EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

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FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 4, 26, 27, 28, 32, 34, 35, 45, and new Rules 28.1 and 32.1 with a recommendation that they be approved and transmitted to the Judicial Conference.[*] The advisory committee accumulated the proposed amendments over several years, so that they could be addressed at one time. The proposals were published for comment in August 2003. More than 500 comments were submitted on the proposed amendments and new rules. Most of the comments were made by judges and lawyers in the Ninth Circuit and were directed at proposed new Rule 32.1. Fifteen witnesses testified at a public hearing on the proposed amendments held in Washington, D.C.

The proposed amendment to Rule 4 clarifies when a district court may reopen the time to file an appeal. Under the amendment, if notice under Civil Rule 77(d) is not received within 21 days after entry of the judgment or order, a party may file a motion to reopen the time to appeal: (1) within 180 days after judgment or order is entered, or (2) within seven days after the party receives notice under Civil Rule 77(d), whichever is earlier. The amendment eliminates the ambiguity that arose from revisions of the rule made as part of the 1998 comprehensive restyling project. The amendment also requires formal notice under Civil Rule 77(d), resolving a circuit split over the type of notice that must be received to trigger the prescribed seven-day period.

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[*]The Committee on Rules of Practice and Procedure returned proposed Rule 32.1 to the advisory committee for further study.

The proposed amendments to Rules 26 and 45 correct the references to President George Washington's Birthday.

Under the proposed amendments to Rule 27, the typeface and type-style requirements governing briefs and other papers under Rule 32 are made applicable to motions. The amendments promote uniformity and prevent potential abuses involving the use of small type-size print to circumvent the rule's page limitations.

Proposed new Rule 28.1 establishes comprehensive procedures for cross-appeals based on the existing requirements governing briefs not involving cross-appeals and the practices of the large majority of circuits. In accordance with most circuit rules, the proposed national rule recognizes the filing of four types of briefs in a case involving a cross-appeal, *i.e.*, the "appellant's principal brief," "appellee's principal and response brief," "appellant's response and reply brief," and "appellee's reply brief." The rule limits the length of each type of brief again consistent with the practices of most circuits. The limits on the "appellee's principal and response brief" are 2,500 words longer than the typical principal brief in recognition that the brief serves not only as a principal brief on the merits of the cross-appeal, but also as the response brief on the merits of the appeal. Cross-appeal provisions contained in Rules 28, 31, and 32 are transferred to the new rule, and conforming cross-references to the new rule are added in Rules 32 and 34.

The proposed amendments to Rule 35(a) resolve an inter-circuit conflict regarding the make-up of the vote for a hearing or a rehearing en banc. Present Rule 35(a) and 28 U.S.C. § 46(c) both require a vote of a "majority of the circuit judges who are in regular active service" to hear a case en banc. In determining whether a disqualified, recused, or otherwise unavailable judge is included when calculating the majority of judges, courts of appeals have interpreted

differently the meaning of "majority" and have adopted different counting methods based on their interpretation of what constitutes a "majority" in their local rules.

In 1973, the Judicial Conference proposed an amendment to section 46(c) that would have established a uniform standard by excluding disqualified judges when determining a majority (JCUS-SEP 73, p. 47). In 1984, the Conference rescinded the 1973 proposal and recommended that each court of appeals clearly describe its counting method without advocating any specific method (JCUS-SEP 84, pp. 55-56). In 1988, the American Bar Association approved a resolution supporting an amendment to Rule 35(a) that would exclude disqualified judges from the "majority."

The advisory committee was prompted to revisit the issue by a decision of the Eleventh Circuit Court of Appeals in *Gulf Power Co. v. Federal Communications Commission*, 226 F.3d 1220 (11th Cir. 2000), in which a petition for an en banc hearing was denied even though six of the seven judges actually voting favored an en banc hearing. In addition, the Judicial Improvements Act of 2002 (H.R. 3892, 107th Cong., 2d Sess.) included an amendment to section 46(c), specifying the exclusion of recused judges from the "majority." But at the request of the Judicial Conference, Congress decided not to go forward with the amendment in deference to the advisory committee's consideration of the issue under the Rules Enabling Act.

In 2002, the advisory committee surveyed the counting method practices of the courts of appeals. It found the courts nearly evenly split between those that adopted an "absolute majority" counting method, in which disqualified judges were included in determining a majority, and those that adopted a "case-majority" counting method, in which disqualified judges were excluded in determining a majority.

The proposed amendments adopt the case majority approach and make clear that disqualified judges are not counted in the "base" in calculating whether a "majority" of the

circuit judges have voted in favor of an en banc hearing. For example, in a case in which five of a circuit's twelve active judges are disqualified, only four judges (a majority of the seven non-disqualified judges) must vote to hear a case en banc. Consistent with the majority quorum requirements of 28 U.S.C. § 46(d), the total number of non-recused judges voting on the en banc petition must be a majority of the active judges in all cases.

The advisory committee concluded that the "case majority" method of counting votes represents the best interpretation of the phrase "a majority of the circuit judges ... in regular active service" that appears in both Rule 35(a) and 28 U.S.C. § 46(c). The latter provision not only prescribes that "a majority of the circuit judges ... in regular active service" may vote to rehear a case en banc, but it also provides that when a case is heard en banc, the en banc court "shall consist of all circuit judges in regular active service." Because recused judges obviously cannot participate in the rehearing, the latter reference to "all circuit judges in regular active service" cannot include recused judges. The advisory committee believes that this same phrase, as it appears in the portion of
28 U.S.C. § 46(c) governing a vote to rehear a case en banc, should be given the same interpretation.

The advisory committee also believes that the case majority method is more appropriate than the "absolute majority" method, because under the absolute majority method a recused judge is treated for practical purposes as affirmatively voting against the en banc hearing petition. In certain cases, a recused judge's passive "negative vote" might prevent a rehearing, thereby leaving the underlying judgment intact and eliminating the possibility that the judgment might be overturned by an en banc court. The result seems inconsistent with the purpose of the rule and underlying statute to prevent a disqualified judge from having any effect on the outcome of a particular case. The result also seems unfair to the parties in the particular case that cannot

be heard en banc because of recusals. The advisory committee is aware of an instance in which recusals blocked en banc review of a death penalty case, even though a majority of the nonrecused judges wanted to hear the case en banc.

Several commenters expressed concern that adopting a case majority counting method might increase the number of en banc hearings. The advisory committee found no indication, however, that the courts of appeals following the case majority method have experienced an increased number of en banc hearings. As a practical matter, the number of en banc hearings is regulated by the members of a court through their votes, and the members of a court can control the number of hearings under any counting method. The advisory committee also considered concerns that the case majority approach could lead to en banc determinations by less than a majority of the judges, establishing precedent not fully endorsed by a majority of the court. But the same possibility arises under the court majority rule in even more extreme form; when many judges are recused, the court majority rule makes the panel opinion unreviewable en banc — hence it becomes the law of the circuit, even though subscribed to by as few as two judges. In either event, the full court is not prevented from reconsidering the precedent in a later case.

The advisory committee concluded that there is no justification for treating similarly situated litigants differently among the courts of appeals. The rule should be interpreted and applied uniformly throughout the nation. The advisory committee concluded that the case majority method is the fairer method and interpretation of section 46(c) and Rule 35(a), and it should be adopted uniformly.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 4, 26, 27, 28, 32, 34, 35, 45, and new Rule 28.1 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Appellate Procedure are in Appendix A with an excerpt from the advisory committee report.

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