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

JOSEPH F WEIS JR
CHAIRMAN

JAMES E MACKLIN JR
SECRETARY

June 15, 1990

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TO THE CHAIRMAN, MEMBERS AND REPORTER OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, CHAIRMAN AND MEMBERS OF THE APPELLATE RULES COMMITTEE, AND TO THE CHAIRMEN, AND REPORTERS OF THE ADVISORY COMMITTEES

Enclosed is the Report of the Advisory Committee on Appellate Rules for the meeting of the Standing Committee on July 12-13, 1990. Also enclosed with the Report are the minutes of the meeting of the Appellate Committee held on October 26, 1989.

The meeting will be held at the Holiday Inn Old Towne, 480 King Street, Alexandria, Virginia, commencing at 9:00 a.m. each day.

I look forward to seeing you there.

James E. Macklin, Jr.
AB

James E. Macklin, Jr.
Secretary

Enclosure

cc: Assistant Dean Carol Ann Mooney

TO: Honorable Joseph F. Weis, Jr. Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Jon O. Newman, Chair
Advisory Committee on Appellate Rules

SUBJECT: Responses to publication in September 1989 of the preliminary draft of proposed amendments to the Federal Rules of Appellate Procedure, and request to correct typographical errors in two other rules.

DATE: June 15, 1990

The following documents are attached: (1) a summary of the written comments received during the public comment period for proposed amendments to Fed. R. App. P. 4(a), 28(a), (b), and (h), 30(b), and 34(d); (2) Rules 28(a), (b), and (h), 30(b) and 34(d) as revised in light of the public comments; and (3) new proposals to correct typographical errors in Fed. R. App. P. 10(c) and 26.1.

The Advisory Committee on Appellate Rules asks that the Standing Committee delay action on the proposed amendment to Fed. R. App. P. 4(a), allowing time for the Advisory Committee to reconsider the amendment in light of the comments received from the public, some of which expressed strong opposition to the proposal. The Advisory Committee requests that the Standing Committee approve the amendments to Fed. R. App. P. 28(a), (b), and (h), 30(b), and 34(d) and forward those rules to the Judicial Conference. In addition, the Advisory Committee requests that the Standing Committee approve corrections to typographical errors in the caption to Fed. R. App. P. 10(c) and in the text of Rule 26.1 and forward those corrections to the Judicial Conference without prior publication and comment.

With regard to Rules 28(a), (b), and (h), 30(b), and 34(d), the Advisory Committee considered all communications received from interested individuals and groups who responded to the Committee's request for comment. Correction of typographical errors, changes in punctuation, and changes in language for clarification have been made.

The changes made by the Advisory Committee subsequent to the original publication of the rules in September 1989 are:

Rule 28(a)(2) A statement of subject matter and appellate jurisdiction.

The typographical error on line 6 has been corrected so that the parenthetical reads as follows: "(ii)". On line 11 "(a)" has been inserted before the word shall, and on line 13 the word "it" (when published, "it" was incorrectly typed as "if") has been deleted and "(b)" has been inserted in its place before the

word shall. Line 13 now reads as follows: "with respect to all parties or, if not, (b) shall include information".

Rule 28(b) Brief of the appellee.

On line 32, a dash has been inserted between the parenthesis following the number one and the parenthesis preceding the number 5, so that an appellant is required to comply with subdivisions (a)(1)-(5). A comma has been inserted on line 32 following the word jurisdiction. The comma should be underlined, indicating that it is being added to the original text of Fed. R. App. P. 28(b).

Rule 28(h) Briefs in cases involving cross appeals.

On line 38 the word "simultaneously" has been replaced with the following phrase: "on the same day". The first sentence now reads, "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 purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders." In keeping with that change the fifth sentence of the advisory committee note has been changed to say: "If notices of appeal are filed on the same day, the rule follows the old approach of treating the plaintiff below as the appellant."

Rule 30 (b) Determination of contents of appendix; cost of producing.

On line 13 the hyphen has been deleted between the words cross and appeal; this is consistent with treatment elsewhere in the rules. Although not really a change, there is a typographical error in the rule as printed for publication. On line 22 the last word on the line should be "issues".

Rule 34(d) Cross and separate appeals.

On line 5 the word "simultaneously" should be changed to "on the same day". This change conforms to the change made in Rule 28(h).

New Proposals

In addition to the rules that have already been published for comment, the Advisory Committee on Appellate Rules submits three amended rules for approval of the Standing Committee.

The first amendment adds a sentence dealing with electronic filing to Fed. R. App. P. 25(a). The proposal generally follows the language proposed by the Judicial Improvements Committee.

The new sentence permits, but does not require, courts of appeals to adopt local rules that allow filing of papers by electronic means. However, courts of appeals cannot adopt such local rules until the Judicial Conference of the United States authorizes the use of facsimile or other electronic technology in the courts. The language of the proposal differs slightly from that proposed by the Judicial Improvements Committee. The Judicial Improvements Committee suggested that local rules allowing electronic filing could be adopted "provided such means are authorized by regulations promulgated by the Judicial Conference . . . " The Advisory Committee believes i) that the Judicial Conference may wish to establish standards for electronic filing that may be broader than "authorization"; ii) "promulgating regulations" is a term of art that may entail more procedural formalities than are necessary to establish the sort of standards needed here. Therefore, the proposal substitutes the following language for that quoted above: "provided such means are authorized by and are consistent with standards established by the Judicial Conference of the United States."

The other two amendments involve only correction of typographical errors; therefore, the Advisory Committee believes that the changes may be submitted to the Judicial Conference without prior publication.

One amendment changes the second word in the caption of Fed. R. App. P. 10(c) from "on" to "of". The caption should read: "Statement of the evidence or proceedings. . ."

The other amendment deletes the word "body" from the first sentence of the text of Fed. R. App. P. 26.1. The sentence should begin, "Any non-governmental corporate party . . ." not "Any non-governmental corporate body party . . ."

SUMMARY OF COMMENTS ON PROPOSED
ADDITION OF A NEW SUBDIVISION TO FED. R. APP. P. 4(a)

Ten comments were submitted on the proposed amendment of Fed. R. 4(a). Two commentators support the proposal with no further comment. One commentator supports the proposal and suggests that it be extended to Fed. R. App. P. 4(b) and that it be expanded to provide protection for criminal defendants who ask their attorneys to file notices of appeal but whose attorneys fail to do so. One commentator supports the proposal but suggests rewriting the subsection so that it first discusses the conduct of the party seeking to appeal and then sets forth the standard for extending the time. Three commentators make no general comment upon the proposed changes but suggest a ten day extension (as in subsection 4(a)(5)) rather than the 14 day extension in the proposal; they further state that a fourteen day extension is unnecessary because of the way days are counted.[1] Three commentators strongly oppose the amendment primarily because the effect will be to delay the finality of all judgments rendered by federal district courts for a minimum of 180 days.

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[1] These comments apparently disregard the fact that under Fed. R. App. P. 26, weekends and holidays are not counted when the period of time prescribed or allowed is less than 7 days. The commentators appear to have assumed that the computation rule in Fed. R. Civ. P. 6(a) applies to appeals. Fed. R. Civ. P. 6(a) does not count intermediate Saturdays, Sundays, or legal holidays when the period of time prescribed or allowed is less than 11 days.

List of Commentators
Proposed Amendment of Fed. R. App. P. 4(a)

1. Honorable Stephen R. Sady
Chief Deputy Federal Defender for the District of Oregon
615 SW Broadway, Suite 200
Portland, Oregon 97205
November 20, 1989

2. Mr. Alan B. Morrison
Director, Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
December 27, 1989

3. Professor Robert J. Martineau
University of Cincinnati College of Law
Cincinnati, Ohio 45221-0040
January 18, 1990

4. Honorable J. Frederick Motz
United States District Judge
101 West Lombard Street
Baltimore, Maryland 21201
January 25, 1990

5. Robert Q. Whitwell, Esquire
Post Office Drawer 886
Oxford, Mississippi 38655
March 2, 1990

6. Ernest Lane III, Esquire
Post Office Box 1854
Greenville, Mississippi 38702-1854
March 9, 1990

7. Honorable Mike Moore
Attorney General, State of Mississippi
Post Office Box 220
Jackson, Mississippi 39205-0220
March 13, 1990

8. Bonnie Brigance Leadbetter, Esquire
Chair, Federal Courts Committee of the Philadelphia Bar Association
One Reading Center
Philadelphia, Pennsylvania 19107
March 13, 1990

9. Joseph D. Cohen, Esquire
Stoel Rives Boley Jones & Grey
Standard Insurance Center
900 S.W. Fifth Avenue, Suite 2300
Portland Oregon 97204-1268
March 14, 1990

10. Michael E. Tigar, Esquire
Loren Kieve, Esquire
Sidney G. Leech, Esquire
Debevoise & Plimpton
555 13th Street, N.W., Suite 1100 East
Washington, D.C. 20004
March 1990

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 4(a)

Honorable Stephen R. Sady
Chief Deputy Federal Defender for the District of Oregon
615 SW Broadway, Suite 200
Portland, Oregon 97205
November 30, 1989
Supports the proposed amendment and suggests that it be included in Fed. R. App. P. 4(b), and further suggests that the concept be expanded so that district courts can reopen appeal time for criminal defendants whose attorneys fail to file notices of appeal as requested by the defendants.

Mr. Alan B. Morrison
Director, Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
December 27, 1990
Supports the amendment but suggests rewriting it so that the rule first discusses the conduct of the party seeking to appeal and then sets forth the standard for a district court's decision on the motion to extend time.
(Also suggests amending Fed. R. App. P. 3 to eliminate the problem highlighted by Torres v. Oakland Scavenger Co., 108 S.Ct 2405 (1988), in which the Supreme Court held that unless a party is specifically named in a notice of appeal as an appellant, the notice of appeal is not valid as to that party.)

Professor Robert J. Martineau
University of Cincinnati College of Law
Cincinnati, Ohio 45221-0040
January 18, 1990
Opposes the proposed amendment stating that the effect will be to delay for a minimum of 180 days the finality of all judgments rendered by federal district courts. Professor Martineau further notes that the only way a prevailing party can prove that a losing party received notice of a judgment is to hand deliver notice and to secure a signed acknowledgement of receipt.

Honorable J. Frederick Motz
United States District Judge
101 West Lombard Street
Baltimore, Maryland 21201
January 25, 1990
(Judge Motz wrote on behalf of the other members of the court and of the court's local rules committee)
They oppose the concept that a judgment is not final when entered, but rather only when it is served upon counsel. They state that evidentiary hearings held to determine whether notices of judgments have been received will be too great a burden for district courts and that the practical effect will be to extend the time for filing notices of appeal to 180 days.

Robert Q. Whitwell, Esquire
Post Office Drawer 886
Oxford, Mississippi 38655
March 2, 1990
Makes no general comment upon the changes suggested but states: "The new Subsection authorizes an extension of fourteen (14) days to file a notice of appeal while the present Subsection 5 allows only ten (10) days to file. This is unnecessary because of the way days are counted."

Ernest Lane III, Esquire
Post Office Box 1854
Greenville, Mississippi 38702-1854
March 9, 1990
Concurs in the comments of Mr. Whitwell and requests the committee to consider his comments as being the same as those of Mr. Whitwell.

Honorable Mike Moore
Attorney General, State of Mississippi
Post Office Box 220
Jackson, Mississippi 39205-0220
March 13, 1990
His comment is identical to Mr. Whitwell's.

Bonnie Brigance Leadbetter, Esquire
Chair, Federal Courts Committee of the Philadelphia Bar Association
One Reading Center
Philadelphia, Pennsylvania 19107
March 13, 1990
Recommends that the proposed amendment be adopted.

Joseph D. Cohen, Esquire
Stoel Rives Boley Jones & Grey
Standard Insurance Center
900 S.W. Fifth Avenue, Suite 2300
Portland Oregon 97204-1268
March 14, 1990
(Transmitting comments from members of the Oregon bar)
Two lawyers oppose the proposed amendment believing that it will inject five extra months of uncertainty into finality of judgment; that it will spawn satellite litigation; and that it will more likely benefit dishonest and incompetent lawyers who receive notice of judgment but who miss the deadline than innocent lawyers who do not receive notice.

Michael E. Tigar, Esquire
Loren Kieve, Esquire
Sidney G. Leech, Esquire
Debevoise & Plimpton
555 13th Street, N.W., Suite 1100 East
Washington, D.C. 20004
March 1990
Support the proposed amendment with no further comment.

SUMMARY OF COMMENTS ON
PROPOSED ADDITION OF NEW SUBDIVISION TO FED. R. APP. P. 28(a)

Nine comments were submitted concerning the proposed addition of a new subsection to Fed. R. App. P. 28(a). None of the comments express opposition to the proposal. Three commentators observe that if an appellant was the defendant below and if the district court's jurisdiction is one of the issues on appeal, requiring the appellant to state the basis for subject matter jurisdiction could be awkward; however, none of these commentators oppose the requirement. One commentator supports the amendment without further discussion. Five commentators support the proposal but suggest further revision. Two of those commentators recommend that the jurisdictional statement be filed prior to filing the briefs believing that earlier detection of jurisdictional defects would be more economical. The third commentator suggests that the jurisdictional material could be placed in a footnote to a brief. The fourth of the supportive commentators makes several suggestions: 1) that the rule should not require a statement of subject matter jurisdiction in appeals from agency decisions; 2) that the rule should not require parties to recite the relevant facts needed to establish jurisdiction because that information should be found in the statement of the case; 3) that when a major issue on appeal is jurisdictional in nature, cross referencing to the statement of the case or to the argument, or to both, should be permitted; 4) that the notes should urge parties to resolve disputes over subject matter jurisdiction or jurisdiction on appeal by a motion

to dismiss filed early in the case. The last commentator expresses approval of the changes but points out a typographical error in line 6 of rule 28.

List of Commentators
Proposed Addition of New Subdivision to Fed. R. App. P. 28(a)

1. Richard P. Holme
David, Graham & Stubbs
1200 Nineteenth Street, N.W., Suite 500
Washington, D.C. 20036-2402
November 27, 1989

2. Mr. Alan B. Morrison
Director, Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
December 27, 1989

3. Mitchell Zimmerman, Esquire
Fenwick, Davis & West
Two Palo Alto Square
Palo Alto, California 94306
January 4, 1990

4. Mr. Gilbert F. Ganucheau
Clerk, United States Court of Appeals
600 Camp Street
New Orleans, Louisiana 70130
January 25, 1990

5. Robert Q. Whitwell, Esquire
Post Office Drawer 886
Oxford, Mississippi 38655
March 2, 1990

6. Ernest Lane III, Esquire
Post Office Box 1854
Greenville, Mississippi 38702-1854
March 9, 1990

7. Robert A. McCarthy, Esquire
President, Ohio State Bar Association
12 South Cherry Street
Troy, Ohio 45373
March 12, 1990

8. Bonnie Brigance Leadbetter, Esquire
Chair, Federal Courts Committee of the Philadelphia Bar Association
One Reading Center
Philadelphia, Pennsylvania 19107
March 13, 1990

9. Michael E. Tigar, Esquire
Loren Kieve, Esquire
Sidney G. Leech, Esquire
Debevoise & Plimpton
555 13th Street, N.W., Suite 1100 East
Washington, D.C. 20004
March 1990

COMMENTS ON PROPOSED ADDITION OF NEW SUBDIVISION
TO FED. R. APP. P. 28(a)

Richard P. Holme, Esquire
Davis, Graham & Stubbs
1200 Nineteenth Street, N.W.
Washington, D.C. 20035-2402
November 27, 1989
Supports the changes but points out the typographical error in line 6 of rule 28.

Mr. Alan B. Morrison
Director, Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
December 27, 1989
Generally supports the proposal but states that much of the proposed rule is unnecessary, particularly in cases that come to courts of appeals directly from agencies.
1. Mr. Morrison notes that "subject matter jurisdiction" of an agency is quite different from the "subject matter jurisdiction" of federal district courts which may be informed by considerations emanating from Article III of the Constitution. He suggests deleting the phrase "or agency" at the end of line 3 of the proposed amendment.
2. He suggests deleting "and with reference to the relevant facts to establish such jurisdiction" on lines 5 and 6, stating that requiring such a statement is unnecessary and duplicates recitations in the statement of the case.
3. He supports requiring a short statement of the basis for jurisdiction in the court of appeals but in those cases in which a major issue on appeal is jurisdictional in nature, he suggests that cross referencing to the statement of the case or to the argument, or to both, should be permitted.
4. Again he suggests deleting "and with reference to the relevant facts to establish such jurisdiction" from lines 7 and 8 of the proposed amendment.
5. Recommends an admonition in the notes urging parties to resolve disputes over subject matter jurisdiction or jurisdiction on appeal by a motion to dismiss filed early in the case.
6. Insert a comma in line 32 after "jurisdiction".

Mitchell Zimmerman, Esquire
Fenwick, Davis & West
Two Palo Alto Square
Palo Alto, CAlifornia 94306
January 4, 1990
Supports requiring a specific jurisdictional statement but recommends that it be required as a distinct document filed within 30 days of the filing of the notice of appeal and that the appellee file objections, or a statement of non-objection, within 14 days of service of the original statement of jurisdiction.

Mr. Gilbert F. Ganucheau
Clerk, United States Court of Appeals
600 Camp Street
New Orleans, Louisiana 70130
January 25, 1990
Supports requiring a specific jurisdictional statement but recommends that it be required at the time of filing the notice of appeal rather than, or in addition to, inclusion of the statement in the briefs.

Robert Q. Whitwell, Esquire
Post Office Drawer 886
Oxford, Mississippi 38655
March 2, 1990
Notes that if an appellant was the defendant below and if the district court's jurisdiction is one of the issues on appeal, requiring the appellant to state the basis for subject matter jurisdiction could be awkward.

Ernest Lane III, Esquire
Post Office Box 1854
Greenville, Mississippi 38702-1854
March 9, 1990
Concurs in the comments of Mr. Whitwell and requests the committee to consider his comments as being the same as those of Mr. Whitwell.

Robert A. McCarthy, Esquire
President, Ohio State Bar Association
12 South Cherry Street
Troy, Ohio 45373
March 12, 1990
Mr. McCarthy's comment is identical to that of Mr. Whitwell.

Bonnie Brigance Leadbetter, Esquire
Chair, Federal Courts Committee of the Philadelphia Bar Association
One Reading Center
Philadelphia, Pennsylvania 19107
March 13, 1990
The committee recommends adoption of the proposed amendment.

Comments on Proposed Addition of New Subdivision to Fed. R. App. P. 28(a)
Page three

Michael E. Tigar, Esquire
Loren Kieve, Esquire
Sidney G. Leech, Esquire
Debevoise & Plimpton
555 13th Street, N.W., Suite 1100 East
Washington, D.C. 20004
March 1990
They support the proposed amendment but suggest that the material could be placed in a footnote to the brief.

SUMMARY OF COMMENTS ON THE
PROPOSED AMENDMENTS TO FED. R. APP. P. 28(h) & 34(d)

Nine comments were submitted concerning the proposed amendments to Fed. R. App. P. 28(h) and 34(d). None of the comments oppose the proposed changes. Three comments support the amendments without further comment. One commentator supports the changes but recommends that rule 28(h) include a reference to rule 34, believing that such reference would eliminate the need for the middle sentence of rule 34; the same commentator also recommends that the term "simultaneously" be construed to mean "received on the same day." Another commentator supports the change but suggests that rather than spreading the requirements relating to cross appeals over three rules, that there be a single rule on cross appeals. Four commentators neither support nor oppose the change, but all three observe that the change gives a tactical advantage to the first party to file an appeal because the appellant generally opens and closes oral argument.

List of Commentators
Proposed Amendments to Fed. R. App. P. 28(h) and 34(d)

1. Mr. Alan B. Morrison
Director, Public Citizen Litigation Group
200 P Street, N.W., Suite 700
Washington, D.C. 20036
December 27, 1989

2. Robert Q. Whitwell, Esquire
Post Office Drawer 886
Oxford, Mississippi 38655
March 2, 1990

3. Ernest Lane III, Esquire
Post Office Box 1854
Greenville, Mississippi 38702-1854
March 9, 1990

4. Robert A. McCarthy, Esquire
President, Ohio State Bar Association
12 South Cherry Street
Troy, Ohio 45373
March 12, 1990

5. Bonnie Brigance Leadbetter, Esquire
Chair, Federal Courts Committee of the Philadelphia Bar Association
One Reading Center
Philadelphia, Pennsylvania 19107
March 13, 1990

6. Honorable Mike Moore
Attorney General, State of Mississippi
Post Office Box 220
Jackson, Mississippi 39205-0220
March 13, 1990

7. Joseph D. Cohen, Esquire
Stoel Rives Boley Jones & Grey
Standard Insurance Center
900 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268
March 14, 1990

8. Michael E. Tigar, Esquire
Loren Kieve, Esquire
Sidney G. Leech, Esquire
Debevoise & Plimpton
555 13th Street, N.W., Suite 1100 East
Washington, D.C. 20004
March 1990

9. William H. Baughman, Jr.
Chair, Sixth Circuit Advisory Committee on Rules
& Internal Operating Procedures
Weston Hurd Fallon Paisley & Howley
2500 Terminal Tower
Cleveland, Ohio 44113-2241
April 5, 1990

COMMENTS ON PROPOSED AMENDMENTS TO FED. R. APP. P. 28(h) & 34(d)

Mr. Alan B. Morrison
Director, Public Citizen Litigation Group
200 P. Street, N.W., Suite 700
Washington, D.C. 20036
December 27, 1989
Supports the change but recommends that Rule 28(h) include a specific reference to Rule 34, believing that if that were done, the middle sentence of Rule 34(d) could be stricken as unnecessary. Further recommends that the term "simultaneously" be construed to mean "received on the same day."

Robert Q. Whitwell, Esquire
Post Office Drawer 886
Oxford, Mississippi 38655
March 2, 1990
Comments that the proposed change gives a tactical advantage to the first party to file an appeal because the appellant generally opens and closes oral argument.

Ernest Lane III, Esquire
Post Office Box 1854
Greenville, Mississippi 38702-1854
March 9, 1990
Concurs in the comments of Mr. Whitwell and requests the committee to consider his comments as being the same as those of Mr. Whitwell

Robert A. McCarthy, Esquire
President, Ohio State Bar Association
12 South Cherry Street
Troy, Ohio 45373
March 12, 1990
His comment is identical to that of Mr. Whitwell.

Bonnie Brigance Leadbetter, Esquire
Chair, Federal Courts Committee of the Philadelphia Bar Association
One Reading Center
Philadelphia, Pennsylvania 19107
March 13, 1990
The committee recommends adoption of the proposed amendment.

Honorable Mike Moore
Attorney General, State of Mississippi
Post Office Box 220
Jackson, Mississippi 39205-0220
March 13, 1990
His comment is identical to that of Mr. Whitwell.

Joseph D. Cohen, Esquire
Stoel Rives Boley Jones & Grey
Standard Insurance Center
900 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268
March 14, 1990
(transmitting comments of members of the Oregon bar)
Two Oregon lawyers registered support for the proposed changes.

Michael E. Tigar, Esquire
Loren Kieve, Esquire
Sidney G. Leech, Esquire
Debevoise & Plimpton
555 13th Street, N.W., Suite 1100 East
Washington, D.C. 20004
March 1990
Support the proposed amendment with no further comment.

William H. Baughman, Jr.
Chair, Sixth Circuit Advisory Committee on Rules
and Internal Operating Procedures
Weston Hurd Fallon Paisley & Howley
2500 Terminal Tower
Cleveland, Ohio 44113-2241
April 5, 1990
No direct opposition to the proposed changes but suggests that rather than spreading the requirements relating to cross appeals over three rules, Fed. R. App. P. 28, 30, and 34, that there be a single rule on cross appeals, similar to the Sixth Circuit's Rule 30. A draft of such a rule accompanied the letter.

SUMMARY OF COMMENTS ON THE PROPOSED
AMENDMENT OF FED. R. APP. P. 30(b)

Eight comments were received concerning the proposed amendment of Fed. R. App. P. 30(b). None of the comments oppose the proposed change. One commentator supports the proposed change with no further comment. Another commentator supports the change but believes that the final sentence is unnecessary. Five commentators support the change but suggest rewording the final sentence of the first paragraph as follows: "Appellants and cross appellants must each simultaneously meet the time deadlines established by the rule with respect to their appeals unless the parties otherwise agree or are otherwise ordered by the Court." Another commentator simply asks whether requiring a cross appellant to serve a statement of issues is an indication that service of a statement of issues is mandatory even though the appellant has designated the entire record, or the parties have agreed on the contents of the appendix.

List of Commentators on
Proposed Amendment of Fed. R. App. P. 30

1. Mr. Alan B. Morrison
Director, Public Citizen Litigation Group
200 P Street, N.W., Suite 700
Washington, D.C. 20036
December 27, 1989

2. Robert J. Sherer, Esquire
Roche, Carens & DeGiacomo
One Post Office Square
Boston, Massachusetts 02109
January 16, 1990

3. Robert Q. Whitwell, Esquire
Post Office Drawer 886
Oxford, Mississippi 38655
March 2, 1990

4. Lester F. Sumners, Esquire
Sumners, Carter, Trout & McMillin, P.A.
140 North Central Avenue
New Albany, Mississippi 38652
March 7, 1990

5. Ernest Lane III, Esquire
Post Office Box 18546.
Greenville, Mississippi 38702-1854
March 9, 1990

6. Robert A. McCarthy, Esquire
President, Ohio State Bar Association
12 South Cherry Street
Troy, Ohio 45373
March 12, 1990

7. Honorable Mike Moore
Attorney General, State of Mississippi
Post Office Box 222
Jackson, Mississippi 39205-0220
March 13, 1990

8. Bonnie Brigance Leadbetter, Esquire
Chair, Federal Courts Committee of the Philadelphia Bar Association
One Reading Center
Philadelphia, Pennsylvania 19107
March 13, 1990

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 30

Mr. Alan B. Morrison
Director, Public Citizen Litigation Group
200 P Street, N.W., Suite 700
Washington, D.C. 20036
December 27, 1989
Supports the interrelation between rule 30(b) and the changes in rule 28(h) but does not believe that the final sentence is necessary.

Robert J. Sherer, Esquire
Roche, Carens & DeGiacomo
One Post Office Square
Boston, Massachusetts 02109
January 16, 1990
Notes that in Massachusetts, whose rules generally copy the language of the analogous federal rules, when an appellant indicates intent to include the entire record in an appendix, a statement of issues is deemed unnecessary. He asks whether requiring a cross appellant to serve a statement of issues is an indication that service of a statement of issues is mandatory even though the appellant has designated the entire record, or the parties have agreed on the contents of the appendix.

Robert Q. Whitwell, Esquire
Post Office Drawer 886
Oxford, Mississippi 38655
March 2, 1990
Supports the changes but suggests rewording the last sentence of the first paragraph as follows: "Appellants and cross appellants must each simultaneously meet the time deadlines established by the rule with respect to their appeals unless the parties otherwise agree or are otherwise ordered by the Court."

Lester F. Sumners, Esquire
Sumners, Carter, Trout & McMillin, P.A.
140 North Central Avenue
New Albany, Mississippi 38652
March 7, 1990
Comment and redrafting suggestion identical to that of Mr. Whitwell.

Ernest Lane III, Esquire
Post Office Box 1854
Greenville, Mississippi 38702-1854
March 9, 1990
Concurs in the comments of Mr. Whitwell and requests the committee to consider his comments as being the same as those of Mr. Whitwell.

Robert A. McCarthy, Esquire
President, Ohio State Bar Association
12 South Cherry Street
Troy, Ohio 45373
March 12, 1990
Comment and redrafting suggestion identical to that of Mr. Whitwell.

Honorable Mike Moore
Attorney General, State of Mississippi
Post Office Box 222
Jackson, Mississippi 39205-3680
March 13, 1990
Comment and redrafting suggestion identical to that of Mr. Whitwell.

Bonnie Brigance Leadbetter, Esquire
Chair, Federal Courts Committee of the Philadelphia Bar Association
One Reading Center
Philadelphia, Pennsylvania 19107
March 13, 1990
The committee recommends adoption of the proposed amendment.

GENERAL COMMENTS ON THE PROPOSED CHANGES IN THE FED. R. APP. P.

Richard P. Holme, Esquire
Davis, Graham & Stubbs
1200 Nineteenth Street, N.W., Suite 500
Washington, D. C. 20036-2402
November 27, 1989
Generally applauded the efforts.

S. Elizabeth Birnbaum, Esquire
Counsel, Water Resources Program
National Wildlife Federation
1400 Sixteenth Street, N.W.
Washington, D.C. 20036-2266
March 14, 1990
The Federation made no specific comments on the proposed amendments, stating only that they are reasonable minor additions to appellate practice.

Rule 28. Briefs

(a) Brief of the appellant.

(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.

~~(2)~~(3) A statement of the issues presented for review.

~~(3)~~(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)).

~~(4)~~(5) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the

appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.

~~(5)~~(6) A short conclusion stating the precise relief sought.

(b) Brief of the appellee. -The brief of the appellee shall conform to the requirements of subdivisions (a)(1)- ~~(4)~~(5), except that a statement of jurisdiction, of the issues, or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(h) Briefs in cases involving cross appeals. -If a cross appeal is filed, ~~the plaintiff in the court below~~ 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 ~~contain the issues and argument involved in his~~ conform to the requirements of subdivision (a)(1)-(6) of this rule with respect to the appellee's appeal as well as ~~the~~ answering ~~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.

COMMITTEE NOTE

Subdivision (a). The amendment adds a new subparagraph (2) that requires an appellant to include a specific jurisdictional statement in the appellant's brief to aid the court of appeals in determining whether it has both federal subject matter and appellate jurisdiction.

Subdivision (b). The amendment requires the appellee to include a jurisdictional statement in the appellee's brief except that the appellee need not include the statement if the appellee is satisfied with the appellant's jurisdictional statement.

Subdivision (h). The amendment provides that when more than one party appeals from a judgment or order, the party filing the first appeal is normally treated as the appellant for purposes of this rule and Rules 30 and 31. The party who first files an appeal usually is the principal appellant and should be treated as such. Parties who file a notice of appeal after the first notice often bring protective appeals and they should be treated as cross appellants. Local rules in the Fourth and Federal Circuits now take that approach. If notices of appeal are filed on the same day, the rule follows the old approach of treating the plaintiff below as the appellant. For purposes of this rule, in criminal cases "the plaintiff" means the United States. In those instances where the designations provided by the rule are inappropriate, they may be altered by agreement of the parties or by an order of the court.

Rule 30. Appendix to the briefs

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(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.

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.

COMMITTEE NOTE

Subdivision (b). The amendment requires a cross appellant to serve the appellant with a statement of the issues that the cross appellant intends to pursue on appeal. No later than ten days after the record is filed, the appellant and cross appellant must serve each other with a statement of the issues each intends to present for review and with a designation of the parts of the record that each wants included in the appendix. Within the next ten days, both the appellee and the cross appellee may designate additional materials for inclusion in the appendix. The appellant must then include in the appendix the parts thus designated for both the appeal and any cross appeals. The Committee expects that simultaneous compliance with this subdivision by an appellant and a cross appellant will be feasible in most cases. If a cross appellant cannot fairly be expected to comply until receipt of the appellant's statement of issues, relief may be sought by motion in the court of appeals.

Rule 34. Oral argument

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(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-plaintiff-in-the-action-below~~ the party who first files a notice of appeal, or in the even 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.

COMMITTEE NOTE

Subdivision (d). The amendment of subdivision (d) conforms this rule with the amendment of Rule 28(h).

Rule 25. Filing and service

(a) *Filing.* - Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. If a motion requests relief which 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 date of filing and shall thereafter transmit 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.

Committee Note

Subdivision (a). The amendment permits, but does not require, courts of appeals to adopt local rules that allow filing of papers by electronic means. However, courts of appeals cannot adopt such local rules until the Judicial Conference of the United States authorizes filing by facsimile or other electronic means.

Rule 10. The record on appeal

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(c) Statement ~~on~~ <u>of</u> 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.

Rule 26.1 Corporate Disclosure Statement

Any non-governmental corporate ~~body~~ party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case shall file a statement identifying all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public. The statement shall 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. The statement shall be included in front of the table of contents in a party's principal brief even if the statement was previously filed.