 1. Scope of Rules and Title	**Rule 1. Scope of Rules; Title**
(a) Scope of rules. — These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the United States Tax Court; in appeals from bankruptcy appellate panels; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.	**(a) Scope of Rules.** (1) These rules govern procedure in the United States courts of appeals. (2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.
(b) Rules not to affect jurisdiction. — These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.	**(b) Rules Do Not Affect Jurisdiction.** These rules do not extend or limit the jurisdiction of the courts of appeals.
(c) Title. — These rules may be known and cited as the Federal Rules of Appellate Procedure.	**(c) Title.** These rules are to be known as the Federal Rules of Appellate Procedure.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. The Advisory Committee recommends deleting the language in subdivision (a) that describes the different types of proceedings that may be brought in a court of appeals. The Advisory Committee believes that the language is unnecessary and that its omission does not work any substantive change.

any

Rule 2. Suspension of rules	Rule 2. Suspension of Rules
In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.	On its own or a party's motion, a court of appeals may — to expedite its decision or for other good cause — suspend the provisions of ~~any of~~ these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

TITLE II. APPEALS FROM JUDGMENTS AND ORDERS OF DISTRICT COURTS	TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT
Rule 3. Appeal as of Right — How Taken	**Rule 3. Appeal as of Right — How Taken**
(a) Filing the Notice of Appeal. — An appeal permitted by law as of right from a district court to a court of appeals must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of subdivision (d) of this Rule 3. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy must be taken in the manner prescribed by Rule 5 and Rule 6 respectively. An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district-court judgment.	**(a) Filing the Notice of Appeal.** (1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). (2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal. (3) (4) An appeal by permission under 28 U.S.C. § 1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6 respectively.
(b) Joint or consolidated appeals. — If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.	**(b) Joint or Consolidated Appeals.** (1) When two or more ~~persons~~ parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant. (2) When the parties have filed separate timely notices of appeal, the appeals may be joined by ~~or consolidated if~~ the court of appeals ~~so orders on its own or a party's motion~~.

(c) Content of the Notice of Appeal. — A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent. In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. Form 1 in the Appendix of Forms is a suggested form for a notice of appeal.

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) Serving the Notice of Appeal. - The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record (apart from the appellant's), or, if a party is not represented by counsel, to the party's last known address. The clerk of the district court shall forthwith send a copy of the notice and of the docket entries to the clerk of the court of appeals named in the notice. The clerk of the district court shall likewise send a copy of any later docket entry in the case to the clerk of the court of appeals. When a defendant appeals in a criminal case, the clerk of the district court shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date when the notice of appeal was filed and, if the notice of appeal was filed in the manner provided in Rule 4(c) by an inmate confined in an institution, the date when the clerk received the notice of appeal. The clerk's failure to serve notice does not affect the validity of the appeal. Service is sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.	**(d) Serving the Notice of Appeal.** (1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record — excluding the appellant's — or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries — and any later docket entries — to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed. (2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the clerk must also note the date when the clerk docketed the notice. (3) The clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient ~~notwithstanding~~ despite the death of a party or the party's counsel.
(e) Payment of fees. — Upon the filing of any separate or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States, the latter to be received by the clerk of the district court on behalf of the court of appeals.	**(e) Payment of Fees.** Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language

to make style and terminology consistent throughout the appellate rules. These changes are generally intended to be stylistic only; in this rule, however, substantive changes are recommended in subdivisions (a), (b) and (d).

Subdivision (b). A joint appeal is authorized only when two or more persons may appeal from a single judgment or order. A joint appeal is treated as a single appeal and the joint appellants file a single brief. Under existing Rule 3(b) parties decide whether to join their appeals. They may do so by filing a joint notice of appeal or by joining their appeals after filing separate notices of appeal.

In consolidated appeals the separate appeals do not merge into one. ~~Separate judgments are entered.~~ The parties do not proceed as a single appellant; ~~and the appellants are not "parties" of each others' cases. See *United States v. Tippett*, 975 F.2d 713 (10th Cir. 1992).~~ Under existing Rule 3(b) it is unclear whether appeals may be consolidated without court order if the parties stipulate to consolidation. The proposed language resolves that ambiguity by requiring a court ~~order for consolidation. The order may be entered upon motion of a party or by the court on its own motion.~~ action

The proposed language also requires a court ~~order~~ action to join appeals after separate notices of appeal have been filed. ~~The order will make it clear that the appeals are joined.~~

Subdivision (d). Paragraph (d)(2) has been amended to require that when an inmate files a notice of appeal by depositing the notice in the institution's internal mail system, the clerk must note the docketing date — rather than the receipt date — on the notice of appeal before serving copies of it. This change conforms to a recommended change in Rule 4(c). Rule 4(c) is amended to provide that when an inmate files the first notice of appeal in a civil case by depositing the notice in an institution's internal mail system, the time for filing a cross-appeal runs from the date the district court dockets the inmate's notice of appeal. Existing Rule 4(c) says that in such a case the time for filing a cross-appeal runs from the date the district court receives the inmate's notice of appeal. A court may "receive" a paper when its mail is delivered to it even if the mail is not processed for a day or two, making the date of receipt uncertain. "Docketing" is an easily identified event. The change is made to eliminate the uncertainty.

Subdivision (a). The provision in paragraph (a)(3) is tranferred from former Rule 3.1(b). The Federal Courts Improvement Act of 1996, Pub. L. 104-317, repealed paragraphs (4) and (5) of 28 U.S.C. §636(c). That statutory change made the continued separate existence of Rule 3.1 unnecessary. New paragraph (a)(3) of this rule simply makes it clear that an appeal from a judgment by a magistrate judge is taken in identical fashion to any other appeal from a district-court judgment.

Rule 3.1. Appeal from a Judgment Entered by a Magistrate Judge in a Civil Case	Rule 3.1 Appeal from a Judgment of a Magistrate Judge in a Civil Case
When the parties consent to a trial before a magistrate judge under 28 U.S.C. § 636(c)(1), any appeal from the judgment must be heard by the court of appeals in accordance with 28 U.S.C. § 636(c)(3), unless the parties consent to an appeal on the record to a district judge and thereafter, by petition only, to the court of appeals, in accordance with 28 U.S.C. § 636(c)(4). An appeal under 28 U.S.C. § 636(c)(3) must be taken in identical fashion as an appeal from any other judgment of the district court.	[abrogated] (a) **To the District Court.** When the parties have consented to a trial before a magistrate judge under 28 U.S.C. § 636(c)(1), an appeal from the judgment is heard by the court of appeals in accordance with § 636(c)(3), unless the parties have consented — at the time of reference to a magistrate judge — to an appeal on the record to a district judge and then, by petition only, to the court of appeals under § 636(c)(4). (b) **To the Court of Appeals.** An appeal under § 636(c)(3) must be taken in the same way as an appeal from any other district-court judgment.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

The Federal Courts Improvement Act of 1996, Pub. L. 104-317, repealed paragraphs (4) and (5) of 28 U.S.C. § 636(c). That statutory change means that when parties consent to trial before a magistrate judge, appeal lies directly, and as a matter of right, to the court of appeals under § 636(c)(3). The parties may not chose to appeal first to a district judge and thereafter seek discretionary review in the court of appeals.

As a result of the statutory amendments, ~~paragraph~~ subdivision (a) of Rule 3.1 is no longer necessary. Since Rule 3.1 existed primarily because of the provisions in ~~paragraph~~ subdivision (a), ~~paragraph~~ subdivision (b) has been moved to Rule 3(a)(3) and Rule 3.1 has been abrogated.

Rule 4. Appeal as of Right — When Taken	Rule 4. Appeal as of Right — When Taken
(a) Appeal in a civil case. — (1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date when the clerk received the notice and send it to the clerk of the district court and the notice will be treated as filed in the district court on the date so noted.	**(a) Appeal in a Civil Case.** **(1) Time for Filing a Notice of Appeal.** (A) In a civil case, except as provided in Rules 4(a)(4) and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after ~~the date when~~ the judgment or order appealed from is entered. 4(a)(1)(B) (B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after ~~entry~~ the judgment or order appealed from is entered.
(2) A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry.	(2) **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision or order — but before the entry of the judgment or order — is treated as filed on the date of and after the entry.
(3) If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.	(3) ~~**Notice of Cross-Appeal.**~~ If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

Multiple Appeals.

(4) If any party 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 filed no later than 10 days after the entry of judgment.	(4) **Effect of a Motion on a Notice of Appeal.** (A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion: (i) for judgment under Rule 50(b); (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment; (iii) for attorney's fees under Rule 54 if a district court extends the time ~~for~~ to appeal under Rule 58; (iv) to alter or amend the judgment under Rule 59; (v) for a new trial under Rule 59; or (vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(computed using Federal Rule of Civil Procedure 6(a))

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 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 file 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.	(B)(i) If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered. (ii) A party intending to challenge an order disposing of ~~the motion~~, or a judgment altered or amended upon such a motion, ~~a party~~ must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion. (iii) No additional fee is required to file an amended notice.

any motion listed in Rule 4 (a) (4) (A)

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.	(5) **Motion for Extension of Time.** (A) The district court may extend the time to file a notice of appeal if: (i) a party so moves ~~within~~ no later than 30 days after the time prescribed by this Rule 4(a) expires; and (ii) that party shows excusable neglect or good cause. (B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules. (C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.	(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied: (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of ~~such~~ entry, the whichever is earlier; (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and (C) the court finds that no party would be prejudiced.
(7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.	(7) **Entry Defined.** A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(b) Appeal in a Criminal Case.- In a criminal case, a defendant shall file the notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or of a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence, or order — but before entry of the judgment or order — is treated as filed on the date of and after the entry. If a defendant makes a timely motion specified immediately below, in accordance with the Federal Rules of Criminal Procedure, an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, whichever is later. This provision applies to a timely motion: (1) for judgment of acquittal; (2) for arrest of judgment; (3) for a new trial on any ground other than newly discovered evidence; or (4) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment.	**(b) Appeal in a Criminal Case.** **(1) Time for Filing a Notice of Appeal.** (A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of: (i) the entry of either the judgment or the order being appealed, or (ii) the filing of the Government's notice of appeal. (B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of: (i) the entry of the judgment or order being appealed; or (ii) the filing of ~~the last defendant's~~ a notice of appeal by any defendant

(2) **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision, sentence, or order — but before the entry of the judgment or order — is treated as filed on the date of and after the entry.

(3) **Effect of a Motion on a Notice of Appeal.**

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions. When an appeal by the government is authorized by statute, the notice of appeal must be filed in the district court within 30 days after (i) the entry of the judgment or order appealed from or (ii) the filing of a notice of appeal by any defendant. A judgment or order is entered within the meaning of this subdivision when it is entered on the criminal docket. Upon a showing of excusable neglect, the district court may — before or after the time has expired, with or without motion and notice — extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.	(B) A notice of appeal filed after the court announces a decision, sentence, or order — but before it disposes of any of the motions referred to in Rule 4(b)(3)(A) — becomes effective upon the later of the following: (i) the entry of the order disposing of the last such remaining motion; or (ii) the entry of the judgment of conviction. (C) A valid notice of appeal is effective — without amendment — to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A). (4) **Motion for Extension of Time.** Upon a finding of excusable neglect or good cause, the district court may — before or after the time has expired, with or without motion and notice — extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).
The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.	(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under ~~Fed. R. Crim. P.~~ 35(c), nor does the filing of a motion under ~~Fed. R. Crim. P.~~ 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. (6) **Entry Defined.** A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

Federal Rule of Criminal Procedure

(c) Appeal by an Inmate Confined in an Institution.- If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. In a civil case in which the first notice of appeal is filed in the manner provided in this subdivision (c), the 14-day period provided in paragraph (a)(3) of this Rule 4 for another party to file a notice of appeal runs from the date when the district court receives the first notice of appeal. In a criminal case in which a defendant files a notice of appeal in the manner provided in this subdivision (c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's receipt of the defendant's notice of appeal.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; in this rule, however, substantive changes are recommended in paragraphs (a)(6) and (b)(4), and in subdivision (c).

Subdivision (a), paragraph (1). Although the Advisory Committee does not intend to make any substantive changes in this paragraph, a cross-reference to Rule 4(c) has been added to subparagraph (a)(1)(A).

Subdivision (a), paragraph (4). Item (vi) in subparagraph (A) of Rule 4(a)(4) provides that filing a motion for relief under Fed. R. Civ. P. 60 will extend the time for filing a notice of appeal if the Rule 60 motion is filed no later than 10 days after judgment is entered. Again, the Advisory Committee does not intend to make any substantive change in this paragraph. But because Fed. R. Civ. P. 6(a) and Fed. R. App. P. 26(a) have different methods for computing time, one might be uncertain whether the 10 day period referred to in Rule 4(a)(4) is computed using Civil Rule 6(a) or Appellate Rule 26(a). Because the Rule 60 motion is filed in the district court, and because Fed. R. App. P. 1(a)(2) says that when the appellate rules provide for filing a motion in the district court, "the procedure must comply with the practice of the district court," the ~~Advisory Committee believes~~ rule provides that the 10 day period is computed using Fed. R. Civ. P. 6(a).

Subdivision (a), paragraph (6). Paragraph (6) permits a district court to reopen the time for appeal if a party has not received notice of the entry of judgment and no party would be prejudiced by the reopening. Before reopening the time for appeal, the existing rule requires the district court to find that the moving party was entitled to notice of the entry of judgment and did not receive it "from the clerk or any party within 21 days of its entry." The Advisory Committee recommends a substantive change. The Advisory Committee recommends that the finding must be that the movant did not receive notice "from the district court or any party within 21 days after entry." This change broadens the type of notice that can preclude reopening the time for appeal. The existing rule provides that only notice from a party or from the clerk bars reopening. The new language precludes reopening if the movant has received notice from "the court."

Subdivision (b). Existing Rule 4(b) provides that when the government is entitled to appeal in a criminal case, the government's notice of appeal must be filed within 30 days after entry of judgment or "the filing of a notice of appeal by any defendant." Use of the term "any defendant" creates an ambiguity. It may mean that when there are multiple defendants in a case, the government may file its notice of appeal as to all defendants as late as 30 days after the last notice of appeal is filed by any defendant. Conversely, it may mean that the government must file its notice within 30 days after the first defendant files a notice of appeal; failure to do so would then preclude the government from cross-appealing as to any subsequently filed notices of appeal in the case. The Advisory Committee recommends amending the rule to state that the government may appeal within 30 days after the later of entry of judgment or the filing of "the last defendant's" notice of appeal. This will remove the existing ambiguity.

Two substantive changes are proposed in what will be paragraph (b)(4). The current rule permits an extension of time to file a notice of appeal if there is a "showing of excusable neglect." First, the rule is

amended to permit a court to extend the time for "good cause" as well as for excusable neglect. Rule 4(a) permits extensions for both reasons in civil cases and the Advisory Committee believes that "good cause" should be sufficient in criminal cases as well. The proposed amendment does not limit extensions for good cause to instances in which the motion for extension of time is filed before the original time has expired. The rule gives the district court discretion to grant extensions for good cause whenever the court believes it appropriate to do so provided that the extended period does not exceed 30 days after the expiration of the time otherwise prescribed by Rule 4(b). Second, paragraph (b)(4) is amended to require only a "finding" of excusable neglect or good cause and not a "showing" of them. Because the rule authorizes the court to provide an extension without a motion, a "showing" is obviously not required; a "finding" is sufficient.

Subdivision (c). Substantive amendments are recommended in this subdivision. The current rule provides that if an inmate confined in an institution files a notice of appeal by depositing it in the institution's internal mail system, the notice is timely filed if deposited on or before the last day for filing. Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee recommends amending the rule to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subdivision.

When an inmate uses the filing method authorized by subdivision (c), the current rule provides that the time for other parties to appeal begins to run from the date the district court "receives" the inmate's notice of appeal. The rule is amended so that the time for other parties begins to run when the district court "dockets" the inmate's appeal. A court may "receive" a paper when its mail is delivered to it even if the mail is not processed for a day or two, making the date of receipt uncertain. "Docketing" is an easily identified event. The change is recommended to eliminate uncertainty. Paragraph (c)(3) is further amended to make it clear that the time for the government to file its appeal runs from the later of the entry of the judgment or order appealed from or the district court's docketing of a defendant's notice filed under this paragraph (c).

Rule 5. Appeal by Permission Under 28 U.S.C. § 1292(b)	Rule 5. Appeal by Permission under 28 U.S.C. § 1292(b)
(a) Petition for permission to appeal. — An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court with proof of service on all other parties to the action in the district court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.	(a) **Petition for Permission to Appeal.** To seek an appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b), a party must — within 10 days after the entry of the district court's order — file with the circuit clerk a petition for permission to appeal. The petition must include proof of service on all other parties to the district-court action. A district-court order may at any time be amended to include the prescribed statement, and permission to appeal may be sought within 10 days after entry of the amended order.
(b) Content of petition; answer. — The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. The petition shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. Within 7 days after service of the petition, an adverse party may file an answer in opposition. The application and answer shall be submitted without oral argument unless otherwise ordered.	(b) **Contents of the Petition; Answer.** (1) The petition must include the following: (A) the facts necessary to understand the controlling question of law that was determined by the district court's order; (B) the question itself; (C) the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially shorten the litigation; and (D) an attached copy of the order being appealed and any findings of fact, conclusions of law, and related opinion. (2) An adverse party may file an answer within 7 days after the petition is served. (3) The petition and answer will be submitted without oral argument unless the court orders otherwise.

(c) Form of Papers; Number of Copies. — All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.	**(c) Form of Papers; Number of Copies.** All papers must conform to Rule 32(a)(1). Three copies must be filed with the original, unless the court requires a different number by local rule or by order in a particular case.
(d) Grant of permission; cost bond; filing of record. — Within 10 days after the entry of an order granting permission to appeal the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b). A notice of appeal need not be filed.	**(d) Grant of Permission; Fees; Cost Bond; Filing the Record.** (1) Within 10 days after the entry of the order granting permission to appeal, the appellant must: (A) pay the district clerk all required fees; and (B) file a cost bond if required under Rule 7; (2) A notice of appeal need not be filed. (3) The district clerk must notify the circuit clerk once the appellant has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

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

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

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

~~from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. Within 7 days after service of the petition an adverse party may file an answer in opposition. The application and answer shall be submitted without oral argument unless otherwise ordered.~~

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

~~(d) *Grant of permission; cost bond; filing of record.* Within 10 days after the entry of an order granting permission to appeal the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b). A notice of~~

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appeal need not be filed.

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

(a) ***Petition for Leave to Appeal; Answer or Cross Petition.*** An appeal from a district court judgment, entered after an appeal under 28 U.S.C. § 636(c)(4) to a district judge from a judgment entered upon direction of a magistrate judge in a civil case, may be sought by filing a petition for leave to appeal. An appeal on petition for leave to appeal is not a matter of right, but its allowance is a matter of sound judicial discretion. The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed. Within 14 days after service of the petition, a party may file an answer in opposition or a cross petition.

(b) ***Content of Petition; Answer.*** The petition for leave to appeal shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in

~~the opinion of the petitioner the appeal should be allowed;~~ ~~and a copy of the order, decree or judgment complained~~ ~~of and any opinion or memorandum relating thereto. The~~ ~~petition and answer shall be submitted to a panel of judges~~ ~~of the court of appeals without oral argument unless~~ ~~otherwise ordered.~~

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

~~(d) *Allowance of the Appeal; Fees; Cost Bond; Filing of Record.*~~ Within 10 days after the entry of an order ~~granting the appeal, the appellant shall (1) pay to the clerk~~ ~~of the district court the fees established by statute and the~~ ~~docket fee prescribed by the Judicial Conference of the~~ ~~United States and (2) file a bond for costs if required~~ ~~pursuant to Rule 7. The clerk of the district court shall~~ ~~notify the clerk of the court of appeals of the payment of~~ ~~the fees. Upon receipt of such notice, the clerk of the~~ ~~court of appeals shall enter the appeal upon the docket.~~ ~~The record shall be transmitted and filed in accordance~~ ~~with Rules 11 and 12(b).~~

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Rule 5 Appeal by Permission

(a) Petition for Permission to Appeal.

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

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

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

either on its own or in response to a party's motion,

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order.

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

(1) The petition must include the following:

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

(B) the question itself;

(C) the relief sought;

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

(E) an attached copy of:

(i) the order, decree, or judgment complained of and any related opinion or memorandum, and

(ii) any order stating the district court's permission to appeal

or finding that ~~any~~ the necessary conditions ~~to appeal~~ are met.

(2) A party may file an answer in opposition or a cross-petition within 7 days after the petition is served.

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

(c) **Form of Papers; Number of Copies.** All papers must conform to Rule 32(a)(1). ~~Three~~ An original and 3 copies must be filed ~~with the original~~, unless the court requires a different number by local rule or by order in a particular case.

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

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

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

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

(2) A notice of appeal need not be filed ~~but~~ the date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

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

Committee Note

In 1992 Congress added paragraph (e) to 28 U.S.C. § 1292. Paragraph (e) says that the Supreme Court has power to prescribe rules that "provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" in section 1292. The amendment of Rule 5 was prompted by the possibility of new rules authorizing additional interlocutory appeals. Rather than add a separate rule governing each such appeal, the Committee believes it is preferable to amend Rule 5 so that it will govern all such appeals.

In addition ~~Rule 5.1 has been largely repetitive of Rule 5 and the Committee believes that its provisions could also be subsumed into Rule 5. Although Rule 5.1 did not deal with an interlocutory appeal, the similarity to Rule 5 was based upon the fact that both rules governed discretionary appeals.~~ the Federal Courts Improvement Act of 1996, Pub. L. 104-317, abolished appeals by permission under 28 U.S.C. § 636(c)(5), making Rule 5.1 obsolete.

This new Rule 5 is intended to govern all discretionary appeals from district court orders, judgments, or decrees. At this

time that includes interlocutory appeals under 28 U.S.C. § 1292(b), (c)(1), and (d)(1) &(2) ~~and the discretionary appeal under 28 U.S.C. § 636(c) from a district court judgment entered after an appeal from a judgment entered on direction of a magistrate judge in a civil case~~. If additional interlocutory appeals are authorized under § 1292(e), the new Rule is intended to govern them if the appeals are discretionary.

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

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

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

Subdivision (b). The changes made in the provisions in paragraph (b)(1) are intended only to broaden them sufficiently to make them appropriate for all discretionary appeals.

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

~~sufficient time to develop a response or cross-petition~~.

Subdivision (c). Subdivision (c) is substantively unchanged.

Subdivision (d). Paragraph (d)(2) is amended to state that "the date when the order granting permission to appeal is entered serves as the date of the notice of appeal" for purposes of calculating time under the rules. That language simply clarifies existing practice.

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Rule 5.1. Appeal by Permission Under 28 U.S.C. § 636(c)(5)	Rule 5.1 Appeal by Leave under 28 U.S.C. § 636(c)(5)
(a) Petition for Leave to Appeal; Answer or Cross Petition. — An appeal from a district court judgment, entered after an appeal under 28 U.S.C. § 636(c)(4) to a district judge from a judgment entered upon direction of a magistrate judge in a civil case, may be sought by filing a petition for leave to appeal. An appeal on petition for leave to appeal is not a matter of right, but its allowance is a matter of sound judicial discretion. The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed. Within 14 days after service of the petition, a party may file an answer in opposition or a cross petition.	**(a) Petition for Leave to Appeal.** (1) A party may seek an appeal from a district-court judgment entered after an appeal before the district court under 28 U.S.C. § 636(c)(4) — that is, an appeal to a court of appeals from the order of a district judge on appeal from a judgment entered upon direction of a magistrate judge in a civil case — by filing a petition for leave to appeal. Such an appeal to a court of appeals is a matter not of right but of sound judicial discretion. (2) The petition must be filed with the circuit clerk within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the district-court action.

[abrogated]

(b) Content of petition; answer. — The petition for leave to appeal shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in the opinion of the petitioner the appeal should be allowed; and a copy of the order, decree or judgment complained of and any opinion or memorandum relating thereto. The petition and answer shall be submitted to a panel of judges of the court of appeals without oral argument unless otherwise ordered.	**(b) Contents of the Petition; Answer or Cross-Petition.** (1) The petition must include the following: (A) the facts necessary to understand the questions to be presented; (B) the questions themselves; (C) the relief sought; (D) the reasons why, in the opinion of the petitioner, the appeal should be allowed; and (E) an attached copy of the order, decree, or judgment complained of and any related opinion or memorandum. (2) Within 14 days after the petition is served, a party may file an answer in opposition or a cross-petition. (3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.
(c) Form of Papers; Number of Copies. — All papers 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.	**(c) Form of Papers; Number of Copies.** All papers must conform to Rule 32(a)(1). Three copies must be filed with the original, unless the court requires a different number by local rule or by order in a particular case.

(d) Allowance of the appeal; fees; cost bond; filing of record. — Within 10 days after the entry of an order granting the appeal, the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice, the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b).	**(d) Allowance of the Appeal; Fees; Cost Bond; Filing of Record.** (1) Within 10 days after entry of the order granting leave to appeal, the appellant must: (A) pay the district clerk all required fees; and (B) file a cost bond if required under Rule 7. (2) A notice of appeal need not be filed. (3) The district clerk must notify the circuit clerk once the appellant has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. The caption to this rule is changed from "Appeal by Permission under 28 U.S.C. § 636(c)(5)" to "Appeal by Leave under 28 U.S.C. § 636(c)(5)." The word "leave" is preferable because § 636(c)(5) and subdivision (a) of this rule both use the term "leave to appeal."

The Federal Courts Improvement Act of 1996, Pub. L. 104-317, abolished appeals by permission under 28 U.S.C. § 636(c)(5), making Rule 5.1 obsolete. Rule 5.1 is, therefore, abrogated.

Rule 6. Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or of a Bankruptcy Appellate Panel	Rule 6. Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel
(a) Appeal from a judgment, order or decree of a district court exercising original jurisdiction in a bankruptcy case. — An appeal to a court of appeals from a final judgment, order or decree of a district court exercising jurisdiction pursuant to 28 U.S.C. § 1334 shall be taken in identical fashion as appeals from other judgments, orders or decrees of district courts in civil actions.	**(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case.** An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.
(b) Appeal from a judgment, order or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case. — (1) Applicability of other rules. All provisions of these rules are applicable to an appeal to a court of appeals pursuant to 28 U.S.C. § 158(d) from a final judgment, order or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction pursuant to 28 U.S.C. § 158(a) or (b), except that: (i) Rules 3.1, 4(a)(4), 4(b), 5.1, 9, 10, 11, 12(b), 13-20, 22-23, and 24(b) are not applicable; (ii) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" shall be read as a reference to Form 5; and (iii) when the appeal is from a bankruptcy appellate panel, the term "district court" as used in any applicable rule, means "appellate panel".	**(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.** (1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b). But there are ~~three~~ 3 exceptions: (A) Rules 3.1, 4(a)(4), 4(b), 5.1, 9, 10, 11, 12(b), 13–20, 22–23, and 24(b) do not apply; (B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; and (C) when the appeal is from a bankruptcy appellate panel, the term "district court," as used in any applicable rule, means "appellate panel."

(2) Additional rules. In addition to the rules made applicable by subsection (b)(1) of this rule, the following rules shall apply to an appeal to a court of appeals pursuant to 28 U.S.C. § 158(d) from a final judgment, order or decree of a district court or of a bankruptcy appellate panel exercising appellate jurisdiction pursuant to 28 U.S.C. § 158(a) or (b):	(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:
(i) Effect of a Motion for Rehearing on the Time for Appeal. If any party files a timely motion for rehearing under Bankruptcy Rule 8015 in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after announcement or entry of the district court's or bankruptcy appellate panel's judgment, order, or decree, but before disposition of the motion for rehearing, is ineffective until the date of the entry of the order disposing of the motion for rehearing. Appellate review of the order disposing of the motion requires the party, in compliance with Appellate Rules 3(c) and 6(b)(1)(ii), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal within the time prescribed by Rule 4, excluding 4(a)(4) and 4(b), measured from the entry of the order disposing of the motion. No additional fees will be required for filing the amended notice.	(A) **Motion for rehearing.** (i) If a timely motion for rehearing under Bankruptcy Rule 8015 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree — but before disposition of the motion for rehearing — becomes effective when the order disposing of the motion for rehearing is entered. (ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4 — excluding Rules 4(a)(4) and 4(b) — measured from the entry of the order disposing of the motion. (iii) No additional fee is required to file an amended notice.

(ii) The record on appeal. Within 10 days after filing the notice of appeal, the appellant shall file with the clerk possessed of the record assembled pursuant to Bankruptcy Rule 8006, and serve on the appellee, a statement of the issues to be presented on appeal and a designation of the record to be certified and transmitted to the clerk of the court of appeals. If the appellee deems other parts of the record necessary, the appellee shall, within 10 days after service of the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included. The record, redesignated as provided above, plus the proceedings in the district court or bankruptcy appellate panel and a certified copy of the docket entries prepared by the clerk pursuant to Rule 3(d) shall constitute the record on appeal.	**(B) The record on appeal.** (i) Within 10 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006 — and serve on the appellee — a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk. (ii) An appellee who believes that other parts of the record are necessary must, within 10 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included. (iii) The record on appeal consists of: • the redesignated record as provided above; • the proceedings in the district court or bankruptcy appellate panel; and • a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(iii) Transmission of the record. When the record is complete for purpose of the appeal, the clerk of the district court or the appellate panel, shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court or of the appellate panel shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerk for the transportation and receipt of exhibits of unusual bulk or weight.	(C) **Forwarding the record.** (i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the clerk will ~~must~~ not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.
All parties shall take any other action necessary to enable the clerk to assemble and transmit the record. The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the redesignated record, subject to the right of any party to request at any time during the pendency of the appeal that the redesignated record be transmitted.	(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.
(iv) Filing of the record. Upon receipt of the record, the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed. Upon receipt of a certified copy of the docket entries transmitted in lieu of the redesignated record pursuant to rule or order, the clerk of the court of appeals shall file it, and shall immediately give notice to all parties of the date on which it was filed.	(D) **Filing of the record.** Upon receiving the record — or a certified copy of the docket entries sent in place of the redesignated record — the circuit clerk must file it and immediately notify all parties of the filing date.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Subdivision (b). Language is added to Rule 6(b)(2)(A)(ii) to conform with the corresponding provision in Rule 4(a)(4). The new language is clarifying rather than substantive. The existing rule states that a party intending to challenge an alteration or amendment of a judgment must file an amended notice of appeal. Of course if a party has not previously filed a notice of appeal, the party would simply file a notice of appeal not an amended one. The proposed language states that the party must file "a notice of appeal or amended notice of appeal."

Rule 7. Bond for costs on appeal in civil cases	Rule 7. Bond for Costs on Appeal in a Civil Case
The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.	In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 8. Stay or Injunction Pending Appeal	Rule 8. Stay or Injunction Pending Appeal
(a) Stay must ordinarily be sought in the first instance in district court; motion for stay in court of appeals. — Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court.	**(a) Motion for Stay.** (1) **Initial Motion in the District Court.** A party must ordinarily move first in the district court for the following relief: (A) a stay of the judgment or order of a district court pending appeal; (B) approval of a supersedeas bond; or (C) an order suspending, modifying, restoring, or granting an injunction ~~during the pendency of an appeal~~ while an appeal is pending.

; Conditions on Relief

A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.	(2) **Motion in the Court of Appeals.** A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges. (A) The motion must: (i) show that moving first in the district court would be impracticable; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action. (B) The motion must also include: (i) the reasons for granting the relief requested and the facts relied on; (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and (iii) relevant parts of the record.
	(C) The moving party must give reasonable notice of the motion to all parties. (D) A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(E) The court may condition relief on a party's filing a bond or other appropriate security in the district court.

a Surety.

(b) Stay may be conditioned upon giving of bond; proceedings against sureties. — Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. A surety's liability may be enforced on motion in the district court without the necessity of an independent action. The motion and such notice of the motion as the district court prescribed may be served on the clerk of the district court, who shall forthwith mail copies to the sureties if their addresses are known.	(b) ~~Stay May Be Conditioned Upon Filing a Bond; Proceedings Against Sureties. Relief by the court of appeals under this rule may be conditioned upon a party's filing a bond or other appropriate security in the district court.~~ If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served. On motion, a surety's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.
(c) Stay in a Criminal Case. — A stay in a criminal case shall be had in accordance with the provisions of Rule 38 of the Federal Rules of Criminal Procedure.	(c) **Stay in a Criminal Case.** Rule 38 of the Federal Rules of Criminal Procedure governs a stay in a criminal case.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 9. Release in a Criminal Case	Rule 9. Release in a Criminal Case
(a) Appeal from an Order Regarding Release Before Judgment of Conviction. -The district court must state in writing, or orally on the record, the reasons for an order regarding release or detention of a defendant in a criminal case. A party appealing from the order, as soon as practicable after filing a notice of appeal with the district court, must file with the court of appeals a copy of the district court's order and its statement of reasons. An appellant who questions the factual basis for the district court's order must file a transcript of any release proceedings in the district court or an explanation of why a transcript has not been obtained. The appeal must be determined promptly. It must be heard, after reasonable notice to the appellee, upon such papers, affidavits, and portions of the record as the parties present or the court may require. Briefs need not be filed unless the court so orders. The court of appeals or a judge thereof may order the release of the defendant pending decision of the appeal.	**(a) Release Before Judgment of Conviction.** (1) The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case. A party appealing from the order must file with the court of appeals a copy of the district-court order and the court's statement of reasons as soon as practicable after filing the notice of appeal. An appellant who questions the factual basis for the district court's order must file a transcript of the release proceedings or ~~explain~~ an explanation of why a transcript was not obtained. (2) After reasonable notice to the appellee, the court of appeals must promptly determine the appeal on the basis of the papers, affidavits, and parts of the record that the parties present or the court requires. Unless the court so orders, briefs need not be filed. (3) The court of appeals or ~~a circuit~~ one of its judges may order the defendant's release pending the disposition of the appeal.
(b) Review of an Order Regarding Release After Judgment of Conviction. — A party entitled to do so may obtain review of a district court's order regarding release that is made after a judgment of conviction by filing a notice of appeal from that order with the district court, or by filing a motion with the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). In addition, the papers filed by the applicant for review must include a copy of the judgment of conviction.	**(b) Release After Judgment of Conviction.** A party entitled to do so may obtain review of a district-court order regarding release after a judgment of conviction by filing a notice of appeal from that order in the district court, or by filing a motion in the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). The papers filed by the party seeking review must include a copy of the judgment of conviction.

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

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 10. The Record on Appeal	**Rule 10. The Record on Appeal**
(a) Composition of the Record on Appeal. — The record on appeal consists of 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.	**(a) Composition of the Record on Appeal.** The following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk.
(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered. —	**(b) The Transcript of Proceedings.**

(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 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 be in writing and within the same period a copy shall 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 so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.	(1) **Appellant's Duty to Order.** Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following: (A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications: (i) the order must be in writing; (ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and (iii) the appellant must, within the same period, file a copy of the order with the district clerk; or (B) ~~if no transcript is ordered,~~ file a certificate ~~to that effect~~. stating that no transcript will be ordered
(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.	(2) **Unsupported Finding or Conclusion.** If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to ~~any such~~ finding or conclusion. that

(3) Unless the entire transcript is to be included, the appellant shall, within the 10-day time provided in paragraph (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal, and shall serve on the appellee a copy of the order or certificate and of the statement. An appellee who believes that a transcript of other parts of the proceedings is necessary shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of the designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.	(3) **Partial Transcript.** Unless the entire transcript is ordered: (A) the appellant must — within the 10 days provided in Rule 10(b)(1) — file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement; (B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 10 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and (C) unless within 10 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.
(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.	(4) **Payment.** At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(c) Statement of the evidence or proceedings when no report was made or when the transcript is unavailable. — If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.	(c) **Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable.** If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 10 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.
(d) Agreed statement as the record on appeal. — In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the court of appeals as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 11. Copies of the agreed statement may be filed as the appendix required by Rule 30.	(d) **Agreed Statement as the Record on Appeal.** In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it — together with any additions that the district court may consider necessary to a full presentation of the issues on appeal — must be approved by the district court and must then be certified to the court of appeals as the record on appeal. The district clerk must then send it to the circuit clerk within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30.

(e) Correction or modification of the record. — If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.	**(e) Correction or Modification of the Record.** (1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly. (2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded: (A) on stipulation of the parties; (B) by the district court before or after the record has been forwarded; or (C) by the court of appeals. (3) All other questions as to the form and contents of the record must be presented to the court of appeals.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 11. Transmission of the record	Rule 11. Forwarding the Record
(a) Duty of appellant. -- After filing the notice of appeal the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. A single record shall be transmitted.	**(a) Appellant's Duty.** An appellant filing a notice of appeal must comply with Rule 10(b) and must do whatever else is necessary to enable the clerk to assemble and forward the record. If there are multiple appeals from a judgment or order, the clerk must forward a single record.
(b) Duty of reporter to prepare and file transcript; notice to court of appeals; duty of clerk to transmit the record. — Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that the reporter has received it and the date on which the reporter expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the clerk of the court of appeals and the action of the clerk of the court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file it with the clerk of the district court and shall notify the clerk of the court of appeals that the reporter has done so.	**(b) Duties of Reporter and District Clerk.** **(1) Reporter's Duty to Prepare and File a Transcript.** The reporter must prepare and file a transcript as follows: (A) Upon receiving an order for a transcript, the reporter must enter at the foot of the order the date of its receipt and the expected completion date and send a copy, so endorsed, to the circuit clerk. (B) If the transcript cannot be completed within 30 days of the reporter's receipt of the order, the reporter may request the circuit clerk to grant additional time to complete it. The clerk must note on the docket the action taken and notify the parties. (C) When a transcript is complete, the reporter must file it with the district clerk and notify the circuit clerk of the filing. (D) If the reporter fails to file the transcript on time, the circuit clerk must notify the district judge and do whatever else the court of appeals directs.

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.	(2) **District Clerk's Duty to Forward.** When the record is complete, the district clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the district clerk ~~must~~ will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.
(c) Temporary retention of record in district court for use in preparing appellate papers. — Notwithstanding the provisions of (a) and (b) of this Rule 11, the parties may stipulate, or the district court on motion of any party may order, that the clerk of the district court shall temporarily retain the record for use by the parties in preparing appellate papers. In that event the clerk of the district court shall certify to the clerk of the court of appeals that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the court may order, the appellant shall request the clerk of the district court to transmit the record.	(c) **Retaining the Record Temporarily in the District Court for Use in Preparing the Appeal.** The parties may stipulate, or the district court on motion may order, the district clerk to retain the record temporarily for the parties to use in preparing the papers on appeal. In that event the district clerk must certify to the circuit clerk that the record on appeal is complete. Upon receipt of the appellee's brief, or earlier if the court orders or the parties agree, the appellant must request the district clerk to forward the record.
(d) [Extension of time for transmission of the record; reduction of time] [Abrogated]	(d) **[Abrogated.]**

(e) Retention of the record in the district court by order of court. — The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted. If the record or any part thereof is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record or parts thereof subject to the request of the court of appeals, and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow and copies of such parts as the parties may designate.	**(e) Retaining the Record by Court Order.** (1) The court of appeals may, by order or local rule, provide that a certified copy of the docket entries be forwarded instead of the entire record. But a party may at any time during the appeal request that designated parts of the record be forwarded. (2) The district court may order the record or some part of it retained if the court needs it while the appeal is pending, subject, however, to call by the court of appeals. (3) If part or all of the record is ordered retained, the district clerk must send to the court of appeals a copy of the order and the docket entries together with the parts of the original record allowed by the district court and copies of any parts of the record designated by the parties.
(f) Stipulation of parties that parts of the record be retained in the district court. — The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.	**(f) Retaining Parts of the Record in the District Court by Stipulation of the Parties.** The parties may agree by written stipulation filed in the district court that designated parts of the record be retained in the district court subject to call by the court of appeals or request by a party. The parts of the record so designated remain a part of the record on appeal.

(g) Record for preliminary hearing in the court of appeals. — If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the court of appeals such parts of the original record as any party shall designate.	(g) **Record for Preliminary Hearing in the Court of Appeals.** If, before the record is forwarded, a party makes any of the following motions in the court of appeals: • for dismissal; • for release; • for a stay pending appeal; • for additional security on the bond on appeal or on a supersedeas bond; or • for any other intermediate order; the district clerk must send the court of appeals any parts of the record designated by any party.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record	**Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record**
(a) Docketing the appeal. — Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, the appellant's name, identified as appellant, shall be added to the title.	**(a) Docketing the Appeal.** Upon receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d), the circuit clerk must docket the appeal under the title of the district-court action and must identify the appellant, adding the appellant's name if necessary.
(b) Filing a Representation Statement. — Within 10 days after filing a notice of appeal, unless another time is designated by the court of appeals, the attorney who filed the notice of appeal shall file with the clerk of the court of appeals a statement naming each party represented on appeal by that attorney.	**(b) Filing a Representation Statement.** Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within 10 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.
(c) Filing the Record, Partial Record, or Certificate. — Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or (g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.	**(c) Filing the Record, Partial Record, or Certificate.** Upon receiving the record, partial record, or district clerk's certificate as provided in Rule 11, the circuit clerk must file it and immediately notify all parties of the filing date.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

TITLE III. REVIEW OF DECISIONS OF THE UNITED STATES TAX COURT	TITLE III. REVIEW OF A DECISION OF THE UNITED STATES TAX COURT
Rule 13. Review of a Decision of the Tax Court	**Rule 13. Review of a Decision of the Tax Court**
(a) How Obtained; Time for Filing Notice of Appeal. — Review of a decision of the United States Tax Court must be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after entry of the Tax Court's decision. At the time of filing the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of Rule 3(d). If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after entry of the Tax Court's decision. The running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order disposing of such motion, or from the entry of decision whichever is later.	**(a) How Obtained; Time for Filing Notice of Appeal.** (1) Review of a decision of the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered. (2) If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later.
(b) Notice of appeal — How filed. — The notice of appeal may be filed by deposit in the office of the clerk of the Tax Court in the District of Columbia or by mail addressed to the clerk. If a notice is delivered to the clerk by mail and is received after expiration of the last day allowed for filing, the postmark date shall be deemed to be the date of delivery, subject to the provisions of § 7502 of the Internal Revenue Code of 1954, as amended, and the regulations promulgated pursuant thereto.	**(b) Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

(c) Content of the notice of appeal; service of the notice; effect of filing and service of the notice. — The content of the notice of appeal, the manner of its service, and the effect of the filing of the notice and of its service shall be as prescribed by Rule 3. Form 2 in the Appendix of Forms is a suggested form of the notice of appeal.	(c) **Contents of the Notice of Appeal; Service; Effect of Filing and Service.** Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.
(d) The record on appeal; transmission of the record; filing of the record. — The provisions of Rules 10, 11 and 12 respecting the record and the time and manner of its transmission and filing and the docketing of the appeal in the court of appeals in cases on appeal from the district courts shall govern in cases on appeal from the Tax Court. Each reference in those rules and in Rule 3 to the district court and to the clerk of the district court shall be read as a reference to the Tax Court and to the clerk of the Tax Court respectively. If appeals are taken from a decision of the Tax Court to more than one court of appeals, the original record shall be transmitted to the court of appeals named in the first notice of appeal filed. Provision for the record in any other appeal shall be made upon appropriate application by the appellant to the court of appeals to which such other appeal is taken.	(d) **The Record on Appeal; Forwarding; Filing.** (1) An appeal from the Tax Court is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals. References in those rules and in Rule 3 to the district court and district clerk are to be read as referring to the Tax Court and its clerk. (2) If an appeal from a Tax Court decision is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 14. Applicability of other rules to review of decisions of the Tax Court	Rule 14. Applicability of Other Rules to the Review of a Tax Court Decision
All provisions of these rules are applicable to review of a decision of the Tax Court, except that Rules 4-9, Rules 15-20, and Rules 22 and 23 are not applicable.	All provisions of these rules, except Rules 4–9, 15–20, and 22–23, apply to the review of a Tax Court decision.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

TITLE IV. REVIEW AND ENFORCEMENT OF ORDERS OF ADMINISTRATIVE AGENCIES, BOARDS, COMMISSIONS AND OFFICERS	TITLE IV. REVIEW AND ENFORCEMENT OF AN ORDER OF AN ADMINISTRATIVE AGENCY, BOARD, COMMISSION, OR OFFICER
Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention	**Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention**
(a) Petition for Review of Order; Joint Petition. - Review of an order of an administrative agency, board, commission, or officer (hereinafter, the term "agency" will include agency, board, commission, or officer) must be obtained by filing with the clerk of a court of appeals that is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" will include a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal).	(a) **Petition for Review; Joint Petition.** (1) Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order. If their interests make joinder practicable, two or more persons may join in a petition to the same court to review the same order.

The petition must name each party seeking review either in the caption or in the body of the petition. Use of such terms as "et al.," or "petitioners," or "respondents" is not effective to name the parties. The petition also must designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency must be named respondent. The United States will also be a respondent if required by statute, even though not designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.	(2) The petition must: (A) name each party seeking review either in the caption or the body of the petition, using such terms as "et al.," "petitioners," or "respondents" does not effectively name the parties; (B) name the agency as a respondent (even though not named in the petition, the United States is a respondent if required by statute); and (C) specify the order or part thereof to be reviewed. (3) Form 3 in the Appendix of Forms is a suggested form of a petition for review. (4) In this rule "agency" includes an agency, board, commission or officer; "petition for review" includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute.

(b) Application for enforcement of order; answer; default; cross-application for enforcement. — An application for enforcement of an order of an agency shall be filed with the clerk of a court of appeals which is authorized to enforce the order. The application shall contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief prayed. Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the clerk an answer to the application. If the respondent fails to file an answer within such time, judgment will be awarded for the relief prayed. If a petition is filed for review of an order which the court has jurisdiction to enforce, the respondent may file a cross-application for enforcement.	**(b) Application or Cross-Application to Enforce an Order; Answer; Default.** (1) An application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order. If a petition is filed to review an agency order that the court may enforce, a party opposing the petition may file a cross-application for enforcement. (2) Within 20 days after ~~the date when~~ the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested. (3) The application must contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief requested.

(c) Service of petition or application. — A copy of a petition for review or of an application or cross-application for enforcement of an order shall be served by the clerk of the court of appeals on each respondent in the manner prescribed by Rule 3(d), unless a different manner of service is prescribed by an applicable statute. At the time of filing, the petitioner shall furnish the clerk with a copy of the petition or application for each respondent. At or before the time of filing a petition for review, the petitioner shall serve a copy thereof on all parties who shall have been admitted to participate in the proceedings before the agency other than respondents to be served by the clerk, and shall file with the clerk a list of those so served.	(c) **Service of the Petition or Application.** The circuit clerk must serve a copy of the petition for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Rule 3(d), unless a different manner of service is prescribed by statute. At the time of filing, the petitioner must: (1) ~~have served~~ serve, or have served a copy on ~~all parties~~ each party admitted to participate in the agency proceedings, except for the respondents; (2) file with the clerk a list of those so served; and (3) give the clerk enough copies of the petition or application to serve each respondent.
(d) Intervention. — Unless an applicable statute provides a different method of intervention, a person who desires to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and file with the clerk of the court of appeals a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene or other notice of intervention authorized by an applicable statute shall be filed within 30 days of the date on which the petition for review is filed.	(d) **Intervention.** Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion — or other notice of intervention authorized by statute — must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.
(e) Payment of Fees. - When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the clerk of the court of appeals the fees established by statute, and also the docket fee prescribed by the Judicial Conference of the United States.	(e) **Payment of Fees.** When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the circuit clerk all required fees.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language

to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 15.1. Briefs and Oral Argument in National Labor Relations Board Proceedings	Rule 15.1. Briefs and Oral Argument in a National Labor Relations Board Proceeding
Each party adverse to the National Labor Relations Board in an enforcement or a review proceeding shall proceed first on briefing and at oral argument unless the court orders otherwise.	In either an enforcement or a review proceeding, a party adverse to the National Labor Relations Board proceeds first on briefing and at oral argument, unless the court orders otherwise.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 16. The record on review or enforcement.	Rule 16. The Record on Review or Enforcement
(a) Composition of the record. — The order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency shall constitute the record on review in proceedings to review or enforce the order of any agency.	(a) **Composition of the Record.** The record on review or enforcement of an agency order consists of: (1) the order involved; (2) any findings or report on which it is based; and (3) the pleadings, evidence, and other parts of the proceedings before the agency.
(b) Omissions from or misstatements in the record. — If anything material to any party is omitted from the record or is misstated therein, the parties may at any time supply the omission or correct the misstatement by stipulation, or the court may at any time direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.	(b) **Omissions From or Misstatements in the Record.** The parties may at any time, by stipulation, supply any omission from the record or correct a misstatement, or the court may so direct. If necessary, the court may direct that a supplemental record be prepared and filed.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 17. Filing of the record	Rule 17. Filing the Record
(a) Agency to file; time for filing; notice of filing. — The agency shall file the record with the clerk of the court of appeals within 40 days after service upon it of the petition for review unless a different time is provided by the statute authorizing review. In enforcement proceedings the agency shall file the record within 40 days after filing an application for enforcement, but the record need not be filed unless the respondent has filed an answer contesting enforcement of the order, or unless the court otherwise orders. The court may shorten or extend the time above prescribed. The clerk shall give notice to all parties of the date on which the record is filed.	(a) **Agency to File; Time for Filing; Notice of Filing.** The agency must file the record with the circuit clerk within 40 days after being served with a petition for review, unless the statute authorizing review provides otherwise, or within 40 days after it files an application for enforcement unless the respondent fails to answer or the court orders otherwise. The court may shorten or extend the time to file the record. The clerk must notify all parties of the date when the record is filed.

(b) Filing — What Constitutes. — The agency may file the entire record or such parts thereof as the parties may designate by stipulation filed with the agency. The original papers in the agency proceeding or certified copies thereof may be filed. Instead of filing the record or designated parts thereof, the agency may file a certified list of all documents, transcripts of testimony, exhibits and other material comprising the record, or a list of such parts thereof as the parties may designate, adequately describing each, and the filing of the certified list shall constitute filing of the record. The parties may stipulate that neither the record nor a certified list be filed with the court. The stipulation shall be filed with the clerk of the court of appeals and the date of its filing shall be deemed the date on which the record is filed. If a certified list is filed, or if the parties designate only parts of the record for filing or stipulate that neither the record nor a certified list be filed, the agency shall retain the record or parts thereof. Upon request of the court or the request of a party, the record or any part thereof thus retained shall be transmitted to the court notwithstanding any prior stipulation. All parts of the record retained by the agency shall be a part of the record on review for all purposes.	**(b) Filing — What Constitutes.** (1) The agency must file: (A) the original or a certified copy of the entire record or parts designated by the parties, or (B) a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties. (2) The parties may stipulate in writing that no record or certified list be filed. The date when the stipulation is filed with the circuit clerk is treated as the date when the record is filed. (3) The agency must retain any portion of the record not filed with the clerk. All parts of the record retained by the agency are a part of the record on review for all purposes and, if the court or a party so requests, must be sent to the court regardless of any prior stipulation.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive change is recommended, however, in subdivision (b).

Subdivision (b). The current rule provides that when a court of appeals is asked to review or enforce an agency order, the agency must file either "the entire record or such parts thereof as the parties may designate by stipulation filed with the agency" or a certified list describing the documents, transcripts, exhibits, and other material constituting the record. If the agency is not filing a certified list, the current rule requires the agency to file the entire record unless the parties file a "stipulation" designating only parts of the record. Such a "stipulation" presumably requires agreement of the parties as to the parts to be filed. The amended language in subparagraph (b)(1)(A) permits the agency to file the entire record or "parts designated by the parties." The new language permits the filing of less than the entire record even when the parties do not agree as to which parts should be filed. Each party can designate the parts that it wants filed; the agency can then forward the parts designated by each party. In contrast, paragraph (b)(2) continues to require stipulation, that is agreement of the parties, that the agency need not file either the record or a certified list.

Rule 18. Stay pending review	Rule 18. Stay Pending Review
Application for a stay of a decision or order of any agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial, or that the action of the agency did not afford the relief which the application had requested. The motion shall also show the reasons for the relief requested and the facts relied upon and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant to the relief sought. Reasonable notice of the motion shall be given to all parties to the proceeding in the court of appeals. The court may condition relief under this rule upon the filing of a bond or other appropriate security. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.	**(a) Motion for a Stay.** (1) **Initial Motion Before the Agency.** A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order. (2) **Motion in the Court of Appeals.** A motion for a stay may be made to the court of appeals or one of its judges. (A) The motion must: (i) show that moving first before the agency would be impracticable; or (ii) state that, a motion having been made, the agency denied the motion or failed to afford the relief requested and state any reasons given by the agency for its actions. (B) The motion must also include: (i) the reasons for granting the relief requested and the facts relied on; (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and (iii) relevant parts of the record.

	(C) The moving party must give reasonable notice of the motion to all parties. (D) The motion must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge. (b) **Bond.** The court may condition relief on the filing of a bond or other appropriate security.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 19. Settlement of judgments enforcing orders	Rule 19. Settlement of a Judgment Enforcing an Agency Order in Part
When an opinion of the court is filed directing the entry of a judgment enforcing in part the order of any agency, the agency shall within 14 days thereafter serve upon the respondent and file with the clerk a proposed judgment in conformity with the opinion. If the respondent objects to the proposed judgment as not in conformity with the opinion, the respondent shall within 7 days thereafter serve upon the agency and file with the clerk a proposed judgment which the respondent deems to be in conformity with the opinion. The court will thereupon settle the judgment and direct its entry without further hearing or argument.	When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within 7 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 20. Applicability of other rules to review or enforcement of agency orders	Rule 20. Applicability of Rules to the Review or Enforcement of an Agency Order
All provisions of these rules are applicable to review or enforcement of orders of agencies, except that Rules 3-14 and Rules 22 and 23 are not applicable. As used in any applicable rule, the term "appellant" includes a petitioner and the term "appellee" includes a respondent in proceedings to review or enforce agency orders.	All provisions of these rules, except Rules 3-14 and 22-23, apply to the review or enforcement of an agency order. In these rules, "appellant" includes a petitioner or applicant, and "appellee" includes a respondent.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

TITLE V. EXTRAORDINARY WRITS	TITLE V. EXTRAORDINARY WRITS
Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs*	**Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs**
~~(a) Mandamus or prohibition to a judge or judges; petition for writ; service and filing.~~ Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The 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 copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.	**(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.** (1) A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party must also provide a copy to the trial court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes. (2) (A) The petition must be titled "In re [name of petitioner]." (B) The petition must state: (i) the relief sought; (ii) the issues presented; (iii) the facts necessary to understand the issues presented by the petition; and (iv) the reasons why the writ should issue. (C) The petition must include a copy of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition. (3) Upon receiving the prescribed docket fee, the clerk must docket the petition and submit it to the court.

*~~Italicized text~~ represents proposed amendments ~~submitted~~ to the Supreme Court ~~on October 12, 1995~~. If approved by the Supreme Court, the amendments ~~take effect~~ on December 1, ~~1996~~, unless Congress acts otherwise.

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*(a) **Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.***

(1) A party petitioning for a writ of mandamus or prohibition directed to a court shall file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party shall also provide a copy to the trial court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

(2)(A) The petition shall be titled "In re [name of petitioner]."

(B) The petition shall state:

(i) the relief sought;

(ii) the issues presented;

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

(iv) the reasons why the writ should issue.

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

(3) When the clerk receives the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) Denial; order directing answer. If the court is of the opinion that the writ should not be granted, it shall 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. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.

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

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

(3) Two or more respondents may answer jointly.

address the petition

(4) The court of appeals may invite or order the trial court judge to ~~respond~~ or may invite an amicus curiae to do so. The trial court judge may request permission to ~~respond~~, but may not ~~respond~~ unless invited or ordered to do so by the court of appeals.

do so

(5) If briefing or oral argument is required, the clerk must advise the parties, and when appropriate, the trial court judge or amicus curiae.

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

(7) The circuit clerk must send a copy of the final disposition to the trial court judge.

address the petition

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(b) Denial; Order Directing Answer; Briefs; Precedence. *(1) The court may deny the petition without an answer. Otherwise, it shall order the respondent, if any, to answer within a fixed time.* *(2) The clerk shall serve the order to respond on all persons directed to respond.* *(3) Two or more respondents may answer jointly.* *(4) The court of appeals may invite or order the trial court judge to respond or may invite an amicus curiae to do so. The trial court judge may request permission to respond but may not respond unless invited or ordered to do so by the court of appeals.* *(5) If briefing or oral argument is required, the clerk shall advise the parties, and when appropriate, the trial court judge or amicus curiae.* *(6) The proceeding shall be given preference over ordinary civil cases.* *(7) The circuit clerk shall send a copy of the final disposition to the trial court judge.*	
(c) ~~Other extraordinary writs.~~ Application ~~for~~ extraordinary writs other than ~~those~~ provided for in subdivisions ~~(a)~~ and (b) of ~~this~~ rule shall be made by petition filed with ~~the clerk~~ of the court of appeals with proof of service on ~~the~~ parties named as respondents. Proceedings on ~~such~~ application shall conform, so far as is practicable, to the ~~procedure~~ prescribed in subdivisions (a) and (b) of this ~~rule~~.	An (c) **Other Extraordinary Writs.** Application for an extraordinary writ other than one ~~of those~~ provided for in Rule 21(a) must be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on the ~~such~~ application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

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(c) *Other Extraordinary Writs. Application for an extraordinary writ other than one of those provided for in subdivisions (a) and (b) of this rule shall be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on such application shall 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.	(d) **Form of Papers; Number of Copies.** All papers must conform to Rule 32(a)(1). An original and ~~three~~ 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.
(d) Form of Papers; Number of Copies. All papers may be typewritten. An original and three copies shall be filed unless the court requires the filing of a different number by local rule or by order in a particular case.	

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Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS	TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS
Rule 22. Habeas Corpus proceedings	**Rule 22. Habeas Corpus Proceeding**
(a) Application for the original writ. — An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.	**(a) Application for the Writ.** An application for a writ of habeas corpus ~~ought to~~ must be made to the appropriate district court. If made to a circuit judge, the application ~~will ordinarily~~ must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not ~~favored; the proper remedy is to appeal to the court of appeals from the district court's order denying the writ~~ permitted.

The applicant may, under 28 U.S.C. § 2253 appeal to the court of appeals from the district court's order denying the application.

/ Necessity of certificate of probable cause for ,eal. — In a habeas corpus proceeding in which ,e detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.	(b) Necessity of Certificate of Probable Cause. Appealability. (1) If the detention complained of in a habeas corpus proceeding arises from process issued by a state court, the applicant cannot take an appeal unless a district or circuit judge issues a certificate of probable cause. If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of probable cause or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate. (2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals. (3) A certificate of probable cause is not required when a state or its representative appeals.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only, in this rule however substantive changes are recommended in paragraphs (b)(1) and (b)(3).

(Note is continued on attached pages)

[rule, however, substantive changes are recommended in paragraphs (b)(1) and (b)(3).]

Subdivision (b), paragraph (1). Two substantive changes are made in this paragraph. First, the paragraph is made applicable to 28 U.S.C. §2255 proceedings. This brings the rule into conformity with 28 U.S.C. § 2253 as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132. Second, the rule states that a certificate of appealability may be issued by "a circuit justice or a circuit or district judge." That language adds a reference to the circuit justice which also brings the rule into conformity with section 2253. The language continues to state that in addition to the circuit justice, both a circuit and a district judge may issue a certificate of appealability. The language of section 2253 is ambiguous; it states that a certificate of appealability may be issued by "a circuit justice or judge." Since the enactment of the Anti-Terrorism and Effective Death Penalty Act, three circuits have held that both district and circuit judges, as well as the circuit justice, may issue a certificate of appealability. Else v. Johnson, 104 F.3d 82 (5th Cir. 1997). Lyons v. Ohio Adult Parole Authority, 105 F.3d 1063 (6th Cir. 1997); and Hunter v. United States, 101 F.3d 1565 (11th Cir. 1996). The approach taken by the rule is consistent

with those decisions.

Subdivision (b), paragraph (3). The Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, amended 28 U.S.C. § 2253 to make it applicable to § 2255 proceedings. Accordingly, paragraph (3) is amended to provide that when the United States or its representative appeals, a certificate of appealability is not required.

Rule 22. Habeas Corpus and Section 2255 Proceedings

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

(b) **Certificate of Appealability.** (1) In a habeas corpus proceeding in which the detention complained of arises ~~out of~~ from process issued by a State court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal ~~by the applicant for the writ may not proceed~~ unless a district ~~or a circuit judge~~ Circuit justice or a circuit or district judge issues a certificate of appealability ~~pursuant to section 2253(c) of Title 28~~ under 28 U.S.C. § 2253(c). ~~United States Code~~. If an ~~appeal is taken by the~~ applicant files a notice of appeal, the district judge who rendered the judgment ~~shall~~ must either issue a certificate of appealability or state ~~the reasons~~ why ~~such~~ a

district clerk must send the

certificate should not issue. The certificate or ~~the~~ statement ~~shall be forwarded~~ to the court of appeals with the notice of appeal and the file of the proceedings ~~proceedings in the~~ district court. If the district judge has denied the certificate, the applicant ~~for the writ~~ may ~~then~~ request ~~issuance of the certificate by~~ to issue the certificate a circuit judge. ~~If such~~ a request ~~is~~ addressed to the court of appeals, ~~it shall be deemed addressed to the judges thereof and shall~~ may be considered by a circuit judge or judges as the court prescribes. ~~deems appropriate.~~ If no express request for a certificate is filed, the notice of appeal ~~shall be deemed to~~ constitutes a request addressed to the judges of the court of appeals. ~~If an appeal is taken by a State or its representative,~~ a certificate of appealability is not required. When a state or its representative or the United States or its representative appeals.

(2)

(3)

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; in this

[rule, however, substantive changes are recommended in paragraphs (b)(1) and (b)(3).]

Subdivision (b), paragraph (1). Two substantive changes are made in this paragraph. First, the paragraph is made applicable to 28 U.S.C. §2255 proceedings. This brings the rule into conformity with 28 U.S.C. § 2253 as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132. Second, the rule states that a certificate of appealability may be issued by "a circuit justice or a circuit or district judge." That language adds a reference to the circuit justice which also brings the rule into conformity with section 2253. The language continues to state that in addition to the circuit justice, both a circuit and a district judge may issue a certificate of appealability. The language of section 2253 is ambiguous; it states that a certificate of appealability may be issued by "a circuit justice or judge." Since the enactment of the Anti-Terrorism and Effective Death Penalty Act, three circuits have held that both district and circuit judges, as well as the circuit justice, may issue a certificate of appealability. Else v. Johnson, 104 F.3d 82 (5th Cir. 1997). Lyons v. Ohio Adult Parole Authority, 105 F.3d 1063 (6th Cir. 1997); and Hunter v. United States, 101 F.3d 1565 (11th Cir. 1996). The approach taken by the rule is consistent

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with those decisions.

Subdivision (b), paragraph (3). The Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, amended 28 U.S.C. §2253 to make it applicable to §2255 proceedings. Accordingly, paragraph (3) is amended to provide that when the United States or its representative appeals, a certificate of appealability is not required.

Rule 23. Custody of prisoners in habeas corpus proceedings	Rule 23. Custody or Release of a Prisoner in a Habeas Corpus Proceeding
(a) Transfer of custody pending review. — Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.	**(a) Transfer of Custody Pending Review.** Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.
(b) Detention or release of prisoner pending review of decision failing to release. — Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon the prisoner's recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.	**(b) Detention or Release Pending Review of Decision Not to Release.** While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court, may order that the prisoner be: (1) detained in the custody from which release is sought; (2) detained in other appropriate custody; or (3) released on personal recognizance, with or without surety.

(c) Release of prisoner pending review of decision ordering release. — Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon the prisoner's recognizance, with or without surety, unless the court or justice or judge rendering the decision or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.	**(c) Release Pending Review of Decision Ordering Release.** While a decision ordering the release of a prisoner is under review, the prisoner must — unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise — be released on personal recognizance, with or without surety.
(d) Modification of initial order respecting custody. — An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.	**(d) Modification of the Initial Order on Custody.** An initial order governing the prisoner's custody or release, including any recognizance or surety, continues in effect pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Subdivision (d). The current rule states that the initial order governing custody or release "shall govern review" in the court of appeals. The amended language says that the initial order generally "continues in effect" pending review.

When Rule 23 was adopted it used the same language as Supreme Court Rule 49, which then governed custody of prisoners in habeas corpus proceedings. The "shall govern review" language was drawn from the Supreme Court Rule. The Supreme Court has since amended its rule, now Rule 36, to say that the initial order "shall continue in effect" unless for reasons shown it is modified or a new order is entered. The Advisory Committee recommends that Rule 23 be amended to similarly state that the initial order "continues in effect." The new language is clearer. It removes the possible implication that the initial order created law of the case, a strange notion to attach to an order regarding custody or release.

Rule 24. Proceedings in Forma Pauperis	**Rule 24. Proceeding in Forma Pauperis**
(a) Leave to proceed on appeal in forma pauperis from district court to court of appeals. — A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that that party is entitled to redress, and a statement of the issues which that party intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial. Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.	**(a) Leave to Proceed in Forma Pauperis.** (1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that: (A) shows in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or to give security for fees and costs; (B) claims an entitlement to redress; and (C) states the issues that the party intends to present on appeal. (2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs. If the district court denies the motion, it must state its reasons in writing. (3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless the district court — before or after the notice of appeal is filed — certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis. In that event, the district court must state in writing its reasons for the certification or finding.

If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by a copy of the affidavit filed in the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of reasons given by the district court for its action.	(4) **Notice of District Court's Denial.** The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following: (A) denies a motion to proceed on appeal in forma pauperis; (B) certifies that the appeal is not taken in good faith; or (C) finds that the party is not otherwise entitled to proceed in forma pauperis. (5) **Motion in the Court of Appeals.** A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed by ~~is~~ Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed ~~in~~ by Rule 24(a)(1).
(b) Leave to proceed on appeal or review in forma pauperis in administrative agency proceedings. — A party to a proceeding before an administrative agency, board, commission or officer (including, for the purpose of this rule, the United States Tax Court) who desires to proceed on appeal or review in a court of appeals in forma pauperis, when such appeal or review may be had directly in a court of appeals, shall file in the court of appeals a motion for leave so to proceed, together with the affidavit prescribed by the first paragraph of (a) of this Rule 24.	**(b) Leave to Proceed in Forma Pauperis on Appeal or Review of an Administrative-Agency Proceeding.** When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24 (a)(1).

(c) Form of briefs, appendices and other papers. — Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form, and may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.	(c) **Leave to Use Original Record.** A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. The Advisory Committee recommends deleting the language in subdivision (c) authorizing a party proceeding in forma pauperis to file papers in typewritten form because the authorization is unnecessary. The rules permit all parties to file typewritten documents.

TITLE VII. GENERAL PROVISIONS	TITLE VII. GENERAL PROVISIONS
Rule 25. Filing and Service*	**Rule 25. Filing and Service**
(a) Filing.- A paper required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing, except that briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used.	**(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 papers within the time fixed for filing. (B) **A brief or appendix.** A brief or appendix is timely filed, however, if on or before the last day for filing, it is: (i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or (ii) dispatched to a third party commercial carrier for delivery to the clerk within 3 calendar days.
* Italicized text represents proposed amendments submitted to the Supreme Court on October 12, 1995. If approved by the Supreme Court, the amendments take effect on December 1, 1996, unless Congress acts otherwise.	

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Rule 25. Filing, Proof of Filing, Service, and Proof of Service

(a) Filing.

*(1) **Filing with the Clerk.** A paper required or permitted to be filed in a court of appeals shall 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 papers within the time fixed for filing.*

*(B) **A brief or appendix.** A brief or appendix is timely filed, however, if on or before the last day for filing, it is:*

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to the clerk for delivery within 3 calendar days by a third-party commercial carrier.

Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the filing date and thereafter give it to the clerk. A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk 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) **Inmate filing.** A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid. (D) **Electronic Filing.** A court of appeals may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. (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; the judge must note the filing date on the motion and give it to the clerk. (4) **Clerk's Refusal of Documents.** The clerk 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.

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*(C) **Inmate filing.** A paper filed by an inmate confined in an institution is timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of 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, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.*

*(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; the judge shall note the filing date on the motion and give it to the clerk.*

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

Service of all papers required. — Copies of all ers filed by any party and not required by these les to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for that party on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.	**(b) Service of All Papers Required.** Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.
(c) Manner of service. — Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.	**(c) Manner of Service.** Service may be personal, by mail, or by third-party commercial carrier for delivery within 3 calendar days. When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court. Personal service includes delivery of the copy to a responsible person at the office of counsel. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.
*(c) **Manner of Service.** Service may be personal, by mail, or by third-party commercial carrier for delivery within 3 calendar days. When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party shall be by a manner at least as expeditious as the manner used to file the paper with the court. Personal service includes delivery of the copy to a responsible person at the office of counsel. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.*	

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~~(d) Proof of Service. — Papers presented for filing must contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, of the names of the persons served, and of the addresses to which the papers were mailed or at which they were delivered, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed.~~	**(d) Proof of Service.** (1) A paper presented for filing must contain either of the following: (A) an acknowledgment of service by the person served; or (B) proof of service consisting of a statement by the person who made service certifying: (i) the date and manner of service; (ii) the names of the persons served; and (iii) their mailing addresses or the addresses of the places of delivery. (2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk. (3) Proof of service may appear on or be affixed to the papers filed.

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*(d) **Proof of Service; Filing.** A paper presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, of the name of the person served, and of the addresses to which the papers were mailed or at which they were delivered, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service shall also state the date and manner by which the document was mailed or dispatched to the clerk.*	
(e) Number of Copies. — Whenever these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.	**(e) Number of Copies.** When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; ~~two~~ a substantive amendments ~~are~~ is recommended, however, in subdivision (a).

Subdivision (a). ~~The first~~ substantive change is in item (a)(2)(B)(ii) where the word ~~"calendar"~~ is deleted. ~~As~~ amended, the ~~mailbox rule~~ is applicable if, on or before ~~the last day~~ for filing a brief or appendix, a party gives the document to a ~~commercial carrier for~~ delivery to the clerk "within 3 days." Deleting the word calendar means that under ~~Rule 26(a)(2)~~ Saturdays, Sundays, and legal holidays are not counted in the 3-day period. ~~This~~ is desirable because when the ~~last day~~ for filing is also the last day the courts are ~~open before~~ a three-day weekend, it may be difficult or impossible ~~to get~~ a commercial carrier to ~~commit~~ to delivery to the court within 3 calendar days, i.e., to delivery when the court ~~is closed~~.

The ~~second~~ substantive amendment recommended in this subdivision is in subparagraph (a)(2)(C) and is a companion to a recommended amendment in Rule 4(c). Currently Rule 25(a)(2)(C) provides that if an inmate confined in an institution files a document by depositing it in the institution's internal mail system, the document is timely filed if deposited on or before the last day for filing. Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee recommends

amending the rule to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subparagraph.

Rule 26. Computation and extension of time*	Rule 26. Computing and Extending Time
(a) Computation of time. — In computing any period of time prescribed or allowed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.	(a) **Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute: (1) Exclude the day of the act, event, or default that begins the period. (2) When the period is less than 7 days, exclude intermediate Saturdays, Sundays, and legal holidays, unless stated in calendar days. (3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which the weather or other conditions make the clerk's office inaccessible.
* Italicized text represents proposed amendments submitted to the Supreme Court on October 12, 1995. If approved by the Supreme Court, the amendments take effect on December 1, 1996, unless Congress acts otherwise.	
As used in this rule "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.	(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(b) Enlargement of time. — The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.	**(b) Extending Time.** For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission ~~or leave~~ to appeal; or (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.
(c) Additional time after service by mail. — 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, 3 days shall be added to the prescribed period.	**(c) Additional Time after Service.** When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.
(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after service of a paper upon that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.	

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive change ~~is~~ recommended, however, in subdivision (a).

First, **Subdivision (a).** ~~The~~ two amendments make the computation method prescribed in this rule applicable to any time period imposed by a local rule. This means that if a local rule establishing a time limit is permitted, the national rule will govern the computation of that period.

Second, paragraph (a)(2) includes language clarifying that whenever the rules establish a time period in "calendar days," weekends and legal holidays are counted.

Rule 26.1. Corporate Disclosure Statement*	Rule 26.1. Corporate Disclosure Statement
Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. The statement must be filed with a party's principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed. * Italicized text represents proposed amendments that were published for public comment in September 1995. If approved — with or without revision — by the advisory committee, Standing Committee, Judicial Conference, and Supreme Court, the amendments take effect on December 1, 1997, unless Congress acts otherwise.	(a) **Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying its parent corporation and listing any publicly held company that owns 10% or more of the party's stock. (b) **Time for Filing.** A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. (c) **Number of Copies.** If the statement is filed before the principal brief, the party must file an original and three copies, unless the court requires a different number by local rule or by order in a particular case.

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

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

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

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive change is recommended, however, in subdivision (a).

Subdivision (a). The amendment deletes the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. Although several circuit rules require identification of such entities, the Committee believes that such disclosure is unnecessary.

A disclosure statement assists a judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case. Given that purpose, disclosure of entities that would not be adversely affected by a decision in the case is unnecessary.

Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent, therefore, has an

interest in litigation involving the subsidiary. The rule requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well. For example, if a party is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the shares of the party, the publicly traded grandparent corporation should be disclosed. Conversely, disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation.

The amendment, however, adds a requirement that the party list all its stockholders that are publicly held companies owning 10% or more of the stock of the party. A judgment against a corporate party can adversely affect the value of the company's stock and, therefore, persons owning stock in the party have an interest in the outcome of the litigation. A judge owning stock in a corporate party ordinarily recuses himself or herself. The new requirement takes the analysis one step further and assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal. The 10% threshold ensures that the corporation in which the judge may own stock is itself sufficiently invested in the party that a judgment adverse to the party could have an adverse impact upon the investing corporation in

which the judge may own stock. This requirement is modeled on the Seventh Circuit's disclosure requirement.

Subdivision (b). The language requiring inclusion of the disclosure statement in a party's principal brief is moved to this subdivision because it deals with the time for filing the statement.

Rule 27. Motions	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 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.	**(a) In General.** (1) **Application for Relief.** An application for an order or other relief is made by motion unless these rules prescribe another form. A motion must be in writing unless the court permits otherwise. (2) **Contents of a Motion.** (A) **Grounds and relief sought.** A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it. (B) **Accompanying documents.** (i) Any affidavit or other paper necessary to support a motion must be served and filed with the motion. (ii) An affidavit must contain only factual information, not legal argument. (iii) A motion seeking substantive relief must include a copy of the trial court's opinion or agency's decision as a separate exhibit.

	(C) **Documents barred or 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.
Any party may file a response in opposition to a motion other than one for 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. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.	(3) **Response.** (A) **Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 10 days after service of the motion unless the court shortens or extends the time. ~~But a motion may be decided before a response is filed if it is a motion for a procedural order governed by Rule 27(b) or a motion authorized by Rule 8, 9, 18, or 41 and reasonable notice has been given.~~ (B) **Request for affirmative relief.** A response may include a motion for affirmative relief. The time to respond to the new motion, and to reply to that response, are governed by Rule 27(a)(3)(A) and (a)(4). The title of the response must alert the court to the request for relief. (4) **Reply to Response.** ~~The moving party may~~ Any reply to a response within 7 days after service of the response ~~unless the court shortens or extends the time~~. A reply must not present matters that do not relate to the response. must be filed

(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 .	(b) **Disposition of a Motion for a Procedural Order.** The court may act on a motion for a procedural order — including a motion under Rule 26(b) — at any time without awaiting a response, and may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions. A party adversely affected by the court's, or the clerk's, action may file a motion to reconsider, vacate, or modify that action. Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed.
(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.	(c) **Power of a Single Judge to Entertain a Motion.** A circuit judge may act alone on any motion, but may 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 only the court may act on any motion or class of motions. The court may review the action of a single judge.

orm of Papers; Number of Copies. — All
s relating to a motion may be typewritten. An
inal and three copies must be filed unless the
urt requires the filing of a different number by
ocal rule or by order in a particular case.

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

(1) **Format.**

(A) **Reproduction.** A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque, and unglazed ~~paper~~. Only one side of the paper may be used.

(B) **Cover.** 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.

(C) **Binding.** The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(D) **Paper size, line spacing, and margins.** The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

	(2) **Page Limits.** A motion or a response to a motion must not exceed 20 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 10 pages. (3) **Number of Copies.** An original and 3 copies must be filed unless the court requires 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

In addition to amending Rule 27 to conform to uniform drafting standards, several substantive amendments are recommended. The Advisory Committee had been working on substantive amendments to Rule 27 just prior to completion of this larger project. Rather than publish the Rule 27 amendments separately, they have been made a part of this packet.

Subdivision (a). Paragraph (1) retains the language of the existing 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 (1) also states that a motion must be in writing unless the court permits otherwise. The writing requirement has been implicit in the rule; the Advisory 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 Advisory Committee decided that it is better to leave the determination of the propriety of an oral motion to the court's discretion. The provision does 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.

Paragraph (2) outlines the contents of a motion. It begins with the general requirement from the current 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 trial court's opinion or agency's 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) retains the provisions of the current rule concerning the filing of a response to a motion except that the time for responding has been expanded to 10 days rather than 7 days. Because the time periods in the rule apply to a substantive motion as well as a procedural motion, the longer time period may help reduce the number of motions for extension of time, or at least provide a more realistic time frame within which to make and dispose of such a motion.

A party filing a response in opposition to a motion may also request affirmative relief. It is the Advisory 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 must 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.~~ As a general matter, a reply should not reargue propositions presented in the motion or present matters that do not relate to the response. Sometimes matters relevant to the motion arise after the motion is filed; treatment of such matters in the reply is appropriate even though strictly speaking it may not relate to the response.

Subdivision (b). The material in 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 reconsider, vacate, or modify the disposition must file a new motion that addresses the order granting the motion.

Although the rule does not require a court to do so, it would be helpful if, whenever a motion is disposed of before receipt of any response from the opposing party, the ruling indicates that it was issued without

awaiting a response. Such a statement will aid the opposing party in deciding whether to request reconsideration. The opposing party may have mailed a response about the time of the ruling and be uncertain whether the court has considered it.

Subdivision (c). The changes in this subdivision are stylistic only. No substantives changes are intended.

Subdivision (d). This subdivision has been substantially revised.

The format requirements have been moved from Rule 32(b) to paragraph (1) of this subdivision. 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. Spiral binding or secure stapling at the upper left-hand corner satisfies the binding requirement. But they are not intended to be the exclusive methods of binding.

Paragraph (2) 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. This 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.

The changes in paragraph (4) are stylistic only. No substantive changes are intended.

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.

28. Briefs	Rule 28. Briefs
(a) Appellant's Brief. — The brief of the appellant must contain, under appropriate headings and in the order here indicated: (1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.	**(a) Appellant's Brief.** The appellant's brief must contain, under appropriate headings and in the order indicated: (1) a corporate disclosure statement if required by Rule 26.1; (2) a table of contents, with page references; (3) a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the brief where they are cited;

(2) A statement of subject matter and appellate jurisdiction. The statement shall include: (i) a statement of the basis for subject matter jurisdiction in the district court or agency, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; (ii) a statement of the basis for jurisdiction in the court of appeals, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; the statement shall include relevant filing dates establishing the timeliness of the appeal or petition for review and (a) shall state that the appeal is from a final order or a final judgment that disposes of all claims with respect to all parties or, if not, (b) shall include information establishing that the court of appeals has jurisdiction on some other basis. (3) A statement of the issues presented for review.	(4) a jurisdictional statement, including: (A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction; (B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction; (C) the filing dates establishing the timeliness of the appeal or petition for review; and (D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis; (5) a statement of the issues presented for review;

(4) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

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

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

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

(6) a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;

(7) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));

(8) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(10) a short conclusion stating the precise relief sought; and

(11) the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. — The brief of the appellee must conform to the requirements of paragraphs (a)(1)-(6) , except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant: (1) the jurisdictional statement; (2) the statement of the issues; (3) the statement of the case; (4) the statement of the standard of review.	**(b) Appellee's Brief.** The appellee's brief must conform to the requirements of Rule 28(a)(1)–(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement: (1) the jurisdictional statement; (2) the statement of the issues; (3) the statement of the case; (4) the statement of the facts; and (5) the statement of the standard of review.
(c) Reply brief. — The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court. All reply briefs shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the reply brief where they are cited.	**(c) Reply Brief.** The appellant may file a brief in reply to the appellee's brief. An appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues presented by the cross-appeal. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the reply brief where they are cited.
(d) References in briefs to parties. — Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee". It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore," etc.	**(d) References to Parties.** In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

(e) References in briefs to the record. — References in the briefs to parts of the record reproduced in the appendix filed with the brief of the appellant (see Rule 30(a)) shall be to the pages of the appendix at which those parts appear. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 30(c). If the record is reproduced in accordance with the provisions of Rule 30(f), or if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.	(e) **References to the Record.** References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example: • Answer p. 7; • Motion for Judgment p. 2; • Transcript p. 231. Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.
(f) Reproduction of statutes, rules, regulations, etc. — If determination of the issues presented requires the study of statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.	(f) **Reproduction of Statutes, Rules, Regulations, etc.** If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.
(g) Length of briefs. — Except by permission of the court, or as specified by local rule of the court of appeals, principal briefs must not exceed 50 pages, and reply briefs must not exceed 25 pages, exclusive of pages containing the corporate disclosure statement, table of contents, tables of citations, proof of service, and any addendum containing statutes, rules, regulations, etc.	(g) **[Reserved]**

(h) 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) 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.	**(h) Briefs in a Case Involving a Cross-Appeal.** If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order. With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the requirements of Rule 28(a)(1)–(11). But an appellee who is satisfied with appellant's statement need not include a statement of the case or of the facts.
(i) 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.	**(i) Briefs in a Case Involving Multiple Appellants or Appellees.** In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.
(j) 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.	**(j) Citation of Supplemental Authorities.** If pertinent and significant authorities come to a party's attention 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 other parties, setting forth the citations. The letter must state without argument the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. Any response must be made promptly and must be similarly limited.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Several substantive changes are recommended in this rule, however. Most of them are necessary to conform Rule 28 with changes recommended in Rule 32.

Subdivision (a). The current rule requires a brief to include a statement of the case which includes a description of the nature of the case, the course of proceedings, the disposition of the case — all of which might be described as the procedural history — as well as a statement of the facts. The amendments separate this into two statements: one procedural, called the statement of the case; and one factual, called the statement of the facts. The Advisory Committee believes that the separation will be helpful to the judges. The table of contents and table of authorities have also been separated into two distinct items.

An additional amendment of subdivision (a) is recommended to conform it with an amendment being made to Rule 32. Rule 32(a)(7) generally requires a brief to include a certificate of compliance with type-volume limitations contained in that rule. (No certificate is required if a brief does not exceed 30 pages, or 15 pages for a reply brief.) Rule 28(a) is amended to include that certificate in the list of items that must be included in a brief whenever it is required by Rule 32.

Subdivision (g). The amendments delete 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.

Subdivision (h). The amendment requires an appellee's brief to comply with Rule 28(a)(1) through (11) with regard to a cross-appeal. The addition of separate paragraphs requiring a corporate disclosure statement, table of authorities, statement of facts, and certificate of compliance increased the relevant paragraphs of subdivision (a) from (7) to (11). The other changes are stylistic; no substantive changes are intended.

, or The District of Columbia

Rule 29. Brief of an Amicus Curiae*	Rule 29. Brief of an Amicus Curiae
A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.	(a) **When Permitted.** The United States or its officer or agency, or a State, Territory ~~or~~ Commonwealth may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only ~~if it is accompanied by the written consent of all parties or by leave of court.~~ (b) **Motion for Leave to File.** The motion must be accompanied by the proposed brief and state: (1) the movant's interest; (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case. by leave of court or if the brief states that all parties have consented to its filing.

~~* Italicized text represents proposed amendments that were published for public comment in September 1995. If approved — with or without revision — by the advisory committee, Standing Committee, Judicial Conference, and Supreme Court, the amendments take effect on December 1, 1997, unless Congress acts otherwise.~~

(a) ***When Permitted.*** *The United States or its officer or agency, or a State, Territory or Commonwealth may file an amicus-curiae brief without consent of the parties or leave of court. Any other amicus curiae may file a brief only if:* *(1) it is accompanied by written consent of all parties;* *(2) the court grants leave on motion; or* *(3) the court so requests.* (b) ***Motion for Leave to File.*** *The motion shall be accompanied by the proposed brief, and shall state:* *(1) the movant's interest;* *(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.*	

(c) ***Contents and Form.*** *An amicus brief shall comply with Rule 32. In addition to the requirements of Rule 32, the cover shall identify the party or parties supported or indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief shall include a disclosure statement like that required of parties by Rule 26.1. With respect to Rule 28, an amicus brief shall include the following:* *(1) a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited;* *(2) a concise statement of the identity of the amicus and its interest in the case; and* *(3) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review.*	(c) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported or indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following: (1) a table of contents, with page references; (2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited; (3) a concise statement of the identity of the amicus curiae ~~and~~ its interest in the case, and the source of its authority to file; (4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and (5) a certificate of compliance, if required by Rule 32(a)(7).

(d) Length. An amicus brief may be no more than one-half the maximum length of a party's principal brief.	(d) **Length.** An amicus brief may be no more than one-half the maximum length of a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.
(e) Time for Filing. An amicus curiae shall file its brief, accompanied by a motion for filing when necessary, within the time allowed to the party being supported. If an amicus does not support either party, the amicus shall file its brief within the time allowed to the appellant or petitioner. A court may grant leave for later filing, specifying the time within which an opposing party may answer.	(e) **Time for Filing.** An amicus curiae must file its brief, accompanied by a motion for filing when necessary, within the time allowed to the party being supported. An amicus curiae who does not support either party must file its brief within the time allowed to the appellant or petitioner. A court may grant leave for later filing, specifying the time within which an opposing party may answer.
(f) Reply Brief. An amicus curiae is not entitled to file a reply brief.	(f) **Reply Brief.** An amicus curiae is not entitled to file a reply brief.
(g) Oral Argument. An amicus curiae's motion to participate in oral argument will be granted only for extraordinary reasons.	(g) **Oral Argument.** An amicus curiae may participate in oral argument with the court's permission.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

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

See attached pages for Committee Note to Rule 29.

Rule 29

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Several substantive changes are recommended in this rule, however.

Subdivision (a). The major change in this subpart is that when a brief is filed with the consent of all parties, it is no longer necessary to obtain the parties' written consent and to file the consents with the brief. It is sufficient to obtain the parties' oral consent and to state in the brief that all parties have consented. It is sometimes difficult to obtain all the written consents by the filing deadline and it is not unusual for counsel to represent that parties have consented; for example, in a motion for extension of time to file a brief it is not unusual for the movant to state that the other parties have been consulted and they do not object to the extension. If a party's consent has been misrepresented, the party will be able to take action before the court considers the amicus brief.

The District of Columbia is added to the list of entities allowed to file an amicus brief without consent of all parties. The other changes in this material are stylistic.

Subdivision (b). The provision in the former rule, granting permission to conditionally file the brief with the motion, is changed to one requiring that the brief accompany the motion. Sup. Ct. R. 37.4 requires that the proposed brief be presented with the motion.

The former rule only required the motion to identify the applicant's interest and to generally state the reasons why an amicus brief is desirable. The amended rule additionally requires that the motion state the relevance of the matters asserted to the disposition of the case. As Sup. Ct. R. 37.1 states:

> "An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.

Because the relevance of the matters asserted by an amicus is ordinarily the most compelling reason for granting leave to file, the Committee believes that it is helpful to explicitly require such a showing.

Subdivision (c). The provisions in this subdivision are entirely new. Previously there was confusion as to whether an amicus brief must include all of the items listed in Rule 28. Out of caution practitioners in some circuits included all those items. Ordinarily that is unnecessary.

The requirement that the cover identify the party supported and indicate whether the amicus supports affirmance or reversal is an administrative aid.

Paragraph (c)(3) requires an amicus to state the source of its authority to file. The amicus simply must identify which of the provisions in Rule 29(a) provides the basis for the amicus to file its brief.

Subdivision (d). This new provision imposes a shorter page limit for an amicus brief than for a party's brief. This is appropriate for two reasons. First, an amicus may omit certain items that must be included in a party's brief. Second, an amicus brief is supplemental. It need not address all issues or all facets of a case. It should treat only matter not adequately addressed by a party.

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

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

A court may grant permission to file an amicus brief in a context in which the

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

The former rule's statement that a court may, for cause shown, grant leave for later filing is unnecessary. Rule 26(b) grants general authority to enlarge the time prescribed in these rules for good cause shown. This new rule, however, states that when a court grants permission for later filing, the court must specify the period within which an opposing party may answer the arguments of the amicus.

Subdivision (f). This subdivision generally prohibits the filing of a reply brief by an amicus curiae. Sup. Ct. R. 37 and local rules of the D.C., Ninth, and Federal Circuits state that an amicus may not file a reply brief. The role of an amicus should not require the use of a reply brief.

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

Rule 30. Appendix to the Briefs	Rule 30. Appendix to the Briefs
(a) Duty of Appellant to Prepare and File; Content of Appendix; Time for Filing; Number of Copies. — The appellant must prepare and file an appendix to the briefs which must contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings, or opinion; (3) the judgment, order, or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the district court should not be included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts. Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant must serve and file the appendix with the brief. Ten copies of the appendix must be filed with the clerk, and one copy must be served on counsel for each party separately represented, unless the court requires the filing or service of a different number by local rule or by order in a particular case.	**(a) Appellant's Responsibility.** (1) **Contents of the Appendix.** The appellant must prepare and file an appendix to the briefs containing: (A) the relevant docket entries in the proceeding below; (B) the relevant portions of the pleadings, charge, findings, or opinion; (C) the judgment, order, or decision in question; and (D) other parts of the record to which the parties wish to direct the court's attention. (2) **Excluded Material.** Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. Parts of the record may be relied on by the court or the parties even though not included in the appendix. (3) **Time to File; Number of Copies.** Unless filing is deferred under Rule 30(c), the appellant must file ~~ten~~ 10 copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. The court may by local rule or by order in a particular case require the filing or service of a different number.

An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party.

(b) Determination of contents of appendix; cost of producing. — The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which the appellant intends to include in the appendix and a statement of the issues which the appellant intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, the appellee shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated with respect to the appeal and any cross appeal. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation. The provisions of this paragraph shall apply to cross appellants and cross appellees.	**(b) All Parties' Responsibilities.** (1) **Determining the Contents of the Appendix.** The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within 10 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 10 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.
Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented the appellant may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party. Each circuit shall provide by local rule for the imposition of sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix.	(2) **Costs of Appendix.** Unless the parties agree otherwise, the appellant must pay the cost of the appendix. If the appellant considers parts of the record designated by the appellee to be unnecessary, the appellant may advise the appellee, who must then advance the cost of including those parts. The cost of the appendix is a taxable cost. But if any party causes unnecessary parts of the record to be included in the appendix, the court may impose the cost of those parts on that party. Each circuit must, by local rule, provide for sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix.

(c) Alternative method of designating contents of the appendix; how references to the record may be made in the briefs when alternative method is used. — If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply, except that the designations referred to therein shall be made by each party at the time each brief is served, and a statement of the issues presented shall be unnecessary.	**(c) Deferred Appendix.** (1) **Deferral Until After Briefs Are Filed.** The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served. Even though the filing of the appendix may be deferred, Rule 30(b) applies; except that a party must designate the parts of the record it wants included in the appendix when it serves its brief, and need not include a statement of the issues presented.

If the deferred appendix authorized by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where the page begins. Or if a party desires to refer in a brief directly to pages of the appendix, that party may serve and file typewritten or page proof copies of the brief within the time required by Rule 31(a), with appropriate references to the pages of the parts of the record involved. In that event, within 14 days after the appendix is filed the party shall serve and file copies of the brief in the form prescribed by Rule 32(a) containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.	(2) **References to the Record.** (A) If the deferred appendix is used, the parties may cite in their briefs the pertinent pages of the record. When the appendix is prepared, the record pages cited in the briefs must be indicated by inserting record page numbers, in brackets, at places in the appendix where those pages of the record appear. (B) A party who wants to refer directly to pages of the appendix may serve and file copies of the brief within the time required by Rule 31(a), containing appropriate references to pertinent pages of the record. In that event, within 14 days after the appendix is filed, the party must serve and file copies of the brief, containing references to the pages of the appendix in place of or in addition to the references to the pertinent pages of the record. Except for the correction of typographical errors, no other changes may be made to the brief.

(d) Arrangement of the appendix. — At the beginning of the appendix there shall be inserted a list of the parts of the record which it contains, in the order in which the parts are set out therein, with references to the pages of the appendix at which each part begins. The relevant docket entries shall be set out following the list of contents. Thereafter, other parts of the record shall be set out in chronological order. When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.	(d) **Format of the Appendix.** The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included pages. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) should be omitted.
(e) Reproduction of exhibits. — Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. Four copies thereof shall be filed with the appendix and one copy shall be served on counsel for each party separately represented. The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this subdivision.	(e) **Reproduction of Exhibits.** Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed. Four copies must be filed with the appendix, and one copy must be served on counsel for each separately represented party. If a transcript of a proceeding before an administrative agency, board, commission, or officer was used in a district-court action and has been designated for inclusion in the appendix, the transcript must be placed in the appendix as an exhibit.
(f) Hearing of appeals on the original record without the necessity of an appendix. — A court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.	(f) **Appeal on the Original Record Without an Appendix.** The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.

Subdivision (a). Paragraph (a)(3) is amended so that it is consistent with Rule 31(b). An unrepresented party proceeding in forma pauperis is only required to file 4 copies of the appendix rather than 10.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Subdivision (c). When a deferred appendix is used, a brief must make reference to the original record rather than to the appendix because it does not exist when the briefs are prepared. Unless a party later files an amended brief with direct references to the pages of the appendix (as provided in subparagraph (c)(2)(B)), the material in the appendix must indicate the pages of the original record from which it was drawn so that a reader of the brief can make meaningful use of the appendix. The instructions in the current rule for cross-referencing the appendix materials to the original record are unclear. The language in paragraph (c)(2) has been amended to try to clarify the procedure.

Subdivision (d). In recognition of the fact that use of a typeset appendix is exceedingly rare in the courts of appeals, the last sentence — permitting a question and answer (as from a transcript) to be in a single paragraph — has been omitted.

Rule 31. Filing and Service of a Brief	**Rule 31. Serving and Filing Briefs**
(a) Time for serving and filing briefs. — The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.	**(a) Time to Serve and File a Brief.** (1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least 3 days before argument, unless the court, for good cause, allows a later filing. (2) A court of appeals that routinely considers cases on the merits promptly after the briefs are filed may shorten the time to serve and file briefs, either by local rule or by order in a particular case.

(b) Number of Copies to Be Filed and Served. — Twenty-five copies of each brief must be filed with the clerk, and two copies must be served on counsel for each party separately represented unless the court requires the filing or service of a different number by local rule or by order in a particular case. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and three legible copies must be filed with the clerk, and one copy must be served on counsel for each party separately represented.	**(b) Number of Copies.** Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on counsel for each separately represented party; ~~unless the court requires a different number by local rule or by order in a particular case.~~ An unrepresented party proceeding in forma pauperis ~~may file an original and 3~~ must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party.
(c) Consequence of failure to file briefs. — If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file a brief, the appellee will not be heard at oral argument except by permission of the court.	**(c) Consequence of Failure to File.** If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.

Committee Note The court may by local rule or by order in a particular case require the filing or service of a different number.

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive change is recommended, however, in subdivision (b).

Subdivision (a). Paragraph (a)(2) explicitly authorizes a court of appeals to shorten a briefing schedule if the court routinely considers cases on the merits promptly after the briefs are filed. Extensions of the briefing schedule, by order, are permitted under the general provisions of Rule 26(b).

Subdivision (b). The current rule says that a party who is permitted to file "typewritten ribbon and carbon copies of the brief" need only file an original and three copies of the brief. The quoted language, in conjunction with current rule 24(c), means that a party allowed to proceed in forma pauperis need not file 25 copies of the brief. Two changes are suggested in this subdivision. First, it is anachronistic to refer to a party who is allowed to file a typewritten brief as if that would distinguish the party from all other parties; any party is permitted to file a typewritten brief. The amended rule states directly that it applies to a party permitted to proceed in forma pauperis. Second, the amended rule does not generally permit parties who are represented by counsel to file the lesser number of briefs. Inexpensive methods of copying are generally available. Unless it would impose hardship, in which case a motion to file a lesser number should be filed, a represented party must file the usual number of briefs.

Rule 32. Form of briefs, the appendix and other papers	Rule 32. Form of a Brief, an Appendix, and Other Papers
(a) Form of briefs and the appendix. — Briefs and appendices may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper. Carbon copies of briefs and appendices may not be submitted without permission of the court except in behalf of parties allowed to proceed 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 not exceeding 8 ½ by 11 inches and type matter not exceeding 6 ½ by 9 ½ inches, with double spacing between each line of text. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents. 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.	**(a) Form of a Brief.** **(1) Reproduction.** (A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used. (B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer. (C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available, the cover of the brief of the appellant should be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix, if separately printed, should be white. The front covers of the briefs and of appendices, if separately printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 12(a)); (3) 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) the title of the document (e.g., Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.

(2) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; and any reply brief, gray. The front cover of a brief must contain:

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

(B) the name of the court;

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

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the ~~document~~ brief, identifying the party or parties for whom the ~~document~~ brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the ~~document~~ brief is filed.

(3) **Binding.** The ~~document~~ brief must be bound in any manner that is secure, does not obscure the text, and permits the ~~document~~ brief to lie reasonably flat when open.

(4) **Paper Size, Line Spacing, and Margins.** The ~~document~~ brief must be on 8 ½ by 11 inch paper. The text must be double-spaced, but quotations more than ~~two~~ 2 lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) **Typeface.** Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger ~~but 12-point type may be used in footnotes.~~

(B) A monospaced face may not contain more than 10 ½ characters per inch.

(6) **Type Styles.** A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined. ~~A brief may use boldface only for case captions, section names, and argument headings. A brief may use all capitals only for case captions and section names. Nevertheless, quoted passages may use the original type style and capitalization~~

(i) A principal brief is acceptable if:
- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(7) **Length.**

(A) **Page limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) **Type-volume limitation.**

(i) A principal brief is acceptable if it contains no more than 14,000 words or 90,000 characters and does not average more than 280 words or 1,800 characters per page. A brief using a monospaced face also is acceptable if it does not contain more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word, ~~character,~~ and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, ~~and~~ any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

	(C) **Certificate of compliance.** A brief submitted under Rule 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or ~~character~~ line count of the word-processing system used to prepare the brief. The certificate must state either: (i) the number of words ~~or characters~~ in the brief ~~and the average number per page~~; or (ii) the number of lines of monospaced type in the brief.
	(b) Form of an Appendix. An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following exceptions: (1) The cover of a separately bound appendix must be white. (2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision. (3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8 ½ by 11 inches, and need not lie reasonably flat when opened.

(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 ½ 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.	**(c) Form of Other Papers.** (1) **Motion.** The form of a motion is governed by Rule 27(d). (2) **Other Papers.** Any other paper, including a petition for rehearing and a petition for rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions: (A) a cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2); and (B) Rule 32(a)(7) does not apply. **(d) Local Variation.** Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

Committee Note

In addition to amending Rule 32 to conform to uniform drafting standards, several substantive amendments are recommended. The Advisory Committee had been working on substantive amendments to Rule 32 for some time prior to completion of this larger project. In fact, earlier versions of proposed amendments to Rule 32 have been previously published. Rather than publish the Rule 32 proposed amendments separately, they have been made a part of this packet.

Subdivision (a). Form of a Brief.

Paragraph (a)(1). Reproduction.

The rule permits the use of "light" paper, not just "white" paper. Cream and buff colored paper, including recycled paper, are acceptable. The rule permits printing on only one side of the paper. Although some argue that paper could be saved by allowing double-sided printing, others argue that in order to preserve legibility a heavier weight paper would be needed, resulting in little, if any, paper saving. In

addition, the blank sides of a brief are commonly used by judges and their clerks for making notes about the case.

Because photocopying is inexpensive and widely available and because use of carbon paper is now very rare, all references to the use of carbon copies have been deleted.

The rule requires that the text be reproduced with a clarity that equals or exceeds the output of a laser printer. That means that the method used must have a print resolution of 300 dots per inch (dpi) or more. This will ensure the legibility of the brief. A brief produced by a typewriter or a daisy wheel printer, as well as one produced by a laser printer, has a print resolution of 300 dpi or more. But a brief produced by a dot-matrix printer, fax machine, or portable printer that uses heat or dye transfer methods does not. Some ink jet printers are 300 dpi or more, but some are 216 dpi and would not be sufficient.

Photographs, illustrations, and tables may be reproduced by any method that results in a good copy.

Paragraph (a)(2). Cover.

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

Paragraph (a)(3). Binding.

The rule requires a brief to be bound in any manner that is secure, does not obscure the text, and that permits the ~~document~~ brief to lie reasonably 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. One circuit already has such a requirement and another 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. Stapling a brief at the upper left-hand corner also satisfies this requirement as long as it is sufficiently secure.

Paragraph (a)(4). Paper Size, Line Spacing, and Margins.

The provisions for pamphlet-size briefs are deleted because their use is so rare. If a circuit wishes to authorize their use, it has authority to do so under subdivision (d) of this rule.

Paragraph (a)(5). Typeface.

This paragraph and the next one, governing type style, are new. The existing rule simply states that a brief 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 computer. 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~~ briefs are easily legible.

With regard to typeface there are two options: proportionally-spaced typeface or monospaced typeface.

Insert * from attached page.

A proportionally-spaced typeface gives a different amount of horizontal space to characters depending upon the width of the character. A capital "M" is given more horizontal space than a lower case "i." The rule requires that a proportionally-spaced typeface have serifs. ~~A serif is a smaller line used to finish off a main stroke of a letter, for example at the top and bottom of a capital "M." Long blocks of text are easier to read in serif type. Books and newspapers as well as all professionally printed briefs are printed in proportionally-spaced, serif type~~. The rule requires a minimum type size of 14 points so that the type is easily legible. ~~But a 12-point type may be used in footnotes.~~

Most typewriters produce monospaced type, and most computers also can do so using fonts with names such as "Courier." + ** on attached page

A monospaced typeface is 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. The rule requires use of a monospaced typeface that produces no more than 10½ characters per inch. A standard typewriter with pica type produces a monospaced typeface with 10 characters per inch (cpi). That is the ideal monospaced typeface. The rule permits up to 10½ cpi because some computer software programs contain monospaced fonts that purport to produce 10 cpi but that in fact produce slightly more than 10 cpi. In order to avoid the need to reprint a brief produced in good faith reliance upon such a program, the rule permits a bit of leeway. A monospaced typeface with no more than 10 cpi is preferred.

Italicizing case names is preferred but underlining may be used.

Paragraph (a)(6). Type Styles.

The rule requires use of plain roman, that is not italic or script, type. Italics may be used ~~only~~ for emphasis ~~and in case names.~~ The use of boldface is also restricted; it may be used only for case captions, section names (section names refers to the ~~headings~~ for the items required ~~in Rule~~ 28(a), e.g., jurisdictional statement, statement of facts), and ~~argument~~ headings. ~~Except that a quoted~~ passage may use the original type style and capitalization, all-capitals may be used only for case captions and section names. ~~These rules also aid~~ legibility.

and boldface

Paragraph (a)(7). Type-Volume Limitation.

Subparagraph (a)(7)(A) contains a safe-harbor provision. A principal brief that does not exceed 30 pages complies with the type-volume limitation without further question or certification. A reply brief that does not exceed 15 pages is similarly treated. The current limit is 50 pages but that limit was established when most briefs were produced on typewriters. The widespread use of personal computers has made a multitude of printing options available to practitioners. Use of a proportional typeface alone can greatly increase the amount of material per page as compared with use of a monospaced typeface. Even though the rule requires use of 14-point proportional type, there is great variation in the x-height of different 14-point typefaces. Selection of a typeface with a small x-height increases the amount of text per page. Computers also make possible fine gradations in spacing between lines and tight tracking between letters and words. All of this, and more, have made the 50 page limit virtually meaningless. Establishing a safe-harbor of 50 pages would permit a person who makes use of the multitude of printing "tricks" available

* ← Serifs are small horizontal or vertical strokes at the ends of the lines that make up the letters and numbers. Studies have shown that long passages of serif type are easier to read and comprehend than long passages of sans-serif type. The rule accordingly limits the principal sections of submissions to serif type, although sans-serif type may be used in headings and captions. This is the same approach magazines, newspapers, and commercial printers take. Look at a professionally printed brief; you will find sans-serif type confined to captions, if it is used at all.

The next line shows two characters enlarged for detail. The first has serifs, the second does not.

** This sentence is in a proportionally spaced font; as you can see, the m and i have different widths.

```
This sentence is in a monospaced font; as you can
see, the m and i have the same width.
```

with most personal computers to file a brief far longer than the "old" 50-page brief. Therefore, as to those briefs not subject to any other volume control than a page limit, a 30 page limit is imposed.

The limits in subparagraph (B) approximate the current 50-page limit and compliance with them is easy even for a person without a personal computer. The aim of these provisions is to create a level playing field. The rule gives every party an equal opportunity to make arguments, without permitting those with the best in-house typesetting an opportunity to expand their submissions.

The length can be determined either by counting words, ~~characters,~~ or lines. That is, the length of a brief is determined not by the number of pages but by the number of words, ~~characters,~~ or lines in the brief. 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 word ~~or character~~ counting methods can be used with any typeface. One can choose to count either words or characters. ~~A character count~~ (count of each letter, number, punctuation mark, etc.) is highly consistent across ~~word~~-processing programs but is not required by the rule because ~~it~~ is not easily done with some programs. A person ~~using~~ a typewriter, however, can easily determine the maximum number of characters per line and certify that the number of characters per page and in the brief does not exceed the maximum. (For example, a typewriter with pica type produces no more than 10 characters per inch. One line of text, therefore, has not more than ~~65~~ characters per line.) ~~Different~~ word-processing programs do not produce as consistent a word count, but the rule permits use of word counts ~~because~~ the variations from program to program are small and some programs do not count characters. The rule imposes not only an overall word/character limit (the number of words or characters in the brief) but also limits the average number of words or characters per page. This latter provision ensures legibility; it does not permit a person to squeeze too many words on a page.

A monospaced brief can meet the volume limitation by using the word or ~~character count, or a~~ line count. If the line counting method is used, the number of lines may not exceed 1,300 — 26 lines per page in a 50 page brief. The number of lines is easily counted manually. Line counting is not sufficient if a proportionally spaced typeface is used, because the amount of material per line can vary widely.

A brief using the type-volume limitations in subparagraph (B) must include a certificate by the attorney, or party proceeding pro se, that the brief complies with the limitation. The rule permits the person preparing the certification to rely upon the word or ~~character~~ line count of the word-processing system used to prepare the brief.

Currently, Rule 28(g) governs the length of a brief. Rule 28(g) begins with the words "[e]xcept by permission of the court," signalling that a party may file a motion to exceed the limits established in the rule. The absence of similar language in Rule 32 does not mean that the Advisory Committee intends to prohibit motions to deviate from the requirements of the rule. The Advisory Committee does not believe that any such language is needed to authorize such a motion.

Subdivision (b). Form of an Appendix.

The provisions governing the form of a brief generally apply to an appendix. The rule recognizes, however, that an appendix is usually produced by photocopying existing documents. The rule requires that the photocopies be legible.

The rule permits inclusion not only of documents from the record but also copies of a printed judicial or agency decision. If a decision that is part of the record in the case has been published, it is helpful to provide a copy of the published decision in place of a copy of the decision from the record.

Subdivision (c). Form of Other Papers.

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 petition for rehearing en banc and a response to either a petition for panel rehearing or a petition for rehearing en banc be prepared in the same manner. But the length limitations of paragraph (a)(7) do not apply to those documents and a cover is not required if all the information needed by the court to properly identify the document and the parties is included in the caption or signature page.

Existing subdivision (b) states that other papers may be produced in like manner, or "they may be typewritten upon opaque, unglazed paper 8½ by 11 inches in size." The quoted language is deleted but that method of preparing documents is not eliminated because (a)(5)(B) permits use of standard pica type. The only change is that the new rule now specifies margins for typewritten documents.

Subdivision (d). Local Variation.

A brief that complies with the national rule should be acceptable in every court. Local rules may move in one direction only; they may authorize noncompliance with certain of the national norms. For example, a court that wishes to do so may authorize printing of briefs on both sides of the paper, or the use of smaller type size or sans-serif proportional type. A local rule may not, however, impose requirements that are not in the national rule.

Rule 33. Appeal Conferences	Rule 33. Appeal Conferences
The court may direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, attorneys must consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an order controlling the course of the proceedings or implementing any settlement agreement.	The court may direct the attorneys — and, when appropriate, the parties — to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

(1) Party's Statement. Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

Rule 34. Oral argument	Rule 34. Oral Argument
(a) In general; local rule. — Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard: Oral argument will be allowed unless (1) the appeal is frivolous; or (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.	(a) **In General.** ~~Any party may file a statement explaining why oral argument should be permitted.~~ Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons: (A) (1) the appeal is frivolous; (B) (2) the dispositive issue or issues have been authoritatively decided; or (C) (3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. (2) Standards.
(b) Notice of argument; postponement. — The clerk shall advise all parties whether oral argument is to be heard, and if so, of the time and place therefor, and the time to be allowed each side. A request for postponement of the argument or for allowance of additional time must be made by motion filed reasonably in advance of the date fixed for hearing.	(b) **Notice of Argument; Postponement.** The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.
(c) Order and Content of Argument.- The appellant is entitled to open and conclude the argument. Counsel may not read at length from briefs, records, or authorities.	(c) **Order and Contents of Argument.** The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

(d) Cross and separate appeals. — A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the court otherwise directs. If a case involves a cross appeal, 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 purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.	**(d) Cross-Appeals and Separate Appeals.** If there is a cross-appeal, Rule 28(h) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.
(e) Non-appearance of parties. — If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.	**(e) Nonappearance of a Party.** If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.
(f) Submission on briefs. — By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.	**(f) Submission on Briefs.** The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.
(g) Use of physical exhibits at argument; removal. — If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the court room before the court convenes on the date of the argument. After the argument counsel shall cause the exhibits to be removed from the court room unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.	**(g) Use of Physical Exhibits at Argument; Removal.** Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and

terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. Substantive changes are recommended in subdivision (a).

Subdivision (a). Currently subdivision (a) says that oral argument must be permitted unless, applying a local rule, a panel of three judges unanimously agrees that oral argument is not necessary. Rule 34 then outlines the criteria to be used to determine whether oral argument is needed and requires any local rule to "conform substantially" to the "minimum standard[s]" established in the national rule. The amendments omit the local rule requirement and make the criteria applicable by force of the national rule. The local rule is an unnecessary instrument.

Paragraph (a)(2) states that one reason for deciding that oral argument is unnecessary is that the dispositive issue has been authoritatively decided. The amended language no longer states that the issue must have been "recently" decided. The Advisory Committee does not intend any substantive change, but thinks that the use of "recently" may be misleading.

Subdivision (d). A cross-reference to Rule 28(h) has been substituted for a reiteration of the provisions of Rule 28(h).

Rule 35. Determination of Causes by the Court in Banc(*)	**Rule 35. En Banc Determination**
(a) When hearing or rehearing in banc will be ordered. — A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.	(a) **When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) consideration ~~by the full court~~ is necessary to secure or maintain uniformity of ~~its~~ decisions; or (2) the proceeding involves a question of exceptional importance.
*~~Italicized~~ text represents proposed amendments that were published for public comment in September 1995. If approved — with or without revision — by the advisory committee, Standing Committee, Judicial Conference, and Supreme Court, the amendments take effect on December 1, 1997, unless Congress acts otherwise.	

Rule 35. En Banc Proceedings	
(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: *(1) consideration by the full court is necessary to secure or maintain uniformity of its decisions; or* *(2) the proceeding involves a question of exceptional importance.*	

(b) Suggestion of a party for hearing or rehearing in banc. — A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; a proceeding ~~may~~ present a question of exceptional importance if it involves an issue ~~as to~~ which the panel decision conflicts with the authoritative decisions of every other ~~federal~~ court of appeals that has addressed the issue. ~~(citation to the conflicting case or cases being required).~~

for example, a petition may assert that

on

United States

(2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

(3) ~~Except by the court's permission, if a petition for a panel rehearing and a petition for rehearing en banc are both filed — whether or not they are combined in a single document — the combined documents must not exceed 15 pages, excluding material not counted under Rule 32.~~

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

(1) The petition shall begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which shall be concisely stated; a proceeding may present a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other federal court of appeals that has addressed the issue (citation to the conflicting case or cases being required).

(2) Except by the court's permission, a petition for en banc hearing or rehearing shall not exceed 15 pages, excluding material not counted under Rule 28(g).

(3) Except by the court's permission, if a petition for a panel rehearing and a petition for rehearing en banc are both filed — whether or not they are combined in a single document — the combined documents shall not exceed 15 pages, excluding material not counted under Rule 28(g).

(c) Time for suggestion of a party for hearing or rehearing in banc; suggestion does not stay mandate. — If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such a petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.	(c) **Time ~~for~~ to Petition for Hearing or Rehearing En Banc.** A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.
~~(c) *Time for Petition for Hearing or Rehearing En Banc. A petition that an appeal be heard initially en banc shall be filed by the date when the appellee's brief is due. A petition for a rehearing en banc shall be filed within the time prescribed by Rule 40 for filing a petition for rehearing.*~~	
(d) Number of Copies. — The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.	(d) **Number of Copies.** The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case. (e) **Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response. Call for a Vote. (f) ~~**Voting on a Petition.**~~ The clerk must forward ~~any such~~ petition to the judges of ~~the~~ court who are in regular ~~active service~~ and, with respect to a petition for rehearing, to ~~any~~ other members of the panel ~~that~~ rendered the decision ~~sought~~ to be reheard. ~~But~~ a vote need not be taken to determine whether the ~~cause~~ case will be heard or reheard en banc unless ~~one of those~~ a judge ~~requests~~ calls for a vote.

(d) *Number of Copies. The number of copies that shall be filed may be prescribed by local rule and may be altered by order in a particular case.* (e) *Response. No response may be filed to a petition for en banc consideration unless the court orders a response.* (f) *Voting on a Petition. The clerk shall forward any such petition to the judges of the court who are in regular active service and, with respect to a petition for rehearing, to any other members of the panel that rendered the decision sought to be reheard. But a vote need not be taken to determine whether the cause will be heard or reheard en banc unless one of those judges requests a vote.*	

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

See note on attached pages.

Rule 35

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Several substantive changes are recommended in this rule, however.

One of the purposes of the substantive amendments is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and delay the running of the period for filing a petition for writ of certiorari. Companion amendments are made to Rule 41.

Subdivision (a). The title of this subdivision is changed from "When hearing or rehearing in banc will be ordered" to "When Hearing or Rehearing En Banc May Be Ordered." The change emphasizes the discretion a court has with regard to granting en banc review.

Subdivision (b). The term "petition" for rehearing en banc is substituted for the term "suggestion" for rehearing en banc. The terminology change reflects, the Committee's intent to treat similarly a petition for panel rehearing and a request for a rehearing en banc. The terminology change also delays the running of the time for filing a petition for a writ of certiorari because Sup. Ct. R. 13.3 says ~~that~~:

> if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment.

The amendments also require each petition for en banc consideration to begin with a statement concisely demonstrating that the case meets the usual criteria for en banc consideration. It is the Committee's hope that requiring such a statement will cause the drafter of a petition to focus on the narrow grounds that support en banc consideration and to realize that a petition should not be filed unless the case meets those rigid standards.

Intercircuit conflict is cited as one reason for asserting that a proceeding

involves a question of "exceptional importance." Intercircuit conflicts create problems. When the circuits construe the same federal law differently, parties' rights and duties depend upon where a case is litigated. Given the increase in the number of cases decided by the federal courts and the limitation on the number of cases the Supreme Court can hear, conflicts between the circuits may remain unresolved by the Supreme Court for an extended period of time. The existence of an intercircuit conflict often generates additional litigation in the other circuits as well as in the circuits that are already in conflict. Although an en banc proceeding will not necessarily prevent intercircuit conflicts, an en banc proceeding provides a safeguard against unnecessary intercircuit conflicts.

Some circuits have had rules or internal operating procedures that recognize a conflict with another circuit as a legitimate basis for granting a rehearing en banc. An intercircuit conflict may present a question of "exceptional importance" because of the costs that intercircuit conflicts impose on the system as a whole, in addition to the significance of the issues involved. It is not, however, the Committee's intent to make the granting of a hearing or rehearing en banc mandatory whenever there is an intercircuit conflict.

The amendment states that "a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other United States court of appeals that has addressed the issue." That language contemplates two situations in which a rehearing en banc may be appropriate. The first is when a panel decision creates a conflict. A panel decision creates a conflict when it conflicts with the decisions of all other circuits that have considered the issue. If a panel decision simply joins one side of an already existing conflict, a rehearing en banc may not be as important because it cannot avoid the conflict. The second situation that may be a strong candidate for a rehearing en banc is one in which the circuit persists in a conflict created by a pre-existing decision of the same circuit and no other circuits have joined on that side of the conflict. The amendment states that the conflict must be with an "authoritative" decision of another circuit. "Authoritative" is used rather than "published" because in some circuits unpublished opinions may be treated as authoritative.

Counsel are reminded that their duty is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of subdivision (a) of this rule and even then the granting of a petition is entirely within the court's discretion.

Paragraph (2) of this subdivision establishes a maximum length for a petition. Fifteen pages is the length currently used in several circuits. Each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. The extraordinary nature of the issue or the threat to uniformity of the court's decision can be established in most cases in less than fifteen

pages. A court may shorten the maximum length on a case by case basis but the rule does not permit a circuit to shorten the length by local rule. The Committee has retained page limits rather than using word or ~~characters~~ line counts similar to those in amended Rule 32 because there has not been a serious enough problem to justify importing the word and ~~character~~ line-count and typeface requirements that are applicable to briefs into other contexts.

Paragraph (3), although similar to (2), is separate because it deals with those instances in which a party files both a petition for rehearing en banc under this rule and a petition for panel rehearing under Rule 40.

To improve the clarity of the rule, the material dealing with filing a response to a petition and with voting on a petition have been moved to new subdivisions (e) and (f).

Subdivision (c). Two changes are made in this subdivision. First, the sentence stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate is deleted. Second, the language permitting a party to include a request for rehearing en banc in a petition for panel rehearing is deleted. The Committee believes that those circuits that want to require two separate documents should have the option to do so.

Subdivision (e). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b). The only changes are stylistic; no substantive changes are intended.

Subdivision (f). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b).

Because of the discretionary nature of the en banc procedure, the filing of a suggestion for rehearing en banc has not required a vote; a vote is taken only when requested by a judge of the court or by a judge who was a member of the panel that rendered the decision sought to be reheard. It is not the Committee's intent to change the discretionary nature of the procedure or to require a vote on a petition for rehearing en banc. The rule continues, therefore, to provide that a court is not obligated to vote on such petitions. It is necessary, however, that each court develop a procedure for disposing of such petitions because they will suspend the finality of the court's judgment and toll the time for filing a petition for certiorari.

Former subdivision (b) contained language directing the clerk to distribute a "suggestion" to certain judges and indicating which judges may call for a vote. New subdivision (f) does not address those issues because they deal with internal court procedures.

Special Note. To avoid confusion, the Advisory Committee urges the Supreme Court to amend its Rule 13.3 by deleting the last sentence.

Rule 36. Entry of judgments	Rule 36. Entry of Judgment; Notice
The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.	(a) **Entry.** A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment: (long dash) — (1) after receiving the court's opinion, but if settlement of the judgment's form is required, after final settlement; or (2) if a judgment is rendered without an opinion, as the court instructs. (b) **Notice.** On the date when judgment is entered, the clerk must mail to all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 37. Interest on judgments	Rule 37. Interest on Judgment
Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.	(a) **When the Court Affirms.** Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered. (b) **When the Court Reverses.** If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 38. Damages and Costs for Frivolous Appeals	Rule 38. Frivolous Appeal — Damages and Costs
If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.	If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Committee Note

Only the caption of this rule has been amended. The changes are intended to be stylistic only.

Rule 39. Costs	Rule 39. Costs
(a) To whom allowed. — Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.	(a) **Against Whom Assessed.** The following rules apply unless the law provides or the court orders otherwise: (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise; (2) if a judgment is affirmed, costs are taxed against the appellant; (3) if a judgment is reversed, costs are taxed against the appellee; (4) if a judgment is affirmed in part, reversed in part, or vacated, costs are taxed only as the court orders.

modified,

(b) Costs for and against the United States. — In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.	**(b) Costs For and Against the United States.** Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.
(c) Costs of briefs, appendices, and copies of records. — By local rule the court of appeals shall fix the maximum rate at which the cost of printing or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable. Such rate shall not be higher than that generally charged for such work in the area where the clerk's office is located and shall encourage the use of economical methods of printing and copying.	**(c) Costs of Copies.** Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief, or appendix, or ~~record~~ authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.
(d) Bill of costs; objections; costs to be inserted in mandate or added later. — A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which the party shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.	**(d) Bill of Costs: Objections; Insertion in Mandate.** (1) A party who wants costs taxed must — within 14 days after entry of judgment — file with the circuit clerk, with proof of service, an itemized and verified bill of costs. (2) Objections must be filed within 10 days after service of the bill of costs, unless the court extends the time. (3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must — upon the circuit clerk's request — add the statement of costs, or any amendment of it, to the mandate.

(e) Costs on appeal taxable in the district courts. — Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.	(e) **Costs on Appeal Taxable in the District Court.** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule: (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. All references to the cost of "printing" have been deleted from subdivision (c) because commercial printing is so rarely used for preparation of documents filed with a court of appeals.

Panel

Rule 40. Petition for Rehearing	Rule 40. Petition for Rehearing
(a) Time for Filing; Content; Answer; Action by Court if Granted. — A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. However, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. The petition must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted.	**(a) Time to File; Contents; Answer; Action by the Court if Granted.** (1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time. (2) **Contents.** The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.
No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.	(3) **Answer.** Unless the court requests, no answer to a petition for ~~rehearing~~ panel is permitted. But ordinarily rehearing will not be granted in the absence of such a request. (4) **Action by the Court.** If a petition for panel rehearing is granted, the court may do any of the following: (A) make a final disposition of the case without reargument; (B) restore the case to the calendar for reargument or resubmission; or (C) issue any other appropriate order.

(b) Form of petition; length. — The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.	**(b) Form of Petition; Length.** The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Unless the court permits or a local rule provides otherwise, a petition for rehearing must not exceed 15 pages. panel

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 41. Issuance of Mandate; Stay of Mandate*	Rule 41. Mandate: Contents; Issuance and Effective Date; Stay
(a) Date of Issuance. — The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate must issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.	(a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs. (b) **When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time. (c) **Effective Date.** The mandate is effective when issued.

*~~Italicized~~ text represents proposed amendments that were published for public comment in September 1995. If approved — with or without revision — by the advisory committee, Standing Committee, Judicial Conference, and Supreme Court, the amendments take effect on December 1, 1997, unless Congress acts otherwise.

(a) The Mandate; Date of Issuance, Effective Date. *(1) Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.* *(2) The court's mandate shall issue 7 days after the time for filing a petition for rehearing expires, unless an order shortens or extends the time, or a party files a petition for rehearing, a petition for rehearing en banc, or a motion for stay of mandate pending petition to the Supreme Court for a writ of certiorari. Unless the court orders otherwise, the timely filing of a petition for rehearing, a petition for rehearing en banc, or the filing of a motion for a stay of mandate pending petition to the Supreme Court for a writ of cetiorari, stays the mandate until the court disposes of the petition or motion. If the court denies the petition for rehearing or rehearing en banc, or the motion for a stay of mandate, the court shall issue the mandate 7 days after entry of the order denying the last such petition or motion, but an order may shorten or extend the time.* *(3) The mandate is effective when issued.*	

(b) Stay of Mandate Pending Petition for Certiorari. — A party who files a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay cannot exceed 30 days unless the period is extended for cause shown or unless during the period of the stay, a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ, in which case the stay will continue until final disposition by the Supreme Court. The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. The court may require a bond or other security as a condition to the grant or continuance of a stay of the mandate.

unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay.

(d) Staying the Mandate.

(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) **Pending Petition for Certiorari.**

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or ~~a notice from the Supreme Court clerk is filed during the stay indicating that the party who obtained the stay has filed a petition for the writ.~~ In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

(b) Stay of Mandate Pending Petition for Certiorai. A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion shall be served on all parties and shall show that the certiorari petition would present a substantial question and that there is good cause for a stay. The stay cannot exceed 90 days, unless the period is extended for good cause, and it cannot, in either case, exceed the time that the party who obtained the stay has to file a petition for a writ of certiorari in the Supreme Court. But if the clerk of the Supreme Court files a notice during the stay indicating that the party who obtained the stay filed a petition for the writ, the stay continues until the Supreme Court's final disposition. The court of appeals shall issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. The court may require a bond or other security before granting or continuing a stay of mandate.	

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

See attached pages

Rule 41

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Several substantive changes are recommended in this rule, however.

Subdivision (b). The existing rule provides that the mandate issues 7 days after the time to file a petition for panel rehearing expires unless such a petition is timely filed. If the petition is denied, the mandate issues 7 days after entry of the order denying the petition. Those provisions are retained but the amendments further provide that if a timely petition for rehearing en banc or motion for stay of mandate ~~are~~ is filed, the mandate does not issue until 7 days after entry of an order denying the last of all such requests. If a petition for rehearing or a petition for rehearing en banc is granted, the court enters a new judgment after the rehearing and the mandate issues within the normal time after entry of that judgment.

Subdivision (c). Subdivision (c) is new. It provides that the mandate is effective when the court issues it. A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed. This amendment is intended to make it clear that the mandate is effective upon issuance and that its effectiveness is not delayed until receipt of the mandate by the trial court or agency, or until the trial court or agency acts upon it. This amendment is consistent with the current understanding. Unless the court orders that the mandate issue earlier than provided in the rule, the parties can easily calculate the anticipated date of issuance and verify issuance with the clerk's office. In those instances in which the court orders earlier issuance of the mandate, the entry of the order on the docket alerts the parties to that fact.

Subdivision (d). Amended paragraph (1) provides that the filing of a petition for panel rehearing, a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari stays the issuance of the mandate until the court disposes of the petition or motion. The provision that a petition for rehearing en banc stays the mandate is a companion to the amendment of Rule 35 that deletes the language stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate. The Committee's objective is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and delay the running of the period for filing a petition for writ of

certiorari. Because the filing of a petition for rehearing en banc will stay the mandate, a court of appeals will need to take final action on the petition but the procedure for doing so is left to local practice.

Paragraph (1) also provides that the filing of a motion for a stay of mandate pending petition to the Supreme court for a writ of certiorari stays the mandate until the court disposes of the motion. If the court denies the motion, the court must issue the mandate 7 days after entering the order denying the motion. If the court grants the motion, the mandate is stayed according to the terms of the order granting the stay. Delaying issuance of the mandate eliminates the need to recall the mandate if the motion for a stay is granted. If, however, the court believes that it would be inappropriate to delay issuance of the mandate until disposition of the motion for a stay, the court may order that the mandate issue immediately.

Paragraph (2). The amendment changes the maximum period for a stay of mandate, absent the court of appeals granting an extension for cause, to 90 days. The presumptive 30-day period was adopted when a party had to file a petition for a writ of certiorari in criminal cases within 30 days after entry of judgment. Supreme Court Rule 13.1 now provides that a party has 90 days after entry of judgment by a court of appeals to file a petition for a writ of certiorari whether the case is civil or criminal.

The amendment does not require a court of appeals to grant a stay of mandate that is coextensive with the period granted for filing a petition for a writ of certiorari. The granting of a stay and the langth of the stay remain within the disscretion of the court of appeals. The amendment means only that a 90-day stay may be granted without a need to show cause for a stay longer than 30 days.

Subparagraph (C) is not new; it has been moved from the end of the rule to this position.

Rule 42. Voluntary dismissal	Rule 42. Voluntary Dismissal
(a) Dismissal in the district court. — If an appeal has not been docketed, the appeal may be dismissed by the district court upon the filing in that court of a stipulation for dismissal signed by all the parties, or upon motion and notice by the appellant.	**(a) Dismissal in the District Court.** Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.
(b) Dismissal in the court of appeals. — If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.	**(b) Dismissal in the Court of Appeals.** The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 43. Substitution of parties	Rule 43. Substitution of Parties
(a) Death of a party. — If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.	**(a) Death of a Party.** (1) **After Notice of Appeal Is Filed.** If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Rule 25. If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings. (2) **Before Notice of Appeal Is Filed — Potential Appellant.** If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative — or, if there is no personal representative, the decedent's attorney of record — may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).
If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or, if there is no personal representative by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.	(3) **Before Notice of Appeal Filed — Potential Appellee.** If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(b) Substitution for other causes. — If substitution of a party in the court of appeals is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).	**(b) Substitution for a Reason Other Than Death.** If a party needs to be substituted for any reason other than death, the procedure prescribed in Rule 43(a) applies.
(c) Public officers; death or separation from office. — (1) When a public officer is a party to an appeal or other proceeding in the court of appeals in an official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and the public officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution. (2) When a public officer is a party to an appeal or other proceeding in an official capacity that public officer may be described as a party by the public officer's official title rather than by name; but the court may require the public officer's name to be added.	**(c) Public Officer: Identification; Substitution.** (1) **Identification of Party.** A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added. (2) **Automatic Substitution of ~~Office Holder~~ Officeholder.** When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 44. Cases involving constitutional questions where United States is not a party	Rule 44. Case Involving a Constitutional Question When the United States Is Not a Party
It shall be the duty of a party who draws in question the constitutionality of any Act of Congress in any proceeding in a court of appeals to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the court of appeals, to give immediate notice in writing to the court of the existence of said question. The clerk shall thereupon certify such fact to the Attorney General.	If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 45. Duties of clerks	Rule 45. Clerk's Duties
(a) General provisions. — The clerk of a court of appeals shall take the oath and give the bond required by law. Neither the clerk nor any deputy clerk shall practice as an attorney or counselor in any court while continuing in office. The court of appeals shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The office of the clerk with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that the office of its clerk shall be open for specified hours on Saturdays or on particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.	**(a) General Provisions.** (1) **Qualifications.** The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office. (2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

(b) The docket; calendar; other records required. — The clerk shall maintain a docket in such form as may be prescribed by the Director of the Administrative Office of the United States Courts. The clerk shall enter a record of all papers filed with the clerk and all process, orders and judgments. An index of cases contained in the docket shall be maintained as prescribed by the Director of the Administrative Office of the United States Courts. The clerk shall prepare, under the direction of the court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law. The clerk shall keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, or as may be required by the court.	**(b) Records.** (1) **The Docket.** The circuit clerk must maintain a docket and an index of all docketed cases in the manner prescribed by the Director of the Administrative Office of the United States Courts. The clerk must record all papers filed with the clerk and all process, orders, and judgments. (2) **Calendar.** Under the court's direction ~~of the court~~, the clerk must prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk must give preference to appeals in criminal cases and to other proceedings and appeals entitled to preference by law. (3) **Other Records.** The clerk must keep other books and records required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, or by the court.
(c) Notice of orders or judgments. — Immediately upon the entry of an order or judgment the clerk shall serve a notice of entry by mail upon each party to the proceeding together with a copy of any opinion respecting the order or judgment, and shall make a note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel.	**(c) Notice of an Order or Judgment.** Upon the entry of an order or judgment, the circuit clerk must immediately serve by mail a notice of entry on each party to the proceeding, with a copy of any opinion, and must note the mailing on the docket. Service on a party represented by counsel must be made on counsel.

(d) Custody of records and papers. — The clerk shall have custody of the records and papers of the court. The clerk shall not permit any original record or paper to be taken from the clerk's custody except as authorized by the orders or instructions of the court. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were received. The clerk shall preserve copies of briefs and appendices and other printed papers filed.	**(d) Custody of Records and Papers.** The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, original papers constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 46. Attorneys	Rule 46. Attorneys
(a) Admission to the bar of a court of appeals; eligibility; procedure for admission. — An attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district courts for the Canal Zone, Guam and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals. An applicant shall file with the clerk of the court of appeals, on a form approved by the court and furnished by the clerk, an application for admission containing the applicant's personal statement showing eligibility for membership. At the foot of the application the applicant shall take and subscribe to the following oath or affirmation: I, _____, do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States. Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. An applicant may be admitted by oral motion in open court, but it is not necessary that the applicant appear before the court for the purpose of being admitted, unless the court shall otherwise order. An applicant shall upon admission pay to the clerk the fee prescribed by rule or order of the court.	**(a) Admission to the Bar.** (1) **Eligibility.** An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

	(2) **Application.** An applicant must file an application for admission, on a form approved by the court ~~and furnished by the clerk~~, that contains the applicant's personal statement showing eligibility for membership. ~~At the foot of the application~~, the applicant must ~~take and~~ subscribe to the following oath or affirmation: "I, _____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."
	(3) **Admission Procedures.** The court will act on the application ~~upon written or oral motion of a member of the bar of the court~~. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.
(b) Suspension or disbarment. — When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.	**(b) Suspension or Disbarment.** If a member of a court's bar has been suspended or disbarred from practice in any other court of record — or is guilty of conduct unbecoming a member of the bar of the court — the member is subject to suspension or disbarment by the court. The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred. The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

On written or oral motion of a member of the court's bar,

(1) Standard. A member of the court's bar is subject to suspension or disbarment by the court if the member:
(A) has been suspended or disbarred from practice in any other court; or
(B) is guilty of conduct unbecoming a member of the bar ~~of the court~~.

(2) Procedure.

(3) Order.

Discipline

(c) Disciplinary power of the court over attorneys. — A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.	(c) ~~Disciplinary Power Over Attorneys.~~ A court of appeals may ~~take any appropriate~~ disciplinary ~~action against~~ an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with ~~these rules or~~ any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 47. Rules of a Court of Appeals	Rule 47. Local Rules by Courts of Appeals
(a) Local Rules. (1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to a party or a lawyer regarding practice before a court shall be in a local rule rather than an internal operating procedure or standing order. A local rule shall be consistent with -- but not duplicative of -- Acts of Congress and rules adopted under 28 U.S.C. § 2072 and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. The clerk of each court of appeals shall 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. (2) A local rule imposing a requirement of form shall 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. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.	**(a) Local Rules.** (1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to ~~a party~~ parties or a lawyers 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 consistent with — but not duplicative of — Acts of Congress and 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. Each circuit clerk 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. (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. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 48. Masters.	Rule 48. Masters
A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, a master shall have power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order including, but not limited to, requiring the production of evidence upon all matters embraced in the reference and putting witnesses and parties on oath and examining them. If the master is not a judge or court employee, the court shall determine the master's compensation and whether the cost will be charged to any of the parties.	(a) **Appointment; Powers.** A court of appeals may appoint a special master to hold hearings, if necessary, and to ~~make~~ recommend~~ations about~~ factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, those powers include, but are not limited to, the following: (1) regulating all aspects of a hearing; (2) taking all appropriate action for the efficient performance of the master's duties under the order; (3) requiring the production of evidence on all matters embraced in the reference; and (4) administering oaths and examining witnesses and parties. (b) **Compensation.** If the master is not a judge or court employee, the court must determine the master's compensation and whether the cost is to be charged to any party.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Form 4

Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

United States District Court for the _____ District of _____

A.B., Plaintiff

v.

Case No. _____

C.D., Defendant

Affidavit in Support of Motion	**Instructions**
I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C § 1621.)	Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.
Signed: _____	Date: _____

If you do not currently live with your husband/wife, you may write "N/A" in response to any question.

My issues on appeal are:

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	**Spouse**	**You**	**Spouse**
Employment	$_____	$_____	$_____	$_____
Self-employment	$_____	$_____	$_____	$_____
Income from real property (such as rental income)	$_____	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____	$_____
Gifts	$_____	$_____	$_____	$_____
Alimony	$_____	$_____	$_____	$_____
Child support	$_____	$_____	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____	$_____	$_____
Disability (such as social security, insurance payments)	$_____	$_____	$_____	$_____
Unemployment payments	$_____	$_____	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____	$_____	$_____
Other (specify):_____	$_____	$_____	$_____	$_____
Total monthly income:	$_____	$_____	$_____	$_____

for the past 2 years

2. *List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay

for the past 2 years

3. *List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay

4. *How much cash do you and your spouse have?* $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
		$_____	$_____
		$_____	$_____
		$_____	$_____

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. *List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.*

Home (Value)	Other real estate (Value)	Motor vehicle #1 (Value)
		Make & year:
		Model:
		Registration #:

Motor vehicle #2 (Value)	Other assets (Value)	Other assets (Value)
Make & year:		
Model:		
Registration #:		

6. *State every person, business, or organization owing you or your spouse money, and the amount owed.*

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse

Seeking to appeal a judgment in a civil action or proceeding

7. *State the persons who rely on you or your spouse for support.*

Name	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. *Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.*

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$_____	$_____
Are real-estate taxes included? ☐Yes ☐No Is property insurance included? ☐Yes ☐No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$_____	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$_____	$_____
Clothing	$_____	$_____
Laundry and dry-cleaning	$_____	$_____
Medical and dental expenses	$_____	$_____
Transportation (not including motor vehicle payments)	$_____	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____
Insurance (not deducted from wages or included in mortgage payments)	$_____	$_____
Homeowner's or renter's	$_____	$_____
Life	$_____	$_____
Health	$_____	$_____
Motor Vehicle	$_____	$_____
Other: _____	$_____	$_____
Taxes (not deducted from wages or included in mortgage payments) (specify): _____	$_____	$_____
Installment payments	$_____	$_____
Motor Vehicle	$_____	$_____
Credit card (name): _____	$_____	$_____
Department store (name): _____	$_____	$_____
Other: _____	$_____	$_____
Alimony, maintenance, and support paid to others	$_____	$_____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$_____	$_____
Other (specify): _____	$_____	$_____
Total monthly expenses:	**$_____**	**$_____**

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*
   ☐Yes ☐No If yes, describe on an attached sheet.

10. *Have you paid — or will you be paying — an attorney any money for services in connection with this case, including the completion of this form?* ☐Yes ☐No

    If yes, how much? $_____

    If yes, state the attorney's name, address, and telephone number:

    _____

    _____

    _____

11. *Have you paid — or will you be paying — anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?*
    ☐Yes ☐No

    If yes, how much? $_____

    If yes, state the person's name, address, and telephone number:

    _____

    _____

    _____

12. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

13. *State the address of your legal residence.*

    _____

    _____

    Your daytime phone number: (____) _____

    Your age: _____ Your years of schooling: _____

    Your social-security number: _____

TITLE I. APPLICABILITY OF RULES	TITLE I. APPLICABILITY OF RULES
Rule 1. Scope of Rules and Title	**Rule 1. Scope of Rules; Title**
(a) Scope of rules. — These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the United States Tax Court; in appeals from bankruptcy appellate panels; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.	**(a) Scope of Rules.** (1) These rules govern procedure in the United States courts of appeals. (2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.
(b) Rules not to affect jurisdiction. — These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.	**(b) Rules Do Not Affect Jurisdiction.** These rules do not extend or limit the jurisdiction of the courts of appeals.
(c) Title. — These rules may be known and cited as the Federal Rules of Appellate Procedure.	**(c) Title.** These rules are to be known as the Federal Rules of Appellate Procedure.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. The Advisory Committee recommends deleting the language in subdivision (a) that describes the different types of proceedings that may be brought in a court of appeals. The Advisory Committee believes that the language is unnecessary and that its omission does not work any substantive change.

Rule 2. Suspension of rules	Rule 2. Suspension of Rules
In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.	On its own or a party's motion, a court of appeals may — to expedite its decision or for other good cause — suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

TITLE II. APPEALS FROM JUDGMENTS AND ORDERS OF DISTRICT COURTS	TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT
Rule 3. Appeal as of Right — How Taken	**Rule 3. Appeal as of Right — How Taken**
(a) Filing the Notice of Appeal. — An appeal permitted by law as of right from a district court to a court of appeals must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of subdivision (d) of this Rule 3. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy must be taken in the manner prescribed by Rule 5 and Rule 6 respectively.	**(a) Filing the Notice of Appeal.** (1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). (2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal. (3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district-court judgment. (4) An appeal by permission under 28 U.S.C. § 1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(b) Joint or consolidated appeals. — If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.	**(b) Joint or Consolidated Appeals.** (1) When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant. (2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(c) Content of the Notice of Appeal. — A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent. In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. Form 1 in the Appendix of Forms is a suggested form for a notice of appeal.	**(c) Contents of the Notice of Appeal.** (1) The notice of appeal must: (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X"; (B) designate the judgment, order, or part thereof being appealed; and (C) name the court to which the appeal is taken. (2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise. (3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class. (4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. (5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) Serving the Notice of Appeal. - The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record (apart from the appellant's), or, if a party is not represented by counsel, to the party's last known address. The clerk of the district court shall forthwith send a copy of the notice and of the docket entries to the clerk of the court of appeals named in the notice. The clerk of the district court shall likewise send a copy of any later docket entry in the case to the clerk of the court of appeals. When a defendant appeals in a criminal case, the clerk of the district court shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date when the notice of appeal was filed and, if the notice of appeal was filed in the manner provided in Rule 4(c) by an inmate confined in an institution, the date when the clerk received the notice of appeal. The clerk's failure to serve notice does not affect the validity of the appeal. Service is sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.	**(d) Serving the Notice of Appeal.** (1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record — excluding the appellant's — or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries — and any later docket entries — to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed. (2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice. (3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient despite the death of a party or the party's counsel.
(e) Payment of fees. — Upon the filing of any separate or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States, the latter to be received by the clerk of the district court on behalf of the court of appeals.	**(e) Payment of Fees.** Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are generally intended to be stylistic only; in this rule, however, substantive changes are recommended in subdivisions (a), (b), and (d).

Subdivison (a). The provision in paragraph (a)(3) is transferred from former Rule 3.1(b). *The Federal Courts Improvement Act of 1996*, Pub. L. No. 104-317, repealed paragraphs (4) and (5) of 28 U.S.C. § 636(c). That statutory change made the continued separate existence of Rule 3.1 unnecessary. New paragraph (a)(3) of this rule simply makes it clear that an appeal from a judgment by a magistrate judge is taken in identical fashion to any other appeal from a district-court judgment.

Subdivision (b). A joint appeal is authorized only when two or more persons may appeal from a single judgment or order. A joint appeal is treated as a single appeal and the joint appellants file a single brief. Under existing Rule 3(b) parties decide whether to join their appeals. They may do so by filing a joint notice of appeal or by joining their appeals after filing separate notices of appeal.

In consolidated appeals the separate appeals do not merge into one. The parties do not proceed as a single appellant. Under existing Rule 3(b) it is unclear whether appeals may be consolidated without court order if the parties stipulate to consolidation. The proposed language resolves that ambiguity by requiring court action.

The proposed language also requires court action to join appeals after separate notices of appeal have been filed.

Subdivision (d). Paragraph (d)(2) has been amended to require that when an inmate files a notice of appeal by depositing the notice in the institution's internal mail system, the clerk must note the docketing date — rather than the receipt date — on the notice of appeal before serving copies of it. This change conforms to a recommended change in Rule 4(c). Rule 4(c) is amended to provide that when an inmate files the first notice of appeal in a civil case by depositing the notice in an institution's internal mail system, the time for filing a cross-appeal runs from the date the district court dockets the inmate's notice of appeal. Existing Rule 4(c) says that in such a case the time for filing a cross-appeal runs from the date the district court receives the inmate's notice of appeal. A court may "receive" a paper when its mail is delivered to it even if the mail is not processed for a day or two, making the date of receipt uncertain. "Docketing" is an easily identified event. The change is made to eliminate the uncertainty.

Rule 3.1. Appeal from a Judgment Entered by a Magistrate Judge in a Civil Case	Rule 3.1 Appeal from a Judgment of a Magistrate Judge in a Civil Case
When the parties consent to a trial before a magistrate judge under 28 U.S.C. § 636(c)(1), any appeal from the judgment must be heard by the court of appeals in accordance with 28 U.S.C. § 636(c)(3), unless the parties consent to an appeal on the record to a district judge and thereafter, by petition only, to the court of appeals, in accordance with 28 U.S.C. § 636(c)(4). An appeal under 28 U.S.C. § 636(c)(3) must be taken in identical fashion as an appeal from any other judgment of the district court.	**[Abrogated]**

Committee Note

The *Federal Courts Improvement Act of 1996*, Pub. L. No. 104-317, repealed paragraphs (4) and (5) of 28 U.S.C. § 636(c). That statutory change means that when parties consent to trial before a magistrate judge, appeal lies directly, and as a matter of right, to the court of appeals under § 636(c)(3). The parties may not choose to appeal first to a district judge and thereafter seek discretionary review in the court of appeals.

As a result of the statutory amendments, subdivision (a) of Rule 3.1 is no longer necessary. Since Rule 3.1 existed primarily because of the provisions in subdivision (a), subdivision (b) has been moved to Rule 3(a)(3) and Rule 3.1 has been abrogated.

Rule 4. Appeal as of Right — When Taken	Rule 4. Appeal as of Right — When Taken
(a) Appeal in a civil case. — (1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date when the clerk received the notice and send it to the clerk of the district court and the notice will be treated as filed in the district court on the date so noted.	**(a) Appeal in a Civil Case.** (1) **Time for Filing a Notice of Appeal.** (A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered. (B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.
(2) A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry.	(2) **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision or order — but before the entry of the judgment or order — is treated as filed on the date of and after the entry.
(3) If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.	(3) **Multiple Appeals.** If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) If any party 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 filed no later than 10 days after the entry of judgment.	(4) **Effect of a Motion on a Notice of Appeal.** (A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion: (i) for judgment under Rule 50(b); (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment; (iii) for attorney's fees under Rule 54 if a district court extends the time to appeal under Rule 58; (iv) to alter or amend the judgment under Rule 59; (v) for a new trial under Rule 59; or (vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

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 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 file 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.	(B)(i) If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered. (ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion. (iii) No additional fee is required to file an amended notice.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.	(5) **Motion for Extension of Time.** (A) The district court may extend the time to file a notice of appeal if: (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and (ii) that party shows excusable neglect or good cause. (B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules. (C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.	(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied: (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier; (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and (C) the court finds that no party would be prejudiced.
(7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.	(7) **Entry Defined.** A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(b) Appeal in a Criminal Case.- In a criminal case, a defendant shall file the notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or of a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence, or order — but before entry of the judgment or order — is treated as filed on the date of and after the entry. If a defendant makes a timely motion specified immediately below, in accordance with the Federal Rules of Criminal Procedure, an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, whichever is later. This provision applies to a timely motion: (1) for judgment of acquittal; (2) for arrest of judgment; (3) for a new trial on any ground other than newly discovered evidence; or (4) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment.	**(b) Appeal in a Criminal Case.** (1) **Time for Filing a Notice of Appeal.** (A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of: (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government's notice of appeal. (B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of: (i) the entry of the judgment or order being appealed; or (ii) the filing of a notice of appeal by any defendant.

(2) **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision, sentence, or order — but before the entry of the judgment or order — is treated as filed on the date of and after the entry.

(3) **Effect of a Motion on a Notice of Appeal.**

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions. When an appeal by the government is authorized by statute, the notice of appeal must be filed in the district court within 30 days after (i) the entry of the judgment or order appealed from or (ii) the filing of a notice of appeal by any defendant. A judgment or order is entered within the meaning of this subdivision when it is entered on the criminal docket. Upon a showing of excusable neglect, the district court may — before or after the time has expired, with or without motion and notice — extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.	(B) A notice of appeal filed after the court announces a decision, sentence, or order — but before it disposes of any of the motions referred to in Rule 4(b)(3)(A) — becomes effective upon the later of the following: (i) the entry of the order disposing of the last such remaining motion; or (ii) the entry of the judgment of conviction. (C) A valid notice of appeal is effective — without amendment — to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A). (4) **Motion for Extension of Time.** Upon a finding of excusable neglect or good cause, the district court may — before or after the time has expired, with or without motion and notice — extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).
The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.	(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(c), nor does the filing of a motion under 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. (6) **Entry Defined.** A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.- If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. In a civil case in which the first notice of appeal is filed in the manner provided in this subdivision (c), the 14-day period provided in paragraph (a)(3) of this Rule 4 for another party to file a notice of appeal runs from the date when the district court receives the first notice of appeal. In a criminal case in which a defendant files a notice of appeal in the manner provided in this subdivision (c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's receipt of the defendant's notice of appeal.	**(c) Appeal by an Inmate Confined in an Institution.** (1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid. (2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice. (3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defen-dant's notice of appeal, whichever is later. **(d) Mistaken Filing in the Court of Appeals.** If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; in this rule, however, substantive changes are recommended in paragraphs (a)(6) and (b)(4), and in subdivision (c).

Subdivision (a), paragraph (1). Although the Advisory Committee does not intend to make any substantive changes in this paragraph, cross-references to Rules 4(a)(1)(B) and 4(c) have been added to subparagraph (a)(1)(A).

Subdivision (a), paragraph (4). Item (vi) in subparagraph (A) of Rule 4(a)(4) provides that filing a motion for relief under Fed. R. Civ. P. 60 will extend the time for filing a notice of appeal if the Rule 60 motion is filed no later than 10 days after judgment is entered. Again, the Advisory Committee does not intend to make any substantive change in this paragraph. But because Fed. R. Civ. P. 6(a) and Fed. R. App. P. 26(a) have different methods for computing time, one might be uncertain whether the 10 day period referred to in Rule 4(a)(4) is computed using Civil Rule 6(a) or Appellate Rule 26(a). Because the Rule 60 motion is filed in the district court, and because Fed. R. App. P. 1(a)(2) says that when the appellate rules provide for filing a motion in the district court, "the procedure must comply with the practice of the district court," the rule provides that the 10-day period is computed using Fed. R. Civ. P. 6(a).

Subdivision (a), paragraph (6). Paragraph (6) permits a district court to reopen the time for appeal if a party has not received notice of the entry of judgment and no party would be prejudiced by the reopening. Before reopening the time for appeal, the existing rule requires the district court to find that the moving party was entitled to notice of the entry of judgment and did not receive it "from the clerk or any party within 21 days of its entry." The Advisory Committee recommends a substantive change. The Advisory Committee recommends that the finding must be that the movant did not receive notice "from the district court or any party within 21 days after entry." This change broadens the type of notice that can preclude reopening the time for appeal. The existing rule provides that only notice from a party or from the clerk bars reopening. The new language precludes reopening if the movant has received notice from "the court."

Subdivision (b). Two substantive changes are proposed in what will be paragraph (b)(4). The current rule permits an extension of time to file a notice of appeal if there is a "showing of excusable neglect." First, the rule is amended to permit a court to extend the time for "good cause" as well as for excusable neglect. Rule 4(a) permits extensions for both reasons in civil cases and the Advisory Committee believes that "good cause" should be sufficient in criminal cases as well. The proposed amendment does not limit extensions for good cause to instances in which the motion for extension of time is filed before the original time has expired. The rule gives the district court discretion to grant extensions for good cause whenever the court believes it appropriate to do so provided that the extended period does not exceed 30 days after the expiration of the time otherwise prescribed by Rule 4(b). Second, paragraph (b)(4) is amended to require only a "finding" of excusable neglect or good cause and not a "showing" of them. Because the rule authorizes the court to provide an extension without a motion, a "showing" is obviously not required; a "finding" is sufficient.

Subdivision (c). Substantive amendments are recommended in this subdivision. The current rule provides that if an inmate confined in an institution files a notice of appeal by depositing it in the institution's internal mail system, the notice is timely filed if deposited on or before the last day for filing. Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee recommends amending the rule to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subdivision.

When an inmate uses the filing method authorized by subdivision (c), the current rule provides that the time for other parties to appeal begins to run from the date the district court "receives" the inmate's notice of appeal. The rule is amended so that the time for other parties begins to run when the district court "dockets" the inmate's appeal. A court may "receive" a paper when its mail is delivered to it even if the mail is not processed for a day or two, making the date of receipt uncertain. "Docketing" is an easily identified event. The change is recommended to eliminate uncertainty. Paragraph (c)(3) is further amended to make it clear that the time for the government to file its appeal runs from the later of the entry of the judgment or order appealed from or the district court's docketing of a defendant's notice filed under this paragraph (c).

Rule 5. Appeal by Permission Under 28 U.S.C. § 1292(b)	**Rule 5. Appeal by Permission**
(a) Petition for permission to appeal. — An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court with proof of service on all other parties to the action in the district court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.	**(a) Petition for Permission to Appeal.** (1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action. (2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal. (3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

(b) Content of petition; answer. — The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. The petition shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. Within 7 days after service of the petition, an adverse party may file an answer in opposition. The application and answer shall be submitted without oral argument unless otherwise ordered.	**(b) Contents of the Petition; Answer or Cross-Petition; Oral Argument.** (1) The petition must include the following: (A) the facts necessary to understand the question presented; (B) the question itself; (C) the relief sought; (D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and (E) an attached copy of: (i) the order, decree, or judgment complained of and any related opinion or memorandum, and (ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met. (2) A party may file an answer in opposition or a cross-petition within 7 days after the petition is served. (3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.
(c) Form of Papers; Number of Copies. — All papers 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.	**(c) Form of Papers; Number of Copies.** All papers must conform to Rule 32(a)(1). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

(d) Grant of permission; cost bond; filing of record. — Within 10 days after the entry of an order granting permission to appeal the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b). A notice of appeal need not be filed.	**(d) Grant of Permission; Fees; Cost Bond; Filing the Record.** (1) Within 10 days after the entry of the order granting permission to appeal, the appellant must: (A) pay the district clerk all required fees; and (B) file a cost bond if required under Rule 7. (2) A notice of appeal need not be filed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules. (3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

Committee Note

In 1992 Congress added subsection (e) to 28 U.S.C. § 1292. Subsection (e) says that the Supreme Court has power to prescribe rules that "provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" in section 1292. The amendment of Rule 5 was prompted by the possibility of new rules authorizing additional interlocutory appeals. Rather than add a separate rule governing each such appeal, the Committee believes it is preferable to amend Rule 5 so that it will govern all such appeals.

In addition the *Federal Courts Improvement Act of 1996*, Pub. L. 104-317, abolished appeals by permission under 28 U.S.C. 636(c)(5), making Rule 5.1 obsolete.

This new Rule 5 is intended to govern all discretionary appeals from district-court orders, judgments, or decrees. At this time that includes interlocutory appeals under 28 U.S.C. § 1292(b), (c)(1), and (d)(1) & (2). If additional interlocutory appeals are authorized under § 1292(e), the new Rule is intended to govern them if the appeals are discretionary.

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

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

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

Subdivision (b). The changes made in the provisions in paragraph (b)(1) are intended only to broaden them sufficiently to make them appropriate for all discretionary appeals.

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

Subdivision (c). Subdivision (c) is substantively unchanged.

Subdivision (d). Paragraph (d)(2) is amended to state that "the date when the order granting permission to appeal is entered serves as the date of the notice of appeal" for purposes of calculating time under the rules. That language simply clarifies existing practice.

Rule 5.1. Appeal by Permission Under 28 U.S.C. § 636(c)(5)	Rule 5.1 Appeal by Leave under 28 U.S.C. § 636(c)(5)
(a) Petition for Leave to Appeal; Answer or Cross Petition. — An appeal from a district court judgment, entered after an appeal under 28 U.S.C. § 636(c)(4) to a district judge from a judgment entered upon direction of a magistrate judge in a civil case, may be sought by filing a petition for leave to appeal. An appeal on petition for leave to appeal is not a matter of right, but its allowance is a matter of sound judicial discretion. The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed. Within 14 days after service of the petition, a party may file an answer in opposition or a cross petition.	[Abrogated]
(b) Content of petition; answer. — The petition for leave to appeal shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in the opinion of the petitioner the appeal should be allowed; and a copy of the order, decree or judgment complained of and any opinion or memorandum relating thereto. The petition and answer shall be submitted to a panel of judges of the court of appeals without oral argument unless otherwise ordered.	
(c) Form of Papers; Number of Copies. — All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.	

(d) Allowance of the appeal; fees; cost bond; filing of record. — Within 10 days after the entry of an order granting the appeal, the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice, the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b).	

Committee Note

The *Federal Courts Improvement Act of 1996*, Pub. L. No. 104-317, abolished appeals by permission under 28 U.S.C. § 636(c)(5), making Rule 5.1 obsolete. Rule 5.1 is, therefore, abrogated.

Rule 6. Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or of a Bankruptcy Appellate Panel	**Rule 6. Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel**
(a) Appeal from a judgment, order or decree of a district court exercising original jurisdiction in a bankruptcy case. — An appeal to a court of appeals from a final judgment, order or decree of a district court exercising jurisdiction pursuant to 28 U.S.C. § 1334 shall be taken in identical fashion as appeals from other judgments, orders or decrees of district courts in civil actions.	**(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case.** An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) Appeal from a judgment, order or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case. — (1) Applicability of other rules. All provisions of these rules are applicable to an appeal to a court of appeals pursuant to 28 U.S.C. § 158(d) from a final judgment, order or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction pursuant to 28 U.S.C. § 158(a) or (b), except that: (i) Rules 3.1, 4(a)(4), 4(b), 5.1, 9, 10, 11, 12(b), 13-20, 22-23, and 24(b) are not applicable; (ii) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" shall be read as a reference to Form 5; and (iii) when the appeal is from a bankruptcy appellate panel, the term "district court" as used in any applicable rule, means "appellate panel".	**(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.** (1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b). But there are 3 exceptions: (A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(b), 13–20, 22–23, and 24(b) do not apply; (B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; and (C) when the appeal is from a bankruptcy appellate panel, the term "district court," as used in any applicable rule, means "appellate panel."
(2) Additional rules. In addition to the rules made applicable by subsection (b)(1) of this rule, the following rules shall apply to an appeal to a court of appeals pursuant to 28 U.S.C. § 158(d) from a final judgment, order or decree of a district court or of a bankruptcy appellate panel exercising appellate jurisdiction pursuant to 28 U.S.C. § 158(a) or (b):	(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(i) Effect of a Motion for Rehearing on the Time for Appeal. If any party files a timely motion for rehearing under Bankruptcy Rule 8015 in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after announcement or entry of the district court's or bankruptcy appellate panel's judgment, order, or decree, but before disposition of the motion for rehearing, is ineffective until the date of the entry of the order disposing of the motion for rehearing. Appellate review of the order disposing of the motion requires the party, in compliance with Appellate Rules 3(c) and 6(b)(1)(ii), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal within the time prescribed by Rule 4, excluding 4(a)(4) and 4(b), measured from the entry of the order disposing of the motion. No additional fees will be required for filing the amended notice.	(A) **Motion for rehearing.** (i) If a timely motion for rehearing under Bankruptcy Rule 8015 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree — but before disposition of the motion for rehearing — becomes effective when the order disposing of the motion for rehearing is entered. (ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4 — excluding Rules 4(a)(4) and 4(b) — measured from the entry of the order disposing of the motion. (iii) No additional fee is required to file an amended notice.

(ii) The record on appeal. Within 10 days after filing the notice of appeal, the appellant shall file with the clerk possessed of the record assembled pursuant to Bankruptcy Rule 8006, and serve on the appellee, a statement of the issues to be presented on appeal and a designation of the record to be certified and transmitted to the clerk of the court of appeals. If the appellee deems other parts of the record necessary, the appellee shall, within 10 days after service of the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included. The record, redesignated as provided above, plus the proceedings in the district court or bankruptcy appellate panel and a certified copy of the docket entries prepared by the clerk pursuant to Rule 3(d) shall constitute the record on appeal.	(B) **The record on appeal.** (i) Within 10 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006 — and serve on the appellee — a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk. (ii) An appellee who believes that other parts of the record are necessary must, within 10 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included. (iii) The record on appeal consists of: • the redesignated record as provided above; • the proceedings in the district court or bankruptcy appellate panel; and • a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(iii) Transmission of the record. When the record is complete for purpose of the appeal, the clerk of the district court or the appellate panel, shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court or of the appellate panel shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerk for the transportation and receipt of exhibits of unusual bulk or weight.	(C) **Forwarding the record.** (i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.
All parties shall take any other action necessary to enable the clerk to assemble and transmit the record. The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the redesignated record, subject to the right of any party to request at any time during the pendency of the appeal that the redesignated record be transmitted.	(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.

(iv) Filing of the record. Upon receipt of the record, the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed. Upon receipt of a certified copy of the docket entries transmitted in lieu of the redesignated record pursuant to rule or order, the clerk of the court of appeals shall file it, and shall immediately give notice to all parties of the date on which it was filed.	(D) **Filing the record**. Upon receiving the record — or a certified copy of the docket entries sent in place of the redesignated record — the circuit clerk must file it and immediately notify all parties of the filing date.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Subdivision (b). Language is added to Rule 6(b)(2)(A)(ii) to conform with the corresponding provision in Rule 4(a)(4). The new language is clarifying rather than substantive. The existing rule states that a party intending to challenge an alteration or amendment of a judgment must file an amended notice of appeal. Of course if a party has not previously filed a notice of appeal, the party would simply file a notice of appeal not an amended one. The proposed language states that the party must file "a notice of appeal or amended notice of appeal."

Rule 7. Bond for costs on appeal in civil cases	Rule 7. Bond for Costs on Appeal in a Civil Case
The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.	In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 8. Stay or Injunction Pending Appeal	Rule 8. Stay or Injunction Pending Appeal
(a) Stay must ordinarily be sought in the first instance in district court; motion for stay in court of appeals. — Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court.	**(a) Motion for Stay.** (1) **Initial Motion in the District Court.** A party must ordinarily move first in the district court for the following relief: (A) a stay of the judgment or order of a district court pending appeal; (B) approval of a supersedeas bond; or (C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.	(2) **Motion in the Court of Appeals; Conditions on Relief.** A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges. (A) The motion must: (i) show that moving first in the district court would be impracticable; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action. (B) The motion must also include: (i) the reasons for granting the relief requested and the facts relied on; (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and (iii) relevant parts of the record.

	(C) The moving party must give reasonable notice of the motion to all parties. (D) A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge. (E) The court may condition relief on a party's filing a bond or other appropriate security in the district court.
(b) Stay may be conditioned upon giving of bond; proceedings against sureties. — Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. A surety's liability may be enforced on motion in the district court without the necessity of an independent action. The motion and such notice of the motion as the district court prescribed may be served on the clerk of the district court, who shall forthwith mail copies to the sureties if their addresses are known.	**(b) Proceeding Against a Surety.** If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served. On motion, a surety's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.
(c) Stay in a Criminal Case. — A stay in a criminal case shall be had in accordance with the provisions of Rule 38 of the Federal Rules of Criminal Procedure.	**(c) Stay in a Criminal Case.** Rule 38 of the Federal Rules of Criminal Procedure governs a stay in a criminal case.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 9. Release in a Criminal Case	Rule 9. Release in a Criminal Case
(a) Appeal from an Order Regarding Release Before Judgment of Conviction. -The district court must state in writing, or orally on the record, the reasons for an order regarding release or detention of a defendant in a criminal case. A party appealing from the order, as soon as practicable after filing a notice of appeal with the district court, must file with the court of appeals a copy of the district court's order and its statement of reasons. An appellant who questions the factual basis for the district court's order must file a transcript of any release proceedings in the district court or an explanation of why a transcript has not been obtained. The appeal must be determined promptly. It must be heard, after reasonable notice to the appellee, upon such papers, affidavits, and portions of the record as the parties present or the court may require. Briefs need not be filed unless the court so orders. The court of appeals or a judge thereof may order the release of the defendant pending decision of the appeal.	**(a) Release Before Judgment of Conviction.** (1) The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case. A party appealing from the order must file with the court of appeals a copy of the district court's order and the court's statement of reasons as soon as practicable after filing the notice of appeal. An appellant who questions the factual basis for the district court's order must file a transcript of the release proceedings or an explanation of why a transcript was not obtained. (2) After reasonable notice to the appellee, the court of appeals must promptly determine the appeal on the basis of the papers, affidavits, and parts of the record that the parties present or the court requires. Unless the court so orders, briefs need not be filed. (3) The court of appeals or one of its judges may order the defendant's release pending the disposition of the appeal.
(b) Review of an Order Regarding Release After Judgment of Conviction. — A party entitled to do so may obtain review of a district court's order regarding release that is made after a judgment of conviction by filing a notice of appeal from that order with the district court, or by filing a motion with the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). In addition, the papers filed by the applicant for review must include a copy of the judgment of conviction.	**(b) Release After Judgment of Conviction.** A party entitled to do so may obtain review of a district-court order regarding release after a judgment of conviction by filing a notice of appeal from that order in the district court, or by filing a motion in the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). The papers filed by the party seeking review must include a copy of the judgment of conviction.

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

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 10. The Record on Appeal	**Rule 10. The Record on Appeal**
(a) Composition of the Record on Appeal. — The record on appeal consists of 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.	**(a) Composition of the Record on Appeal.** The following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk.
(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered. —	**(b) The Transcript of Proceedings.**

(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 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 be in writing and within the same period a copy shall 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 so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.	(1) **Appellant's Duty to Order.** Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following: (A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications: (i) the order must be in writing; (ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and (iii) the appellant must, within the same period, file a copy of the order with the district clerk; or (B) file a certificate stating that no transcript will be ordered.
(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.	(2) **Unsupported Finding or Conclusion.** If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10-day time provided in paragraph (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal, and shall serve on the appellee a copy of the order or certificate and of the statement. An appellee who believes that a transcript of other parts of the proceedings is necessary shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of the designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.	(3) **Partial Transcript.** Unless the entire transcript is ordered: (A) the appellant must — within the 10 days provided in Rule 10(b)(1) — file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement; (B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 10 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and (C) unless within 10 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.
(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.	(4) **Payment.** At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(c) Statement of the evidence or proceedings when no report was made or when the transcript is unavailable. — If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.	(c) **Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable.** If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 10 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.
(d) Agreed statement as the record on appeal. — In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the court of appeals as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 11. Copies of the agreed statement may be filed as the appendix required by Rule 30.	(d) **Agreed Statement as the Record on Appeal.** In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it — together with any additions that the district court may consider necessary to a full presentation of the issues on appeal — must be approved by the district court and must then be certified to the court of appeals as the record on appeal. The district clerk must then send it to the circuit clerk within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30.

(e) Correction or modification of the record. — If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.	**(e) Correction or Modification of the Record.** (1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly. (2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded: (A) on stipulation of the parties; (B) by the district court before or after the record has been forwarded; or (C) by the court of appeals. (3) All other questions as to the form and contents of the record must be presented to the court of appeals.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 11. Transmission of the record	Rule 11. Forwarding the Record
(a) Duty of appellant. -- After filing the notice of appeal the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. A single record shall be transmitted.	**(a) Appellant's Duty.** An appellant filing a notice of appeal must comply with Rule 10(b) and must do whatever else is necessary to enable the clerk to assemble and forward the record. If there are multiple appeals from a judgment or order, the clerk must forward a single record.
(b) Duty of reporter to prepare and file transcript; notice to court of appeals; duty of clerk to transmit the record. — Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that the reporter has received it and the date on which the reporter expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the clerk of the court of appeals and the action of the clerk of the court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file it with the clerk of the district court and shall notify the clerk of the court of appeals that the reporter has done so.	**(b) Duties of Reporter and District Clerk.** (1) **Reporter's Duty to Prepare and File a Transcript.** The reporter must prepare and file a transcript as follows: (A) Upon receiving an order for a transcript, the reporter must enter at the foot of the order the date of its receipt and the expected completion date and send a copy, so endorsed, to the circuit clerk. (B) If the transcript cannot be completed within 30 days of the reporter's receipt of the order, the reporter may request the circuit clerk to grant additional time to complete it. The clerk must note on the docket the action taken and notify the parties. (C) When a transcript is complete, the reporter must file it with the district clerk and notify the circuit clerk of the filing. (D) If the reporter fails to file the transcript on time, the circuit clerk must notify the district judge and do whatever else the court of appeals directs.

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.	(2) **District Clerk's Duty to Forward.** When the record is complete, the district clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the district clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.
(c) Temporary retention of record in district court for use in preparing appellate papers. — Notwithstanding the provisions of (a) and (b) of this Rule 11, the parties may stipulate, or the district court on motion of any party may order, that the clerk of the district court shall temporarily retain the record for use by the parties in preparing appellate papers. In that event the clerk of the district court shall certify to the clerk of the court of appeals that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the court may order, the appellant shall request the clerk of the district court to transmit the record.	(c) **Retaining the Record Temporarily in the District Court for Use in Preparing the Appeal.** The parties may stipulate, or the district court on motion may order, that the district clerk retain the record temporarily for the parties to use in preparing the papers on appeal. In that event the district clerk must certify to the circuit clerk that the record on appeal is complete. Upon receipt of the appellee's brief, or earlier if the court orders or the parties agree, the appellant must request the district clerk to forward the record.
(d) [Extension of time for transmission of the record; reduction of time] [Abrogated]	(d) **[Abrogated.]**

(e) Retention of the record in the district court by order of court. — The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted. If the record or any part thereof is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record or parts thereof subject to the request of the court of appeals, and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow and copies of such parts as the parties may designate.	(e) **Retaining the Record by Court Order.** (1) The court of appeals may, by order or local rule, provide that a certified copy of the docket entries be forwarded instead of the entire record. But a party may at any time during the appeal request that designated parts of the record be forwarded. (2) The district court may order the record or some part of it retained if the court needs it while the appeal is pending, subject, however, to call by the court of appeals. (3) If part or all of the record is ordered retained, the district clerk must send to the court of appeals a copy of the order and the docket entries together with the parts of the original record allowed by the district court and copies of any parts of the record designated by the parties.
(f) Stipulation of parties that parts of the record be retained in the district court. — The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.	(f) **Retaining Parts of the Record in the District Court by Stipulation of the Parties.** The parties may agree by written stipulation filed in the district court that designated parts of the record be retained in the district court subject to call by the court of appeals or request by a party. The parts of the record so designated remain a part of the record on appeal.

(g) Record for preliminary hearing in the court of appeals. — If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the court of appeals such parts of the original record as any party shall designate.	(g) **Record for a Preliminary Motion in the Court of Appeals.** If, before the record is forwarded, a party makes any of the following motions in the court of appeals: • for dismissal; • for release; • for a stay pending appeal; • for additional security on the bond on appeal or on a supersedeas bond; or • for any other intermediate order — the district clerk must send the court of appeals any parts of the record designated by any party.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record	Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record
(a) Docketing the appeal. — Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, the appellant's name, identified as appellant, shall be added to the title.	(a) **Docketing the Appeal.** Upon receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d), the circuit clerk must docket the appeal under the title of the district-court action and must identify the appellant, adding the appellant's name if necessary.
(b) Filing a Representation Statement. — Within 10 days after filing a notice of appeal, unless another time is designated by the court of appeals, the attorney who filed the notice of appeal shall file with the clerk of the court of appeals a statement naming each party represented on appeal by that attorney.	(b) **Filing a Representation Statement.** Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within 10 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.
(c) Filing the Record, Partial Record, or Certificate. — Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or (g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.	(c) **Filing the Record, Partial Record, or Certificate.** Upon receiving the record, partial record, or district clerk's certificate as provided in Rule 11, the circuit clerk must file it and immediately notify all parties of the filing date.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

TITLE III. REVIEW OF DECISIONS OF THE UNITED STATES TAX COURT	TITLE III. REVIEW OF A DECISION OF THE UNITED STATES TAX COURT
Rule 13. Review of a Decision of the Tax Court	**Rule 13. Review of a Decision of the Tax Court**
(a) How Obtained; Time for Filing Notice of Appeal. — Review of a decision of the United States Tax Court must be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after entry of the Tax Court's decision. At the time of filing the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of Rule 3(d). If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after entry of the Tax Court's decision. The running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order disposing of such motion, or from the entry of decision whichever is later.	**(a) How Obtained; Time for Filing Notice of Appeal.** (1) Review of a decision of the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered. (2) If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later.
(b) Notice of appeal — How filed. — The notice of appeal may be filed by deposit in the office of the clerk of the Tax Court in the District of Columbia or by mail addressed to the clerk. If a notice is delivered to the clerk by mail and is received after expiration of the last day allowed for filing, the postmark date shall be deemed to be the date of delivery, subject to the provisions of § 7502 of the Internal Revenue Code of 1954, as amended, and the regulations promulgated pursuant thereto.	**(b) Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

(c) Content of the notice of appeal; service of the notice; effect of filing and service of the notice. — The content of the notice of appeal, the manner of its service, and the effect of the filing of the notice and of its service shall be as prescribed by Rule 3. Form 2 in the Appendix of Forms is a suggested form of the notice of appeal.	(c) **Contents of the Notice of Appeal; Service; Effect of Filing and Service.** Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.
(d) The record on appeal; transmission of the record; filing of the record. — The provisions of Rules 10, 11 and 12 respecting the record and the time and manner of its transmission and filing and the docketing of the appeal in the court of appeals in cases on appeal from the district courts shall govern in cases on appeal from the Tax Court. Each reference in those rules and in Rule 3 to the district court and to the clerk of the district court shall be read as a reference to the Tax Court and to the clerk of the Tax Court respectively. If appeals are taken from a decision of the Tax Court to more than one court of appeals, the original record shall be transmitted to the court of appeals named in the first notice of appeal filed. Provision for the record in any other appeal shall be made upon appropriate application by the appellant to the court of appeals to which such other appeal is taken.	(d) **The Record on Appeal; Forwarding; Filing.** (1) An appeal from the Tax Court is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals. References in those rules and in Rule 3 to the district court and district clerk are to be read as referring to the Tax Court and its clerk. (2) If an appeal from a Tax Court decision is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 14. Applicability of other rules to review of decisions of the Tax Court	Rule 14. Applicability of Other Rules to the Review of a Tax Court Decision
All provisions of these rules are applicable to review of a decision of the Tax Court, except that Rules 4-9, Rules 15-20, and Rules 22 and 23 are not applicable.	All provisions of these rules, except Rules 4–9, 15–20, and 22–23, apply to the review of a Tax Court decision.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

TITLE IV. REVIEW AND ENFORCEMENT OF ORDERS OF ADMINISTRATIVE AGENCIES, BOARDS, COMMISSIONS AND OFFICERS	TITLE IV. REVIEW AND ENFORCEMENT OF AN ORDER OF AN ADMINISTRATIVE AGENCY, BOARD, COMMISSION, OR OFFICER
Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention	**Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention**
(a) Petition for Review of Order; Joint Petition. - Review of an order of an administrative agency, board, commission, or officer (hereinafter, the term "agency" will include agency, board, commission, or officer) must be obtained by filing with the clerk of a court of appeals that is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" will include a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal).	**(a) Petition for Review; Joint Petition.** (1) Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order. If their interests make joinder practicable, two or more persons may join in a petition to the same court to review the same order.

The petition must name each party seeking review either in the caption or in the body of the petition. Use of such terms as "et al.," or "petitioners," or "respondents" is not effective to name the parties. The petition also must designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency must be named respondent. The United States will also be a respondent if required by statute, even though not designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.	(2) The petition must: (A) name each party seeking review either in the caption or the body of the petition — using such terms as "et al.," "petitioners," or "respondents" does not effectively name the parties; (B) name the agency as a respondent (even though not named in the petition, the United States is a respondent if required by statute); and (C) specify the order or part thereof to be reviewed. (3) Form 3 in the Appendix of Forms is a suggested form of a petition for review. (4) In this rule "agency" includes an agency, board, commission, or officer; "petition for review" includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute.

(b) Application for enforcement of order; answer; default; cross-application for enforcement. — An application for enforcement of an order of an agency shall be filed with the clerk of a court of appeals which is authorized to enforce the order. The application shall contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief prayed. Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the clerk an answer to the application. If the respondent fails to file an answer within such time, judgment will be awarded for the relief prayed. If a petition is filed for review of an order which the court has jurisdiction to enforce, the respondent may file a cross-application for enforcement.	**(b) Application or Cross-Application to Enforce an Order; Answer; Default.** (1) An application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order. If a petition is filed to review an agency order that the court may enforce, a party opposing the petition may file a cross-application for enforcement. (2) Within 20 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested. (3) The application must contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief requested.

(c) Service of petition or application. — A copy of a petition for review or of an application or cross-application for enforcement of an order shall be served by the clerk of the court of appeals on each respondent in the manner prescribed by Rule 3(d), unless a different manner of service is prescribed by an applicable statute. At the time of filing, the petitioner shall furnish the clerk with a copy of the petition or application for each respondent. At or before the time of filing a petition for review, the petitioner shall serve a copy thereof on all parties who shall have been admitted to participate in the proceedings before the agency other than respondents to be served by the clerk, and shall file with the clerk a list of those so served.	(c) **Service of the Petition or Application.** The circuit clerk must serve a copy of the petition for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Rule 3(d), unless a different manner of service is prescribed by statute. At the time of filing, the petitioner must: (1) serve, or have served, a copy on each party admitted to participate in the agency proceedings, except for the respondents; (2) file with the clerk a list of those so served; and (3) give the clerk enough copies of the petition or application to serve each respondent.
(d) Intervention. — Unless an applicable statute provides a different method of intervention, a person who desires to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and file with the clerk of the court of appeals a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene or other notice of intervention authorized by an applicable statute shall be filed within 30 days of the date on which the petition for review is filed.	(d) **Intervention.** Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion — or other notice of intervention authorized by statute — must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.
(e) Payment of Fees. - When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the clerk of the court of appeals the fees established by statute, and also the docket fee prescribed by the Judicial Conference of the United States.	(e) **Payment of Fees.** When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the circuit clerk all required fees.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 15.1. Briefs and Oral Argument in National Labor Relations Board Proceedings	**Rule 15.1. Briefs and Oral Argument in a National Labor Relations Board Proceeding**
Each party adverse to the National Labor Relations Board in an enforcement or a review proceeding shall proceed first on briefing and at oral argument unless the court orders otherwise.	In either an enforcement or a review proceeding, a party adverse to the National Labor Relations Board proceeds first on briefing and at oral argument, unless the court orders otherwise.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 16. The record on review or enforcement.	**Rule 16. The Record on Review or Enforcement**
(a) Composition of the record. — The order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency shall constitute the record on review in proceedings to review or enforce the order of any agency.	(a) **Composition of the Record.** The record on review or enforcement of an agency order consists of: (1) the order involved; (2) any findings or report on which it is based; and (3) the pleadings, evidence, and other parts of the proceedings before the agency.

(b) Omissions from or misstatements in the record. — If anything material to any party is omitted from the record or is misstated therein, the parties may at any time supply the omission or correct the misstatement by stipulation, or the court may at any time direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.	**(b) Omissions From or Misstatements in the Record.** The parties may at any time, by stipulation, supply any omission from the record or correct a misstatement, or the court may so direct. If necessary, the court may direct that a supplemental record be prepared and filed.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 17. Filing of the record	**Rule 17. Filing the Record**
(a) Agency to file; time for filing; notice of filing. — The agency shall file the record with the clerk of the court of appeals within 40 days after service upon it of the petition for review unless a different time is provided by the statute authorizing review. In enforcement proceedings the agency shall file the record within 40 days after filing an application for enforcement, but the record need not be filed unless the respondent has filed an answer contesting enforcement of the order, or unless the court otherwise orders. The court may shorten or extend the time above prescribed. The clerk shall give notice to all parties of the date on which the record is filed.	**(a) Agency to File; Time for Filing; Notice of Filing.** The agency must file the record with the circuit clerk within 40 days after being served with a petition for review, unless the statute authorizing review provides otherwise, or within 40 days after it files an application for enforcement unless the respondent fails to answer or the court orders otherwise. The court may shorten or extend the time to file the record. The clerk must notify all parties of the date when the record is filed.

(b) Filing — What Constitutes. — The agency may file the entire record or such parts thereof as the parties may designate by stipulation filed with the agency. The original papers in the agency proceeding or certified copies thereof may be filed. Instead of filing the record or designated parts thereof, the agency may file a certified list of all documents, transcripts of testimony, exhibits and other material comprising the record, or a list of such parts thereof as the parties may designate, adequately describing each, and the filing of the certified list shall constitute filing of the record. The parties may stipulate that neither the record nor a certified list be filed with the court. The stipulation shall be filed with the clerk of the court of appeals and the date of its filing shall be deemed the date on which the record is filed. If a certified list is filed, or if the parties designate only parts of the record for filing or stipulate that neither the record nor a certified list be filed, the agency shall retain the record or parts thereof. Upon request of the court or the request of a party, the record or any part thereof thus retained shall be transmitted to the court notwithstanding any prior stipulation. All parts of the record retained by the agency shall be a part of the record on review for all purposes.	**(b) Filing — What Constitutes.** (1) The agency must file: (A) the original or a certified copy of the entire record or parts designated by the parties; or (B) a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties. (2) The parties may stipulate in writing that no record or certified list be filed. The date when the stipulation is filed with the circuit clerk is treated as the date when the record is filed. (3) The agency must retain any portion of the record not filed with the clerk. All parts of the record retained by the agency are a part of the record on review for all purposes and, if the court or a party so requests, must be sent to the court regardless of any prior stipulation.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive change is recommended, however, in subdivision (b).

Subdivision (b). The current rule provides that when a court of appeals is asked to review or enforce an agency order, the agency must file either "the entire record or such parts thereof as the parties may designate by stipulation filed with the agency" or a certified list describing the documents, transcripts, exhibits, and other material constituting the record. If the agency is not filing a certified list, the current rule requires the agency to file the entire record unless the parties file a "stipulation" designating only parts of the record. Such a "stipulation" presumably requires agreement of the parties as to the parts to be filed. The amended language in subparagraph (b)(1)(A) permits the agency to file the entire record or "parts designated by the parties." The new language permits the filing of less than the entire record even when the parties do not agree as to which parts should be filed. Each party can designate the parts that it wants filed; the agency can then forward the parts designated by each party. In contrast, paragraph (b)(2) continues to require stipulation, that is agreement of the parties, that the agency need not file either the record or a certified list.

Rule 18. Stay pending review	Rule 18. Stay Pending Review
Application for a stay of a decision or order of any agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial, or that the action of the agency did not afford the relief which the application had requested. The motion shall also show the reasons for the relief requested and the facts relied upon and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant to the relief sought. Reasonable notice of the motion shall be given to all parties to the proceeding in the court of appeals. The court may condition relief under this rule upon the filing of a bond or other appropriate security. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.	**(a) Motion for a Stay.** (1) **Initial Motion Before the Agency.** A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order. (2) **Motion in the Court of Appeals.** A motion for a stay may be made to the court of appeals or one of its judges. (A) The motion must: (i) show that moving first before the agency would be impracticable; or (ii) state that, a motion having been made, the agency denied the motion or failed to afford the relief requested and state any reasons given by the agency for its action. (B) The motion must also include: (i) the reasons for granting the relief requested and the facts relied on; (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and (iii) relevant parts of the record.

	(C) The moving party must give reasonable notice of the motion to all parties. (D) The motion must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge. **(b) Bond.** The court may condition relief on the filing of a bond or other appropriate security.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 19. Settlement of judgments enforcing orders	**Rule 19. Settlement of a Judgment Enforcing an Agency Order in Part**
When an opinion of the court is filed directing the entry of a judgment enforcing in part the order of any agency, the agency shall within 14 days thereafter serve upon the respondent and file with the clerk a proposed judgment in conformity with the opinion. If the respondent objects to the proposed judgment as not in conformity with the opinion, the respondent shall within 7 days thereafter serve upon the agency and file with the clerk a proposed judgment which the respondent deems to be in conformity with the opinion. The court will thereupon settle the judgment and direct its entry without further hearing or argument.	When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within 7 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 20. Applicability of other rules to review or enforcement of agency orders	**Rule 20. Applicability of Rules to the Review or Enforcement of an Agency Order**
All provisions of these rules are applicable to review or enforcement of orders of agencies, except that Rules 3-14 and Rules 22 and 23 are not applicable. As used in any applicable rule, the term "appellant" includes a petitioner and the term "appellee" includes a respondent in proceedings to review or enforce agency orders.	All provisions of these rules, except Rules 3-14 and 22-23, apply to the review or enforcement of an agency order. In these rules, "appellant" includes a petitioner or applicant, and "appellee" includes a respondent.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

TITLE V. EXTRAORDINARY WRITS	TITLE V. EXTRAORDINARY WRITS
Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs	**Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs**
(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing. (1) A party petitioning for a writ of mandamus or prohibition directed to a court shall file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party shall also provide a copy to the trial court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes. (2)(A) The petition shall be titled "In re [name of petitioner]." (B) The petition shall state: (i) the relief sought; (ii) the issues presented; (iii) the facts necessary to understand the issues presented by the petition; and (iv) the reasons why the writ should issue. (C) The petition shall include copies of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition. (3) When the clerk receives the prescribed docket fee, the clerk shall docket the petition and submit it to the court.	**(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.** (1) A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes. (2) (A) The petition must be titled "In re [name of petitioner]." (B) The petition must state: (i) the relief sought; (ii) the issues presented; (iii) the facts necessary to understand the issues presented by the petition; and (iv) the reasons why the writ should issue. (C) The petition must include a copy of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition. (3) Upon receiving the prescribed docket fee, the clerk must docket the petition and submit it to the court.

(b) Denial; Order Directing Answer; Briefs; Precedence. (1) The court may deny the petition without an answer. Otherwise, it shall order the respondent, if any, to answer within a fixed time. (2) The clerk shall serve the order to respond on all persons directed to respond. (3) Two or more respondents may answer jointly. (4) The court of appeals may invite or order the trial court judge to respond or may invite an amicus curiae to do so. The trial court judge may request permission to respond but may not respond unless invited or ordered to do so by the court of appeals. (5) If briefing or oral argument is required, the clerk shall advise the parties, and when appropriate, the trial court judge or amicus curiae. (6) The proceeding shall be given preference over ordinary civil cases. (7) The circuit clerk shall send a copy of the final disposition to the trial court judge.	**(b) Denial; Order Directing Answer; Briefs; Precedence.** (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 clerk must serve the order to respond on all persons directed to respond. (3) Two or more respondents may answer jointly. (4) The court of appeals may invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so. The trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals. (5) If briefing or oral argument is required, the clerk must advise the parties, and when appropriate, the trial-court judge or amicus curiae. (6) The proceeding must be given preference over ordinary civil cases. (7) The circuit clerk must send a copy of the final disposition to the trial-court judge.
(c) Other Extraordinary Writs. Application for an extraordinary writ other than one of those provided for in subdivisions (a) and (b) of this rule shall be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule.	**(c) Other Extraordinary Writs.** An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

(d) Form of Papers; Number of Copies. All papers may be typewritten. An original and three copies shall be filed unless the court requires the filing of a different number by local rule or by order in a particular case.	**(d) Form of Papers; Number of Copies.** All papers must conform to Rule 32(a)(1). An original and 3 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

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS	**TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS**
Rule 22. Habeas corpus and section 2255 proceedings	**Rule 22. Habeas Corpus and Section 2255 Proceedings**
(a) Application for the Orginal Writ. — An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application shall be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge shall not be permitted. The applicant may, pursuant to section 2253 of title 28, United States Code, appeal to the appropriate court of appeals from the order of the district court denying the writ.	**(a) Application for the Orginal Writ.** An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) Certificate of Appealability. — In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an a appeal is taken by a State or its representative, a certificate of appealability is not required.	**(b) Certificate of Appealability.** (1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate. (2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals. (3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; in this rule, however, substantive changes are recommended in paragraphs (b)(1) and (b)(3).

Subdivision (b), paragraph (1). Two substantive changes are made in this paragraph. First, the paragraph is made applicable to 28 U.S.C. § 2255 proceedings. This brings the rule into conformity with 28 U.S.C. § 2253 as amended by the *Anti-Terrorism and Effective Death Penalty Act of 1996*, Pub. L. No. 104-132. Second, the rule states that a certificate of appealability may be issued by "a circuit justice or a circuit or district judge." That language adds a reference to the circuit justice which also brings the rule into conformity with section 2253. The language continues to state that in addition to the circuit justice, both a circuit and a district judge may issue a certificate of appealability. The language of section 2253 is ambiguous; it states that a certificate of appealability may be issued by "a circuit justice or judge." Since the enactment of the *Anti-Terrorism and Effective Death Penalty Act*, three circuits have held that both district and circuit judges, as well as the circuit justice, may issue a certificate of appealability. *Else v. Johnson*, 104 F.3d 82 (5th Cir. 1997); *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6th Cir. 1997); and *Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996). The approach taken by the rule is consistent with those decisions.

Subdivision (b), paragraph (3). The *Anti-Terrorism and Effective Death Penalty Act of 1996*, Pub. L. No. 104-132, amended 28 U.S.C. § 2253 to make it applicable to § 2255 proceedings. Accordingly, paragraph (3) is amended to provide that when the United States or its representative appeals, a certificate of appealability is not required.

Rule 23. Custody of prisoners in habeas corpus proceedings	**Rule 23. Custody or Release of a Prisoner in a Habeas Corpus Proceeding**
(a) Transfer of custody pending review. — Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.	**(a) Transfer of Custody Pending Review.** Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.

Subdivision (b), paragraph (1). Two substantive changes are made in this paragraph. First, the paragraph is made applicable to 28 U.S.C. § 2255 proceedings. This brings the rule into conformity with 28 U.S.C. § 2253 as amended by the *Anti-Terrorism and Effective Death Penalty Act of 1996*, Pub. L. No. 104-132. Second, the rule states that a certificate of appealability may be issued by "a circuit justice or a circuit or district judge." That language adds a reference to the circuit justice which also brings the rule into conformity with section 2253. The language continues to state that in addition to the circuit justice, both a circuit and a district judge may issue a certificate of appealability. The language of section 2253 is ambiguous; it states that a certificate of appealability may be issued by "a circuit justice or judge." Since the enactment of the *Anti-Terrorism and Effective Death Penalty Act*, three circuits have held that both district and circuit judges, as well as the circuit justice, may issue a certificate of appealability. *Else v. Johnson*, 104 F.3d 82 (5th Cir. 1997); *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6th Cir. 1997); and *Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996). The approach taken by the rule is consistent with those decisions.

Subdivision (b), paragraph (3). The *Anti-Terrorism and Effective Death Penalty Act of 1996*, Pub. L. No. 104-132, amended 28 U.S.C. § 2253 to make it applicable to § 2255 proceedings. Accordingly, paragraph (3) is amended to provide that when the United States or its representative appeals, a certificate of appealability is not required.

Rule 23. Custody of prisoners in habeas corpus proceedings	**Rule 23. Custody or Release of a Prisoner in a Habeas Corpus Proceeding**
(a) Transfer of custody pending review. — Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.	**(a) Transfer of Custody Pending Review.** Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.

(b) Detention or release of prisoner pending review of decision failing to release. — Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon the prisoner's recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.	**(b) Detention or Release Pending Review of Decision Not to Release.** While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court, may order that the prisoner be: (1) detained in the custody from which release is sought; (2) detained in other appropriate custody; or (3) released on personal recognizance, with or without surety.
(c) Release of prisoner pending review of decision ordering release. — Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon the prisoner's recognizance, with or without surety, unless the court or justice or judge rendering the decision or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.	**(c) Release Pending Review of Decision Ordering Release.** While a decision ordering the release of a prisoner is under review, the prisoner must — unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise — be released on personal recognizance, with or without surety.
(d) Modification of initial order respecting custody. — An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.	**(d) Modification of the Initial Order on Custody.** An initial order governing the prisoner's custody or release, including any recognizance or surety, continues in effect pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee

has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Subdivision (d). The current rule states that the initial order governing custody or release "shall govern review" in the court of appeals. The amended language says that the initial order generally "continues in effect" pending review.

When Rule 23 was adopted it used the same language as Supreme Court Rule 49, which then governed custody of prisoners in habeas corpus proceedings. The "shall govern review" language was drawn from the Supreme Court Rule. The Supreme Court has since amended its rule, now Rule 36, to say that the initial order "shall continue in effect" unless for reasons shown it is modified or a new order is entered. The Advisory Committee recommends that Rule 23 be amended to similarly state that the initial order "continues in effect." The new language is clearer. It removes the possible implication that the initial order created law of the case, a strange notion to attach to an order regarding custody or release.

Rule 24. Proceedings in Forma Pauperis	**Rule 24. Proceeding in Forma Pauperis**
(a) Leave to proceed on appeal in forma pauperis from district court to court of appeals. — A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that that party is entitled to redress, and a statement of the issues which that party intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial. Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.	**(a) Leave to Proceed in Forma Pauperis.** (1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that: (A) shows in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or to give security for fees and costs; (B) claims an entitlement to redress; and (C) states the issues that the party intends to present on appeal. (2) **Action on the Motion**. If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs. If the district court denies the motion, it must state its reasons in writing. (3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless the district court — before or after the notice of appeal is filed — certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis. In that event, the district court must state in writing its reasons for the certification or finding.

If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by a copy of the affidavit filed in the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of reasons given by the district court for its action.	(4) **Notice of District Court's Denial.** The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following: (A) denies a motion to proceed on appeal in forma pauperis; (B) certifies that the appeal is not taken in good faith; or (C) finds that the party is not otherwise entitled to proceed in forma pauperis. (5) **Motion in the Court of Appeals.** A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed by Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).
(b) Leave to proceed on appeal or review in forma pauperis in administrative agency proceedings. — A party to a proceeding before an administrative agency, board, commission or officer (including, for the purpose of this rule, the United States Tax Court) who desires to proceed on appeal or review in a court of appeals in forma pauperis, when such appeal or review may be had directly in a court of appeals, shall file in the court of appeals a motion for leave so to proceed, together with the affidavit prescribed by the first paragraph of (a) of this Rule 24.	**(b) Leave to Proceed in Forma Pauperis on Appeal or Review of an Administrative-Agency Proceeding.** When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24 (a)(1).

(c) Form of briefs, appendices and other papers. — Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form, and may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.	(c) **Leave to Use Original Record.** A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. The Advisory Committee recommends deleting the language in subdivision (c) authorizing a party proceeding in forma pauperis to file papers in typewritten form because the authorization is unnecessary. The rules permit all parties to file typewritten documents.

TITLE VII. GENERAL PROVISIONS	TITLE VII. GENERAL PROVISIONS
Rule 25. Filing, Proof of Filing, Service, and Proof of Service	**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 shall 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 papers within the time fixed for filing. (B) **A brief or appendix.** A brief or appendix is timely filed, however, if on or before the last day for filing, it is: (i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or (ii) dispatched to the clerk for delivery within 3 calendar days by a third-party commercial carrier.	**(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 papers within the time fixed for filing. (B) **A brief or appendix.** A brief or appendix is timely filed, however, if on or before the last day for filing, it is: (i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or (ii) dispatched to a third party commercial carrier for delivery to the clerk within 3 calendar days.

(C) **Inmate filing.** A paper filed by an inmate confined in an institution is timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of 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.	(C) **Inmate filing.** A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.
(D) **Electronic Filing.** A court of appeals may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.	(D) **Electronic Filing.** A court of appeals may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.
(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; the judge shall note the filing date on the motion and give it to the clerk.	(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; the judge must note the filing date on the motion and give it to the clerk.
(4) **Clerk's Refusal of Documents.** The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.	(4) **Clerk's Refusal of Documents.** The clerk 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.

(b) Service of all papers required. — Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for that party on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.	**(b) Service of All Papers Required.** Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.
(c)Manner of Service. Service may be personal, by mail, or by third-party commercial carrier for delivery within 3 calendar days. When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party shall be by a manner at least as expeditious as the manner used to file the paper with the court. Personal service includes delivery of the copy to a responsible person at the office of counsel. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.	**(c) Manner of Service.** Service may be personal, by mail, or by third-party commercial carrier for delivery within 3 calendar days. When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court. Personal service includes delivery of the copy to a responsible person at the office of counsel. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

(d) **Proof of Service; Filing.** A paper presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, of the name of the person served, and of the addresses to which the papers were mailed or at which they were delivered, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service shall also state the date and manner by which the document was mailed or dispatched to the clerk.	(d) **Proof of Service.** (1) A paper presented for filing must contain either of the following: (A) an acknowledgment of service by the person served; or (B) proof of service consisting of a statement by the person who made service certifying: (i) the date and manner of service; (ii) the names of the persons served; and (iii) their mailing addresses or the addresses of the places of delivery. (2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk. (3) Proof of service may appear on or be affixed to the papers filed.
(e) Number of Copies. — Whenever these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.	(e) **Number of Copies.** When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive amendment is recommended, however, in subdivision (a).

Subdivision (a). The substantive amendment recommended in this subdivision is in subparagraph (a)(2)(C) and is a companion to a recommended amendment in Rule 4(c). Currently Rule 25(a)(2)(C) provides that if an inmate confined in an institution files a document by depositing it in the institution's

internal mail system, the document is timely filed if deposited on or before the last day for filing. Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee recommends amending the rule to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subparagraph.

Rule 26. Computation and extension of time	**Rule 26. Computing and Extending Time**
(a) Computation of time. — In computing any period of time prescribed or allowed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.	**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute: (1) Exclude the day of the act, event, or default that begins the period. (2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days. (3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which the weather or other conditions make the clerk's office inaccessible.
As used in this rule "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.	(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(b) Enlargement of time. — The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.	**(b) Extending Time.** For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.
(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after service of a paper upon that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.	**(c) Additional Time after Service.** When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; two substantive changes are recommended, however, in subdivision (a).

Subdivision (a). First, the amendments make the computation method prescribed in this rule applicable to any time period imposed by a local rule. This means that if a local rule establishing a time limit is permitted, the national rule will govern the computation of that period.

Second, paragraph (a)(2) includes language clarifying that whenever the rules establish a time period in "calendar days," weekends and legal holidays are counted.

Rule 26.1. Corporate Disclosure Statement	Rule 26.1. Corporate Disclosure Statement
Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. The statement must be filed with a party's principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed.	(a) **Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying all its parent corporations and listing any publicly held company that owns 10% or more of the party's stock. (b) **Time for Filing.** A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. (c) **Number of Copies.** If the statement is filed before the principal brief, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive change is recommended, however, in subdivision (a).

Subdivison (a). The amendment deletes the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. Although several circuit rules require identification of such entities, the Committee believes that such disclosure is unnecessary.

A disclosure statement assists a judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case. Given that purpose, disclosure of entities that would not be adversely affected by a decision in the case is unnecessary.

Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. The rule requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well. For example, if a party is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the shares of the party, the publicly traded grandparent corporation should be disclosed. Conversely, disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For

example, if a party is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation.

The amendment, however, adds a requirement that the party lists all its stockholders that are publicly held companies owning 10% or more of the stock of the party. A judgment against a corporate party can adversely affect the value of the company's stock and, therefore, persons owning stock in the party have an interest in the outcome of the litigation. A judge owning stock in a corporate party ordinarily recuses himself or herself. The new requirement takes the analysis one step further and assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal. The 10% threshold ensures that the corporation in which the judge may own stock is itself sufficiently invested in the party that a judgment adverse to the party could have an adverse impact upon the investing corporation in which the judge may own stock. This requirement is modeled on the Seventh Circuit's disclosure requirement.

Subdivision (b). The language requiring inclusion of the disclosure statement in a party's principal brief is moved to this subdivision because it deals with the time for filing the statement.

Rule 27. Motions	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 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.	**(a) In General.** (1) **Application for Relief.** An application for an order or other relief is made by motion unless these rules prescribe another form. A motion must be in writing unless the court permits otherwise. (2) **Contents of a Motion.** (A) **Grounds and relief sought.** A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it. (B) **Accompanying documents.** (i) Any affidavit or other paper necessary to support a motion must be served and filed with the motion. (ii) An affidavit must contain only factual information, not legal argument. (iii) A motion seeking substantive relief must include a copy of the trial court's opinion or agency's decision as a separate exhibit.
	(C) **Documents barred or 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.

Any party may file a response in opposition to a motion other than one for 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.	(3) **Response.** (A) **Time to file**. Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner. (B) **Request for affirmative relief.** A response may include a motion for affirmative relief. The time to respond to the new motion, and to reply to that response, are governed by Rule 27(a)(3)(A) and (a)(4). The title of the response must alert the court to the request for relief. (4) **Reply to Response.** Any reply to a response must be filed within 7 days after service of the response. A reply must not present matters that do not relate to the response.
(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	**(b) Disposition of a Motion for a Procedural Order.** The court may act on a motion for a procedural order — including a motion under Rule 26(b) — at any time without awaiting a response, and may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions. A party adversely affected by the court's, or the clerk's, action may file a motion to reconsider, vacate, or modify that action. Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed.

(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.	(c) **Power of a Single Judge to Entertain a Motion**. A circuit judge may act alone on any motion, but may 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 only the court may act on any motion or class of motions. The court may review the action of a single judge.

(d) Form of Papers; Number of Copies. — All papers relating to a motion may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.	**(d) Form of Papers; Page Limits; and Number of Copies.** (1) **Format.** (A) **Reproduction.** A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used. (B) **Cover.** 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. (C) **Binding.** The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open. (D) **Paper size, line spacing, and margins.** The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

	(2) **Page Limits.** A motion or a response to a motion must not exceed 20 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 10 pages. (3) **Number of Copies.** An original and 3 copies must be filed unless the court requires 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

In addition to amending Rule 27 to conform to uniform drafting standards, several substantive amendments are recommended. The Advisory Committee had been working on substantive amendments to Rule 27 just prior to completion of this larger project. Rather than publish the Rule 27 amendments separately, they have been made a part of this packet.

Subdivision (a). Paragraph (1) retains the language of the existing 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 (1) also states that a motion must be in writing unless the court permits otherwise. The writing requirement has been implicit in the rule; the Advisory 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 Advisory Committee decided that it is better to leave the determination of the propriety of an oral motion to the court's discretion. The provision does 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.

Paragraph (2) outlines the contents of a motion. It begins with the general requirement from the current 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 trial court's opinion or agency's 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) retains the provisions of the current rule concerning the filing of a response to a motion except that the time for responding has been expanded to 10 days rather than 7 days. Because the time periods in the rule apply to a substantive motion as well as a procedural motion, the longer time period may help reduce the number of motions for extension of time, or at least provide a more realistic time frame within which to make and dispose of such a motion.

A party filing a response in opposition to a motion may also request affirmative relief. It is the Advisory 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 must 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. Two circuits currently have rules authorizing a reply. As a general matter, a reply should not reargue propositions presented in the motion or present matters that do not relate to the response. Sometimes matters relevant to the motion arise after the motion is filed; treatment of such matters in the reply is appropriate even though strictly speaking it may not relate to the response.

Subdivision (b). The material in 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 reconsider, vacate, or modify the disposition must file a new motion that addresses the order granting the motion.

Although the rule does not require a court to do so, it would be helpful if, whenever a motion is disposed of before receipt of any response from the opposing party, the ruling indicates that it was issued without awaiting a response. Such a statement will aid the opposing party in deciding whether to request reconsideration. The opposing party may have mailed a response about the time of the ruling and be uncertain whether the court has considered it.

Subdivision (c). The changes in this subdivision are stylistic only. No substantives changes are intended.

Subdivision (d). This subdivision has been substantially revised.

The format requirements have been moved from Rule 32(b) to paragraph (1) of this subdivision. 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. Spiral binding or secure stapling at the upper left-hand corner satisfies the binding requirement. But they are not intended to be the exclusive methods of binding.

Paragraph (2) 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. This 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.

The changes in paragraph (4) are stylistic only. No substantive changes are intended.

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	Rule 28. Briefs
(a) Appellant's Brief. — The brief of the appellant must contain, under appropriate headings and in the order here indicated: (1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.	**(a) Appellant's Brief.** The appellant's brief must contain, under appropriate headings and in the order indicated: (1) a corporate disclosure statement if required by Rule 26.1; (2) a table of contents, with page references; (3) a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the brief where they are cited;
(2) A statement of subject matter and appellate jurisdiction. The statement shall include: (i) a statement of the basis for subject matter jurisdiction in the district court or agency, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; (ii) a statement of the basis for jurisdiction in the court of appeals, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; the statement shall include relevant filing dates establishing the timeliness of the appeal or petition for review and (a) shall state that the appeal is from a final order or a final judgment that disposes of all claims with respect to all parties or, if not, (b) shall include information establishing that the court of appeals has jurisdiction on some other basis. (3) A statement of the issues presented for review.	(4) a jurisdictional statement, including: (A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction; (B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction; (C) the filing dates establishing the timeliness of the appeal or petition for review; and (D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis; (5) a statement of the issues presented for review;

(4) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)). (5) A summary of argument. The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. It should not be a mere repetition of the argument headings. (6) An argument. The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues. (7) A short conclusion stating the precise relief sought.	(6) a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below; (7) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e)); (8) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings; (9) the argument, which must contain: (A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and (B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues); (10) a short conclusion stating the precise relief sought; and (11) the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. — The brief of the appellee must conform to the requirements of paragraphs (a)(1)-(6) , except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant: (1) the jurisdictional statement; (2) the statement of the issues; (3) the statement of the case; (4) the statement of the standard of review.	**(b) Appellee's Brief.** The appellee's brief must conform to the requirements of Rule 28(a)(1)–(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement: (1) the jurisdictional statement; (2) the statement of the issues; (3) the statement of the case; (4) the statement of the facts; and (5) the statement of the standard of review.
(c) Reply brief. — The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court. All reply briefs shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the reply brief where they are cited.	**(c) Reply Brief.** The appellant may file a brief in reply to the appellee's brief. An appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues presented by the cross-appeal. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the reply brief where they are cited.
(d) References in briefs to parties. — Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee". It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore," etc.	**(d) References to Parties.** In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

(e) References in briefs to the record. — References in the briefs to parts of the record reproduced in the appendix filed with the brief of the appellant (see Rule 30(a)) shall be to the pages of the appendix at which those parts appear. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 30(c). If the record is reproduced in accordance with the provisions of Rule 30(f), or if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.	**(e) References to the Record.** References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example: • Answer p. 7; • Motion for Judgment p. 2; • Transcript p. 231. Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.
(f) Reproduction of statutes, rules, regulations, etc. — If determination of the issues presented requires the study of statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.	**(f) Reproduction of Statutes, Rules, Regulations, etc.** If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.
(g) Length of briefs. — Except by permission of the court, or as specified by local rule of the court of appeals, principal briefs must not exceed 50 pages, and reply briefs must not exceed 25 pages, exclusive of pages containing the corporate disclosure statement, table of contents, tables of citations, proof of service, and any addendum containing statutes, rules, regulations, etc.	**(g) [Reserved]**

(h) 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) 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.	**(h) Briefs in a Case Involving a Cross-Appeal.** If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order. With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the requirements of Rule 28(a)(1)–(11). But an appellee who is satisfied with appellant's statement need not include a statement of the case or of the facts.
(i) 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.	**(i) Briefs in a Case Involving Multiple Appellants or Appellees.** In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.
(j) 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.	**(j) Citation of Supplemental Authorities.** If pertinent and significant authorities come to a party's attention after the party's brief has been filed — or after oral argument but before decision — a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state without argument the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. Any response must be made promptly and must be similarly limited.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Several substantive changes are recommended in this rule, however. Most of them are necessary to conform Rule 28 with changes recommended in Rule 32.

Subdivision (a). The current rule requires a brief to include a statement of the case which includes a description of the nature of the case, the course of proceedings, the disposition of the case — all of which might be described as the procedural history — as well as a statement of the facts. The amendments separate this into two statements: one procedural, called the statement of the case; and one factual, called the statement of the facts. The Advisory Committee believes that the separation will be helpful to the judges. The table of contents and table of authorities have also been separated into two distinct items.

An additional amendment of subdivision (a) is recommended to conform it with an amendment being made to Rule 32. Rule 32(a)(7) generally requires a brief to include a certificate of compliance with type-volume limitations contained in that rule. (No certificate is required if a brief does not exceed 30 pages, or 15 pages for a reply brief.) Rule 28(a) is amended to include that certificate in the list of items that must be included in a brief whenever it is required by Rule 32.

Subdivision (g). The amendments delete 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.

Subdivision (h). The amendment requires an appellee's brief to comply with Rule 28(a)(1) through (11) with regard to a cross-appeal. The addition of separate paragraphs requiring a corporate disclosure statement, table of authorities, statement of facts, and certificate of compliance increased the relevant paragraphs of subdivision (a) from (7) to (11). The other changes are stylistic; no substantive changes are intended.

Rule 29. Brief of an Amicus Curiae	**Rule 29. Brief of an Amicus Curiae**
A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.	**(a) When Permitted.** The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing. **(b) Motion for Leave to File.** The motion must be accompanied by the proposed brief and state: (1) the movant's interest; and (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

	(c) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following: (1) a table of contents, with page references; (2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited; (3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file; (4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and (5) a certificate of compliance, if required by Rule 32(a)(7).

	(d) Length. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief. **(e) Time for Filing.** An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer. **(f) Reply Brief.** Except by the court's permission, an amicus curiae may not file a reply brief. **(g) Oral Argument.** An amicus curiae may participate in oral argument only with the court's permission.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Several substantive changes are recommended in this rule, however.

Subdivision (a). The major change in this subpart is that when a brief is filed with the consent of all parties, it is no longer necessary to obtain the parties' written consent and to file the consents with the brief. It is sufficient to obtain the parties' oral consent and to state in the brief that all parties have consented. It is sometimes difficult to obtain all the written consents by the filing deadline and it is not unusual for counsel to represent that parties have consented; for example, in a motion for extension of time to file a brief it is not unusual for the movant to state that the other parties have been consulted and they do not object to the extension. If a party's consent has been misrepresented, the party will be able to take action before the court considers the amicus brief.

The District of Columbia is added to the list of entities allowed to file an amicus brief without consent of all parties. The other changes in this material are stylistic.

Subdivision (b). The provision in the former rule, granting permission to conditionally file the brief with the motion, is changed to one requiring that the brief accompany the motion. Sup. Ct. R. 37.4 requires that the proposed brief be presented with the motion.

The former rule only required the motion to identify the applicant's interest and to generally state the reasons why an amicus brief is desirable. The amended rule additionally requires that the motion state the relevance of the matters asserted to the disposition of the case. As Sup. Ct. R. 37.1 states:

> An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus curiae* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.

Because the relevance of the matters asserted by an amicus is ordinarily the most compelling reason for granting leave to file, the Committee believes that it is helpful to explicitly require such a showing.

Subdivision (c). The provisions in this subdivision are entirely new. Previously there was confusion as to whether an amicus brief must include all of the items listed in Rule 28. Out of caution practitioners in some circuits included all those items. Ordinarily that is unnecessary.

The requirement that the cover identify the party supported and indicate whether the amicus supports affirmance or reversal is an administrative aid.

Paragraph (c)(3) requires an amicus to state the source of its authority to file. The amicus simply must identify which of the provisions in Rule 29(a) provides the basis for the amicus to file its brief.

Subdivision (d). This new provision imposes a shorter page limit for an amicus brief than for a party's brief. This is appropriate for two reasons. First, an amicus may omit certain items that must be included in a party's brief. Second, an amicus brief is supplemental. It need not address all issues or all facets of a case. It should treat only matter not adequately addressed by a party.

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

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

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

The former rule's statement that a court may, for cause shown, grant leave for later filing is unnecessary. Rule 26(b) grants general authority to enlarge the time prescribed in these rules for good cause shown. This new rule, however, states that when a court grants permission for later filing, the court must specify the period within which an opposing party may answer the arguments of the amicus.

Subdivision (f). This subdivision generally prohibits the filing of a reply brief by an amicus curiae. Sup. Ct. R. 37 and local rules of the D.C., Ninth, and Federal Circuits state that an amicus may not file a reply brief. The role of an amicus should not require the use of a reply brief.

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

Rule 30. Appendix to the Briefs	Rule 30. Appendix to the Briefs
(a) Duty of Appellant to Prepare and File; Content of Appendix; Time for Filing; Number of Copies. — The appellant must prepare and file an appendix to the briefs which must contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings, or opinion; (3) the judgment, order, or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the district court should not be included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts. Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant must serve and file the appendix with the brief. Ten copies of the appendix must be filed with the clerk, and one copy must be served on counsel for each party separately represented, unless the court requires the filing or service of a different number by local rule or by order in a particular case.	**(a) Appellant's Responsibility.** (1) **Contents of the Appendix.** The appellant must prepare and file an appendix to the briefs containing: (A) the relevant docket entries in the proceeding below; (B) the relevant portions of the pleadings, charge, findings, or opinion; (C) the judgment, order, or decision in question; and (D) other parts of the record to which the parties wish to direct the court's attention. (2) **Excluded Material.** Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. Parts of the record may be relied on by the court or the parties even though not included in the appendix. (3) **Time to File; Number of Copies.** Unless filing is deferred under Rule 30(c), the appellant must file 10 copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(b) Determination of contents of appendix; cost of producing. — The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which the appellant intends to include in the appendix and a statement of the issues which the appellant intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, the appellee shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated with respect to the appeal and any cross appeal. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation. The provisions of this paragraph shall apply to cross appellants and cross appellees.	**(b) All Parties' Responsibilities.** (1) **Determining the Contents of the Appendix.** The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within 10 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 10 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.
Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented the appellant may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party. Each circuit shall provide by local rule for the imposition of sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix.	(2) **Costs of Appendix.** Unless the parties agree otherwise, the appellant must pay the cost of the appendix. If the appellant considers parts of the record designated by the appellee to be unnecessary, the appellant may advise the appellee, who must then advance the cost of including those parts. The cost of the appendix is a taxable cost. But if any party causes unnecessary parts of the record to be included in the appendix, the court may impose the cost of those parts on that party. Each circuit must, by local rule, provide for sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix.

(c) Alternative method of designating contents of the appendix; how references to the record may be made in the briefs when alternative method is used. — If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply, except that the designations referred to therein shall be made by each party at the time each brief is served, and a statement of the issues presented shall be unnecessary.	**(c) Deferred Appendix.** (1) **Deferral Until After Briefs Are Filed.** The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served. Even though the filing of the appendix may be deferred, Rule 30(b) applies; except that a party must designate the parts of the record it wants included in the appendix when it serves its brief, and need not include a statement of the issues presented.
If the deferred appendix authorized by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where the page begins. Or if a party desires to refer in a brief directly to pages of the appendix, that party may serve and file typewritten or page proof copies of the brief within the time required by Rule 31(a), with appropriate references to the pages of the parts of the record involved. In that event, within 14 days after the appendix is filed the party shall serve and file copies of the brief in the form prescribed by Rule 32(a) containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.	(2) **References to the Record.** (A) If the deferred appendix is used, the parties may cite in their briefs the pertinent pages of the record. When the appendix is prepared, the record pages cited in the briefs must be indicated by inserting record page numbers, in brackets, at places in the appendix where those pages of the record appear. (B) A party who wants to refer directly to pages of the appendix may serve and file copies of the brief within the time required by Rule 31(a), containing appropriate references to pertinent pages of the record. In that event, within 14 days after the appendix is filed, the party must serve and file copies of the brief, containing references to the pages of the appendix in place of or in addition to the references to the pertinent pages of the record. Except for the correction of typographical errors, no other changes may be made to the brief.

(d) Arrangement of the appendix. — At the beginning of the appendix there shall be inserted a list of the parts of the record which it contains, in the order in which the parts are set out therein, with references to the pages of the appendix at which each part begins. The relevant docket entries shall be set out following the list of contents. Thereafter, other parts of the record shall be set out in chronological order. When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.	(d) **Format of the Appendix.** The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included pages. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) should be omitted.
(e) Reproduction of exhibits. — Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. Four copies thereof shall be filed with the appendix and one copy shall be served on counsel for each party separately represented. The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this subdivision.	(e) **Reproduction of Exhibits.** Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed. Four copies must be filed with the appendix, and one copy must be served on counsel for each separately represented party. If a transcript of a proceeding before an administrative agency, board, commission, or officer was used in a district-court action and has been designated for inclusion in the appendix, the transcript must be placed in the appendix as an exhibit.
(f) Hearing of appeals on the original record without the necessity of an appendix. — A court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.	(f) **Appeal on the Original Record Without an Appendix.** The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Subdivision (a). Paragraph (a)(3) is amended so that it is consistent with Rule 31(b). An unrepresented party proceeding in forma pauperis is only required to file 4 copies of the appendix rather than 10.

Subdivision (c). When a deferred appendix is used, a brief must make reference to the original record rather than to the appendix because it does not exist when the briefs are prepared. Unless a party later files an amended brief with direct references to the pages of the appendix (as provided in subparagraph (c)(2)(B)), the material in the appendix must indicate the pages of the original record from which it was drawn so that a reader of the brief can make meaningful use of the appendix. The instructions in the current rule for cross-referencing the appendix materials to the original record are unclear. The language in paragraph (c)(2) has been amended to try to clarify the procedure.

Subdivision (d). In recognition of the fact that use of a typeset appendix is exceedingly rare in the courts of appeals, the last sentence — permitting a question and answer (as from a transcript) to be in a single paragraph — has been omitted.

Rule 31. Filing and Service of a Brief	**Rule 31. Serving and Filing Briefs**
(a) Time for serving and filing briefs. — The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.	**(a) Time to Serve and File a Brief.** (1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least 3 days before argument, unless the court, for good cause, allows a later filing. (2) A court of appeals that routinely considers cases on the merits promptly after the briefs are filed may shorten the time to serve and file briefs, either by local rule or by order in a particular case.

(b) Number of Copies to Be Filed and Served. — Twenty-five copies of each brief must be filed with the clerk, and two copies must be served on counsel for each party separately represented unless the court requires the filing or service of a different number by local rule or by order in a particular case. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and three legible copies must be filed with the clerk, and one copy must be served on counsel for each party separately represented.	**(b) Number of Copies.** Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.
(c) Consequence of failure to file briefs. — If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file a brief, the appellee will not be heard at oral argument except by permission of the court.	**(c) Consequence of Failure to File.** If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive change is recommended, however, in subdivision (b).

Subdivision (a). Paragraph (a)(2) explicitly authorizes a court of appeals to shorten a briefing schedule if the court routinely considers cases on the merits promptly after the briefs are filed. Extensions of the briefing schedule, by order, are permitted under the general provisions of Rule 26(b).

Subdivision (b). The current rule says that a party who is permitted to file "typewritten ribbon and carbon copies of the brief" need only file an original and three copies of the brief. The quoted language, in conjunction with current rule 24(c), means that a party allowed to proceed in forma pauperis need not file 25 copies of the brief. Two changes are suggested in this subdivision. First, it is anachronistic to refer to a party who is allowed to file a typewritten brief as if that would distinguish the party from all other parties; any party is permitted to file a typewritten brief. The amended rule states directly that it applies to a party permitted to proceed in forma pauperis. Second, the amended rule does not generally permit parties who are represented by counsel to file the lesser number of briefs. Inexpensive methods of copying are generally available. Unless it would impose hardship, in which case a motion to file a lesser number should be filed, a represented party must file the usual number of briefs.

Rule 32. Form of briefs, the appendix and other papers	Rule 32. Form of Briefs, Appendices, and Other Papers
(a) Form of briefs and the appendix. — Briefs and appendices may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper. Carbon copies of briefs and appendices may not be submitted without permission of the court except in behalf of parties allowed to proceed 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 not exceeding 8 ½ by 11 inches and type matter not exceeding 6 ½ by 9 ½ inches, with double spacing between each line of text. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents. 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.	**(a) Form of a Brief.** (1) **Reproduction.** (A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used. (B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer. (C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available, the cover of the brief of the appellant should be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix, if separately printed, should be white. The front covers of the briefs and of appendices, if separately printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 12(a)); (3) 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) the title of the document (e.g., Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.	(2) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; and any reply brief, gray. The front cover of a brief must contain: (A) the number of the case centered at the top; (B) the name of the court; (C) the title of the case (see Rule 12(a)); (D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below; (E) the title of the brief, identifying the party or parties for whom the brief is filed; and (F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

	(3) **Binding**. The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open. (4) **Paper Size, Line Spacing, and Margins.** The brief must be on 8 ½ by 11 inch paper. The text must be double-spaced, but quotations more than 2 lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there. (5) **Typeface.** Either a proportionally spaced or a monospaced face may be used. (A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger. (B) A monospaced face may not contain more than 10 ½ characters per inch. (6) **Type Styles**. A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) **Length.**

(A) **Page limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) **Type-volume limitation.**

(i) A principal brief is acceptable if:
- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

	(C) **Certificate of compliance.** A brief submitted under Rule 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either: (i) the number of words in the brief; or (ii) the number of lines of monospaced type in the brief.
	(b) Form of an Appendix. An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following exceptions: (1) The cover of a separately bound appendix must be white. (2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision. (3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8 ½ by 11 inches, and need not lie reasonably flat when opened.

(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 ½ 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.	**(c) Form of Other Papers.** (1) **Motion.** The form of a motion is governed by Rule 27(d). (2) **Other Papers.** Any other paper, including a petition for rehearing and a petition for rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions: (A) a cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2); and (B) Rule 32(a)(7) does not apply. **(d) Local Variation.** Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

Committee Note

In addition to amending Rule 32 to conform to uniform drafting standards, several substantive amendments are recommended. The Advisory Committee had been working on substantive amendments to Rule 32 for some time prior to completion of this larger project. In fact, earlier versions of proposed amendments to Rule 32 have been previously published. Rather than publish the Rule 32 proposed amendments separately, they have been made a part of this packet.

Subdivision (a). Form of a Brief.

Paragraph (a)(1). Reproduction.

The rule permits the use of "light" paper, not just "white" paper. Cream and buff colored paper, including recycled paper, are acceptable. The rule permits printing on only one side of the paper. Although some argue that paper could be saved by allowing double-sided printing, others argue that in order to preserve legibility a heavier weight paper would be needed, resulting in little, if any, paper saving. In addition, the blank sides of a brief are commonly used by judges and their clerks for making notes about the case.

Because photocopying is inexpensive and widely available and because use of carbon paper is now very rare, all references to the use of carbon copies have been deleted.

The rule requires that the text be reproduced with a clarity that equals or exceeds the output of a laser printer. That means that the method used must have a print resolution of 300 dots per inch (dpi) or more. This will ensure the legibility of the brief. A brief produced by a typewriter or a daisy wheel printer, as well as one produced by a laser printer, has a print resolution of 300 dpi or more. But a brief produced by a dot-matrix printer, fax machine, or portable printer that uses heat or dye transfer methods does not. Some ink jet printers are 300 dpi or more, but some are 216 dpi and would not be sufficient.

Photographs, illustrations, and tables may be reproduced by any method that results in a good copy.

Paragraph (a)(2). Cover.

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

Paragraph (a)(3). Binding.

The rule requires a brief to be bound in any manner that is secure, does not obscure the text, and that permits the brief to lie reasonably 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. One circuit already has such a requirement and another 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. Stapling a brief at the upper left-hand corner also satisfies this requirement as long as it is sufficiently secure.

Paragraph (a)(4). Paper Size, Line Spacing, and Margins.

The provisions for pamphlet-size briefs are deleted because their use is so rare. If a circuit wishes to authorize their use, it has authority to do so under subdivision (d) of this rule.

Paragraph (a)(5). Typeface.

This paragraph and the next one, governing type style, are new. The existing rule simply states that a brief 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 computer. 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 briefs are easily legible.

With regard to typeface there are two options: proportionally-spaced typeface or monospaced typeface.

A proportionally-spaced typeface gives a different amount of horizontal space to characters depending upon the width of the character. A capital "M" is given more horizontal space than a lower case "i." The

rule requires that a proportionally-spaced typeface have serifs. Serifs are small horizontal or vertical strokes at the ends of the lines that make up the letters and numbers. Studies have shown that long passages of serif type are easier to read and comprehend than long passsages of sans-serif type. The rule accordingly limits the principal sections of submissions to serif type, although sans-serif type may be used in headings and captions. This is the same approach magazines, newspapers, and commercial printers take. Look at a professionally printed brief; you will find sans-serif type confined to captions, if it is used at all. The next line shows two characters enlarged for detail. The first has serifs, the second does not.

So that the type is easily legible, the rule requires a minimum type size of 14 points for proportionally-spaced typeface.

A monospaced typeface is 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. Most typewriters produce mono-spaced type, and most computers also can do so using fonts with names such as "Courier."

> This sentence is in a proportionally spaced font; as you can see, the m and i have different widths.
>
> `This sentence is in a monospaced font; as you can see, the m and i have the same width.`

The rule requires use of a monospaced typeface that produces no more than 10½ characters per inch. A standard typewriter with pica type produces a monospaced typeface with 10 characters per inch (cpi). That is the ideal monospaced typeface. The rule permits up to 10½ cpi because some computer software programs contain monospaced fonts that purport to produce 10 cpi but that in fact produce slightly more than 10 cpi. In order to avoid the need to reprint a brief produced in good faith reliance upon such a program, the rule permits a bit of leeway. A monospaced typeface with no more than 10 cpi is preferred.

Paragraph (a)(6). Type Styles.

The rule requires use of plain roman, that is not italic or script, type. Italics and boldface may be used for emphasis. Italicizing case names is preferred but underlining may be used.

Paragraph (a)(7). Type-Volume Limitation.

Subparagraph (a)(7)(A) contains a safe-harbor provision. A principal brief that does not exceed 30 pages complies with the type-volume limitation without further question or certification. A reply brief that does not exceed 15 pages is similarly treated. The current limit is 50 pages but that limit was established when most briefs were produced on typewriters. The widespread use of personal computers has made a multitude of printing options available to practitioners. Use of a proportional typeface alone can greatly increase the amount of material per page as compared with use of a monospaced typeface. Even though the rule requires use of 14-point proportional type, there is great variation in the x-height of different 14-point typefaces. Selection of a typeface with a small x-height increases the amount of text per page. Computers also make possible fine gradations in spacing between lines and tight tracking between letters and words. All of this, and more, have made the 50 page limit virtually meaningless. Establishing a safe-

harbor of 50 pages would permit a person who makes use of the multitude of printing "tricks" available with most personal computers to file a brief far longer than the "old" 50-page brief. Therefore, as to those briefs not subject to any other volume control than a page limit, a 30 page limit is imposed.

The limits in subparagraph (B) approximate the current 50-page limit and compliance with them is easy even for a person without a personal computer. The aim of these provisions is to create a level playing field. The rule gives every party an equal opportunity to make arguments, without permitting those with the best in-house typesetting an opportunity to expand their submissions.

The length can be determined either by counting words or lines. That is, the length of a brief is determined not by the number of pages but by the number of words or lines in the brief. 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 word counting method can be used with any typeface.

A monospaced brief can meet the volume limitation by using the word or a line count. If the line counting method is used, the number of lines may not exceed 1,300 — 26 lines per page in a 50 page brief. The number of lines is easily counted manually. Line counting is not sufficient if a proportionally spaced typeface is used, because the amount of material per line can vary widely.

A brief using the type-volume limitations in subparagraph (B) must include a certificate by the attorney, or party proceeding pro se, that the brief complies with the limitation. The rule permits the person preparing the certification to rely upon the word or line count of the word-processing system used to prepare the brief.

Currently, Rule 28(g) governs the length of a brief. Rule 28(g) begins with the words "[e]xcept by permission of the court," signalling that a party may file a motion to exceed the limits established in the rule. The absence of similar language in Rule 32 does not mean that the Advisory Committee intends to prohibit motions to deviate from the requirements of the rule. The Advisory Committee does not believe that any such language is needed to authorize such a motion.

Subdivision (b). Form of an Appendix.

The provisions governing the form of a brief generally apply to an appendix. The rule recognizes, however, that an appendix is usually produced by photocopying existing documents. The rule requires that the photocopies be legible.

The rule permits inclusion not only of documents from the record but also copies of a printed judicial or agency decision. If a decision that is part of the record in the case has been published, it is helpful to provide a copy of the published decision in place of a copy of the decision from the record.

Subdivision (c). Form of Other Papers.

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 petition for rehearing en banc and a response to either a petition for panel rehearing or a petition for rehearing en banc be prepared in the same manner. But the length limitations of paragraph (a)(7) do not apply to those documents and a cover is not required if all the information

needed by the court to properly identify the document and the parties is included in the caption or signature page.

Existing subdivision (b) states that other papers may be produced in like manner, or "they may be typewritten upon opaque, unglazed paper 8½ by 11 inches in size." The quoted language is deleted but that method of preparing documents is not eliminated because (a)(5)(B) permits use of standard pica type. The only change is that the new rule now specifies margins for typewritten documents.

Subdivision (d). Local Variation.

A brief that complies with the national rule should be acceptable in every court. Local rules may move in one direction only; they may authorize noncompliance with certain of the national norms. For example, a court that wishes to do so may authorize printing of briefs on both sides of the paper, or the use of smaller type size or sans-serif proportional type. A local rule may not, however, impose requirements that are not in the national rule.

Rule 33. Appeal Conferences	Rule 33. Appeal Conferences
The court may direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, attorneys must consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an order controlling the course of the proceedings or implementing any settlement agreement.	The court may direct the attorneys — and, when appropriate, the parties — to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 34. Oral argument	Rule 34. Oral Argument
(a) In general; local rule. — Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard: Oral argument will be allowed unless (1) the appeal is frivolous; or (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.	**(a) In General.** (1) **Party's Statement.** Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted. (2) **Standards.** Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons: (A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.
(b) Notice of argument; postponement. — The clerk shall advise all parties whether oral argument is to be heard, and if so, of the time and place therefor, and the time to be allowed each side. A request for postponement of the argument or for allowance of additional time must be made by motion filed reasonably in advance of the date fixed for hearing.	**(b) Notice of Argument; Postponement.** The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.
(c) Order and Content of Argument.- The appellant is entitled to open and conclude the argument. Counsel may not read at length from briefs, records, or authorities.	**(c) Order and Contents of Argument.** The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

(d) Cross and separate appeals. — A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the court otherwise directs. If a case involves a cross appeal, 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 purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.	**(d) Cross-Appeals and Separate Appeals.** If there is a cross-appeal, Rule 28(h) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.
(e) Non-appearance of parties. — If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.	**(e) Nonappearance of a Party.** If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.
(f) Submission on briefs. — By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.	**(f) Submission on Briefs.** The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.
(g) Use of physical exhibits at argument; removal. — If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the court room before the court convenes on the date of the argument. After the argument counsel shall cause the exhibits to be removed from the court room unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.	**(g) Use of Physical Exhibits at Argument; Removal.** Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. Substantive changes are recommended in subdivision (a).

Subdivision (a). Currently subdivision (a) says that oral argument must be permitted unless, applying a local rule, a panel of three judges unanimously agrees that oral argument is not necessary. Rule 34 then outlines the criteria to be used to determine whether oral argument is needed and requires any local rule to "conform substantially" to the "minimum standard[s]" established in the national rule. The amendments omit the local rule requirement and make the criteria applicable by force of the national rule. The local rule is an unnecessary instrument.

Paragraph (a)(2) states that one reason for deciding that oral argument is unnecessary is that the dispositive issue has been authoritatively decided. The amended language no longer states that the issue must have been "recently" decided. The Advisory Committee does not intend any substantive change, but thinks that the use of "recently" may be misleading.

Subdivision (d). A cross-reference to Rule 28(h) has been substituted for a reiteration of the provisions of Rule 28(h).

Rule 35. Determination of Causes by the Court in Banc	**Rule 35. En Banc Determination**
(a) When hearing or rehearing in banc will be ordered. — A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.	**(a) When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance.

(b) Suggestion of a party for hearing or rehearing in banc. — A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.	**(b) Petition for Hearing or Rehearing En Banc.** A party may petition for a hearing or rehearing en banc. (1) The petition must begin with a statement that either: (A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of every other United States Court of Appeals that has addressed the issue. (2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32. (3) For purposes of the page limit in rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

(c) Time for suggestion of a party for hearing or rehearing in banc; suggestion does not stay mandate. — If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such a petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.	**(c) Time to Petition for Hearing or Rehearing En Banc.** A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.
(d) Number of Copies. — The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.	**(d) Number of Copies.** The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case. **(e) Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response. **(f) Call for a Vote.** A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Several substantive changes are recommended in this rule, however.

One of the purposes of the substantive amendments is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and delay the running of the period for filing a petition for writ of certiorari. Companion amendments are made to Rule 41.

Subdivision (a). The title of this subdivision is changed from "When hearing or rehearing in banc will be ordered" to "When Hearing or Rehearing En Banc May Be Ordered." The change emphasizes the discretion a court has with regard to granting en banc review.

Subdivision (b). The term "petition" for rehearing en banc is substituted for the term "suggestion" for rehearing en banc. The terminology change reflects the Committee's intent to treat similarly a petition for panel rehearing and a request for a rehearing en banc. The terminology change also delays the running of the time for filing a petition for a writ of certiorari because Sup. Ct. R. 13.3 says:

> if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties. . .runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment.

The amendments also require each petition for en banc consideration to begin with a statement concisely demonstrating that the case meets the usual criteria for en banc consideration. It is the Committee's hope that requiring such a statement will cause the drafter of a petition to focus on the narrow grounds that support en banc consideration and to realize that a petition should not be filed unless the case meets those rigid standards.

Intercircuit conflict is cited as one reason for asserting that a proceeding involves a question of "exceptional importance." Intercircuit conflicts create problems. When the circuits construe the same federal law differently, parties' rights and duties depend upon where a case is litigated. Given the increase in the number of cases decided by the federal courts and the limitation on the number of cases the Supreme Court can hear, conflicts between the circuits may remain unresolved by the Supreme Court for an extended period of time. The existence of an intercircuit conflict often generates additional litigation in the other circuits as well as in the circuits that are already in conflict. Although an en banc proceeding will not necessarily prevent intercircuit conflicts, an en banc proceeding provides a safeguard against unnecessary intercircuit conflicts.

Some circuits have had rules or internal operating procedures that recognize a conflict with another circuit as a legitimate basis for granting a rehearing en banc. An intercircuit conflict may present a question of "exceptional importance" because of the costs that intercircuit conflicts impose on the system as a whole, in addition to the significance of the issues involved. It is not, however, the Committee's intent to make the granting of a hearing or rehearing en banc mandatory whenever there is an intercircuit conflict.

The amendment states that "a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other United States Court of Appeals that has addressed the issue." That language contemplates two situations in which a rehearing en banc may be appropriate. The first is when a panel decision creates a conflict. A panel decision creates a conflict when it conflicts with the decisions of all other circuits that have considered the issue. If a panel decision simply joins one side of an already existing conflict, a rehearing en banc may not be as important because it cannot avoid the conflict. The second situation that may be a strong candidate for a rehearing en banc is one in which the circuit persists in a conflict created by a pre-existing decision of the same circuit and no other circuits have joined on that side of the conflict. The amendment states that the conflict must be with an "authoritative" decision of another circuit. "Authoritative" is used rather than "published" because in some circuits unpublished opinions may be treated as authoritative.

Counsel are reminded that their duty is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of subdivision (a) of this rule and even then the granting of a petition is entirely within the court's discretion.

Paragraph (2) of this subdivision establishes a maximum length for a petition. Fifteen pages is the length currently used in several circuits. Each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. The extraordinary nature of the issue or the threat to uniformity of the court's decision can be established in most cases in less than fifteen pages. A court may shorten the maximum length on a case by case basis but the rule does not permit a circuit to shorten the length by local rule. The Committee has retained page limits rather than using word or line counts similar to those in amended Rule 32 because there has not been a serious enough problem to justify importing the word and line-count and typeface requirements that are applicable to briefs into other contexts.

Paragraph (3), although similar to (2), is separate because it deals with those instances in which a party files both a petition for rehearing en banc under this rule and a petition for panel rehearing under Rule 40.

To improve the clarity of the rule, the material dealing with filing a response to a petition and with voting on a petition have been moved to new subdivisions (e) and (f).

Subdivision (c). Two changes are made in this subdivision. First, the sentence stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate is deleted. Second, the language permitting a party to include a request for rehearing en banc in a petition for panel rehearing is deleted. The Committee believes that those circuits that want to require two separate documents should have the option to do so.

Subdivision (e). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b). The only changes are stylistic; no substantive changes are intended.

Subdivision (f). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b).

Because of the discretionary nature of the en banc procedure, the filing of a suggestion for rehearing en banc has not required a vote; a vote is taken only when requested by a judge. It is not the Committee's intent to change the discretionary nature of the procedure or to require a vote on a petition for rehearing en banc. The rule continues, therefore, to provide that a court is not obligated to vote on such petitions. It is necessary, however, that each court develop a procedure for disposing of such petitions because they will suspend the finality of the court's judgment and toll the time for filing a petition for certiorari.

Former subdivision (b) contained language directing the clerk to distribute a "suggestion" to certain judges and indicating which judges may call for a vote. New subdivision (f) does not address those issues because they deal with internal court procedures.

Special Note. To avoid confusion, the Advisory Committee urges the Supreme Court to amend its Rule 13.3 by deleting the last sentence.

Rule 36. Entry of judgments	Rule 36. Entry of Judgment; Notice
The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.	**(a) Entry.** A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment: (1) after receiving the court's opinion — but if settlement of the judgment's form is required, after final settlement; or (2) if a judgment is rendered without an opinion, as the court instructs. **(b) Notice.** On the date when judgment is entered, the clerk must mail to all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 37. Interest on judgments	Rule 37. Interest on Judgment
Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.	(a) **When the Court Affirms.** Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered. (b) **When the Court Reverses.** If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 38. Damages and Costs for Frivolous Appeals	Rule 38. Frivolous Appeal — Damages and Costs
If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.	If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Committee Note

Only the caption of this rule has been amended. The changes are intended to be stylistic only.

Rule 39. Costs	Rule 39. Costs
(a) To whom allowed. — Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.	**(a) Against Whom Assessed.** The following rules apply unless the law provides or the court orders otherwise: (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise; (2) if a judgment is affirmed, costs are taxed against the appellant; (3) if a judgment is reversed, costs are taxed against the appellee; (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.
(b) Costs for and against the United States. — In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.	**(b) Costs For and Against the United States.** Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(c) Costs of briefs, appendices, and copies of records. — By local rule the court of appeals shall fix the maximum rate at which the cost of printing or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable. Such rate shall not be higher than that generally charged for such work in the area where the clerk's office is located and shall encourage the use of economical methods of printing and copying.	(c) **Costs of Copies.** Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.
(d) Bill of costs; objections; costs to be inserted in mandate or added later. — A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which the party shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.	(d) **Bill of Costs: Objections; Insertion in Mandate.** (1) A party who wants costs taxed must — within 14 days after entry of judgment — file with the circuit clerk, with proof of service, an itemized and verified bill of costs. (2) Objections must be filed within 10 days after service of the bill of costs, unless the court extends the time. (3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must — upon the circuit clerk's request — add the statement of costs, or any amendment of it, to the mandate.

(e) Costs on appeal taxable in the district courts. — Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.	**(e) Costs on Appeal Taxable in the District Court.** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule: (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. All references to the cost of "printing" have been deleted from subdivision (c) because commercial printing is so rarely used for preparation of documents filed with a court of appeals.

Rule 40. Petition for Rehearing	Rule 40. Petition for Panel Rehearing
(a) Time for Filing; Content; Answer; Action by Court if Granted. — A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. However, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. The petition must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted.	**(a) Time to File; Contents; Answer; Action by the Court if Granted.** (1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time. (2) **Contents.** The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.
No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.	(3) **Answer.** Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request. (4) **Action by the Court.** If a petition for panel rehearing is granted, the court may do any of the following: (A) make a final disposition of the case without reargument; (B) restore the case to the calendar for reargument or resubmission; or (C) issue any other appropriate order.

(b) Form of petition; length. — The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.	**(b) Form of Petition; Length.** The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 41. Issuance of Mandate; Stay of Mandate	**Rule 41. Mandate: Contents; Issuance and Effective Date; Stay**
(a) Date of Issuance. — The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate must issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.	**(a) Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs. **(b) When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time. **(c) Effective Date.** The mandate is effective when issued.

(b) Stay of Mandate Pending Petition for Certiorari. — A party who files a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay cannot exceed 30 days unless the period is extended for cause shown or unless during the period of the stay, a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ, in which case the stay will continue until final disposition by the Supreme Court. The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. The court may require a bond or other security as a condition to the grant or continuance of a stay of the mandate.	**(d) Staying the Mandate.** (1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise. (2) **Pending Petition for Certiorari.** (A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay. (B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition. (C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate. (D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Several substantive changes are recommended in this rule, however.

Subdivision (b). The existing rule provides that the mandate issues 7 days after the time to file a petition for panel rehearing expires unless such a petition is timely filed. If the petition is denied, the mandate issues 7 days after entry of the order denying the petition. Those provisions are retained but the amendments further provide that if a timely petition for rehearing en banc or motion for stay of mandate is filed, the mandate does not issue until 7 days after entry of an order denying the last of all such requests. If a petition for rehearing or a petition for rehearing en banc is granted, the court enters a new judgment after the rehearing and the mandate issues within the normal time after entry of that judgment.

Subdivision (c). Subdivision (c) is new. It provides that the mandate is effective when the court issues it. A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed. This amendment is intended to make it clear that the mandate is effective upon issuance and that its effectiveness is not delayed until receipt of the mandate by the trial court or agency, or until the trial court or agency acts upon it. This amendment is consistent with the current understanding. Unless the court orders that the mandate issue earlier than provided in the rule, the parties can easily calculate the anticipated date of issuance and verify issuance with the clerk's office. In those instances in which the court orders earlier issuance of the mandate, the entry of the order on the docket alerts the parties to that fact.

Subdivision (d). Amended paragraph (1) provides that the filing of a petition for panel rehearing, a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari stays the issuance of the mandate until the court disposes of the petition or motion. The provision that a petition for rehearing en banc stays the mandate is a companion to the amendment of Rule 35 that deletes the language stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate. The Committee's objective is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and delay the running of the period for filing a petition for writ of certiorari. Because the filing of a petition for rehearing en banc will stay the mandate, a court of appeals will need to take final action on the petition but the procedure for doing so is left to local practice.

Paragraph (1) also provides that the filing of a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari stays the mandate until the court disposes of the motion. If the court denies the motion, the court must issue the mandate 7 days after entering the order denying the motion. If the court grants the motion, the mandate is stayed according to the terms of the order granting the stay. Delaying issuance of the mandate eliminates the need to recall the mandate if the motion for a stay is granted. If, however, the court believes that it would be inappropriate to delay issuance of the mandate until disposition of the motion for a stay, the court may order that the mandate issue immediately.

Paragraph (2). The amendment changes the maximum period for a stay of mandate, absent the court of appeals granting an extension for cause, to 90 days. The presumptive 30-day period was adopted when a party had to file a petition for a writ of certiorari in criminal cases within 30 days after entry of judgment. Supreme Court Rule 13.1 now provides that a party has 90 days after entry of judgment by a court of appeals to file a petition for a writ of certiorari whether the case is civil or criminal.

The amendment does not require a court of appeals to grant a stay of mandate that is coextensive with the period granted for filing a petition for a writ of certiorari. The granting of a stay and the length of the stay remain within the discretion of the court of appeals. The amendment means only that a 90-day stay may be granted without a need to show cause for a stay longer than 30 days.

Subparagraph (C) is not new; it has been moved from the end of the rule to this position.

Rule 42. Voluntary dismissal	Rule 42. Voluntary Dismissal
(a) Dismissal in the district court. — If an appeal has not been docketed, the appeal may be dismissed by the district court upon the filing in that court of a stipulation for dismissal signed by all the parties, or upon motion and notice by the appellant.	**(a) Dismissal in the District Court.** Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.
(b) Dismissal in the court of appeals. — If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.	**(b) Dismissal in the Court of Appeals.** The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 43. Substitution of parties	Rule 43. Substitution of Parties
(a) Death of a party. — If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.	**(a) Death of a Party.** (1) **After Notice of Appeal Is Filed.** If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Rule 25. If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings. (2) **Before Notice of Appeal Is Filed — Potential Appellant.** If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative — or, if there is no personal representative, the decedent's attorney of record — may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).
If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or, if there is no personal representative by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.	(3) **Before Notice of Appeal Filed — Potential Appellee.** If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).
(b) Substitution for other causes. — If substitution of a party in the court of appeals is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).	**(b) Substitution for a Reason Other Than Death.** If a party needs to be substituted for any reason other than death, the procedure prescribed in Rule 43(a) applies.

(c) Public officers; death or separation from office. — (1) When a public officer is a party to an appeal or other proceeding in the court of appeals in an official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and the public officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution. (2) When a public officer is a party to an appeal or other proceeding in an official capacity that public officer may be described as a party by the public officer's official title rather than by name; but the court may require the public officer's name to be added.	**(c) Public Officer: Identification; Substitution.** (1) **Identification of Party.** A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added. (2) **Automatic Substitution of Officeholder.** When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 44. Cases involving constitutional questions where United States is not a party	Rule 44. Case Involving a Constitutional Question When the United States Is Not a Party
It shall be the duty of a party who draws in question the constitutionality of any Act of Congress in any proceeding in a court of appeals to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the court of appeals, to give immediate notice in writing to the court of the existence of said question. The clerk shall thereupon certify such fact to the Attorney General.	If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 44. Cases involving constitutional questions where United States is not a party	Rule 44. Case Involving a Constitutional Question When the United States Is Not a Party
It shall be the duty of a party who draws in question the constitutionality of any Act of Congress in any proceeding in a court of appeals to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the court of appeals, to give immediate notice in writing to the court of the existence of said question. The clerk shall thereupon certify such fact to the Attorney General.	If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 45. Duties of clerks	Rule 45. Clerk's Duties
(a) General provisions. — The clerk of a court of appeals shall take the oath and give the bond required by law. Neither the clerk nor any deputy clerk shall practice as an attorney or counselor in any court while continuing in office. The court of appeals shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The office of the clerk with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that the office of its clerk shall be open for specified hours on Saturdays or on particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.	**(a) General Provisions.** (1) **Qualifications.** The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office. (2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

(b) The docket; calendar; other records required. — The clerk shall maintain a docket in such form as may be prescribed by the Director of the Administrative Office of the United States Courts. The clerk shall enter a record of all papers filed with the clerk and all process, orders and judgments. An index of cases contained in the docket shall be maintained as prescribed by the Director of the Administrative Office of the United States Courts. The clerk shall prepare, under the direction of the court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law. The clerk shall keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, or as may be required by the court.	**(b) Records.** (1) **The Docket.** The circuit clerk must maintain a docket and an index of all docketed cases in the manner prescribed by the Director of the Administrative Office of the United States Courts. The clerk must record all papers filed with the clerk and all process, orders, and judgments. (2) **Calendar.** Under the court's direction, the clerk must prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk must give preference to appeals in criminal cases and to other proceedings and appeals entitled to preference by law. (3) **Other Records.** The clerk must keep other books and records required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, or by the court.
(c) Notice of orders or judgments. — Immediately upon the entry of an order or judgment the clerk shall serve a notice of entry by mail upon each party to the proceeding together with a copy of any opinion respecting the order or judgment, and shall make a note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel.	**(c) Notice of an Order or Judgment.** Upon the entry of an order or judgment, the circuit clerk must immediately serve by mail a notice of entry on each party to the proceeding, with a copy of any opinion, and must note the mailing on the docket. Service on a party represented by counsel must be made on counsel.
(d) Custody of records and papers. — The clerk shall have custody of the records and papers of the court. The clerk shall not permit any original record or paper to be taken from the clerk's custody except as authorized by the orders or instructions of the court. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were received. The clerk shall preserve copies of briefs and appendices and other printed papers filed.	**(d) Custody of Records and Papers.** The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, original papers constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 46. Attorneys	Rule 46. Attorneys
(a) Admission to the bar of a court of appeals; eligibility; procedure for admission. — An attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district courts for the Canal Zone, Guam and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals. An applicant shall file with the clerk of the court of appeals, on a form approved by the court and furnished by the clerk, an application for admission containing the applicant's personal statement showing eligibility for membership. At the foot of the application the applicant shall take and subscribe to the following oath or affirmation: I, _____, do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States. Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. An applicant may be admitted by oral motion in open court, but it is not necessary that the applicant appear before the court for the purpose of being admitted, unless the court shall otherwise order. An applicant shall upon admission pay to the clerk the fee prescribed by rule or order of the court.	**(a) Admission to the Bar.** (1) **Eligibility.** An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

	(2) **Application.** An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation: "I, _____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States." (3) **Admission Procedures.** On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) Suspension or disbarment. — When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.	**(b) Suspension or Disbarment.** (1) **Standard.** A member of the court's bar is subject to suspension or disbarment by the court if the member: (A) has been suspended or disbarred from practice in any other court; or (B) is guilty of conduct unbecoming a member of the court's bar. (2) **Procedure.** The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred. (3) **Order.** The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.
(c) Disciplinary power of the court over attorneys. — A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.	**(c) Discipline.** A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 47. Rules of a Court of Appeals	Rule 47. Local Rules by Courts of Appeals
(a) Local Rules. (1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to a party or a lawyer regarding practice before a court shall be in a local rule rather than an internal operating procedure or standing order. A local rule shall be consistent with -- but not duplicative of -- Acts of Congress and rules adopted under 28 U.S.C. § 2072 and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. The clerk of each court of appeals shall 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. (2) A local rule imposing a requirement of form shall 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. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.	**(a) Local Rules.** (1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers 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 consistent with — but not duplicative of — Acts of Congress and 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. Each circuit clerk 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. (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. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Committee Note

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 48. Masters.	**Rule 48. Masters**
A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, a master shall have power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order including, but not limited to, requiring the production of evidence upon all matters embraced in the reference and putting witnesses and parties on oath and examining them. If the master is not a judge or court employee, the court shall determine the master's compensation and whether the cost will be charged to any of the parties.	**(a) Appointment; Powers.** A court of appeals may appoint a special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, those powers include, but are not limited to, the following: (1) regulating all aspects of a hearing; (2) taking all appropriate action for the efficient performance of the master's duties under the order; (3) requiring the production of evidence on all matters embraced in the reference; and (4) administering oaths and examining witnesses and parties. **(b) Compensation.** If the master is not a judge or court employee, the court must determine the master's compensation and whether the cost is to be charged to any party.

Committee Note

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Form 4

Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

United States District Court for the _____ District of _____

A.B., Plaintiff

v. Case No. _____

C.D., Defendant

Affidavit in Support of Motion	**Instructions**
I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C § 1621.)	Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.
Signed: _____	Date: _____

My issues on appeal are:

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	**Spouse**	**You**	**Spouse**
Employment	$_____	$_____	$_____	$_____
Self-employment	$_____	$_____	$_____	$_____
Income from real property (such as rental income)	$_____	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____	$_____
Gifts	$_____	$_____	$_____	$_____
Alimony	$_____	$_____	$_____	$_____
Child support	$_____	$_____	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____	$_____	$_____
Disability (such as social security, insurance payments)	$_____	$_____	$_____	$_____
Unemployment payments	$_____	$_____	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____	$_____	$_____
Other (specify):_____	$_____	$_____	$_____	$_____
Total monthly income:	$_____	$_____	$_____	$_____

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay

4. *How much cash do you and your spouse have?* $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
		$_____	$_____
		$_____	$_____
		$_____	$_____

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. *List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.*

Home (Value)	**Other real estate** (Value)	**Motor vehicle #1** (Value)
		Make & year:
		Model:
		Registration #:

Motor vehicle #2 (Value)	**Other assets** (Value)	**Other assets** (Value)
Make & year:		
Model:		
Registration #:		

6. *State every person, business, or organization owing you or your spouse money, and the amount owed.*

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse

7. *State the persons who rely on you or your spouse for support.*

Name	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. *Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.*

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real-estate taxes included? ☐Yes ☐No Is property insurance included? ☐Yes ☐No	$_____	$_____
Utilities (electricity, heating fuel, water, sewer, and telephone)	$_____	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$_____	$_____
Clothing	$_____	$_____
Laundry and dry-cleaning	$_____	$_____
Medical and dental expenses	$_____	$_____
Transportation (not including motor vehicle payments)	$_____	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____
Insurance (not deducted from wages or included in mortgage payments)	$_____	$_____
Homeowner's or renter's	$_____	$_____
Life	$_____	$_____
Health	$_____	$_____
Motor Vehicle	$_____	$_____
Other: _____	$_____	$_____
Taxes (not deducted from wages or included in mortgage payments) (specify): _____	$_____	$_____
Installment payments	$_____	$_____
Motor Vehicle	$_____	$_____
Credit card (name): _____	$_____	$_____
Department store (name): _____	$_____	$_____
Other: _____	$_____	$_____
Alimony, maintenance, and support paid to others	$_____	$_____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$_____	$_____
Other (specify): _____	$_____	$_____
Total monthly expenses:	$_____	$_____

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*
   ☐Yes ☐No If yes, describe on an attached sheet.

10. *Have you paid — or will you be paying — an attorney any money for services in connection with this case, including the completion of this form?* ☐Yes ☐No

    If yes, how much? $_____

    If yes, state the attorney's name, address, and telephone number:

    _____

    _____

    _____

11. *Have you paid — or will you be paying — anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?*
    ☐Yes ☐No

    If yes, how much? $_____

    If yes, state the person's name, address, and telephone number:

    _____

    _____

    _____

12. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

13. *State the address of your legal residence.*

    _____

    _____

    Your daytime phone number: (____) _____

    Your age: _____ Your years of schooling: _____

    Your social-security number: _____

for the past 2 years

2. *List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay

for the past 2 years

3. *List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay

4. *How much cash do you and your spouse have?* $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
		$_____	$_____
		$_____	$_____
		$_____	$_____

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

Seeking to appeal a judgment in a civil action or proceeding

5. *List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.*

Home	(Value)	Other real estate	(Value)	Motor vehicle #1	(Value)
				Make & year:	
				Model:	
				Registration #:	

Motor vehicle #2	(Value)	Other assets	(Value)	Other assets	(Value)
Make & year:					
Model:					
Registration #:					

6. *State every person, business, or organization owing you or your spouse money, and the amount owed.*

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse