TO: Judge Robert E. Keeton, Chair, Standing Committee on Rules of Practice and Procedure

cc: Members, Advisory Committee on Appellate Rules, Chairs of and Reporters to the Civil, Criminal, and Bankruptcy Advisory Committees, Joseph F. Spaniol, Jr., Esq., and Professor Carol Ann Mooney

FROM: Judge Kenneth F. Ripple, Chair, Advisory Committee on Appellate Rules

DATE: June 21, 1991

RE: July 18, 19, & 20, 1991, Meeting

Enclosed are drafts of proposed amendments to Fed. R. App. P. 3, 3.1, 4, 5.1, 10, 25, 28, 34, and 35. The Advisory Committee on Appellate Rules offers these amendments for your consideration.

A summary of the proposed changes is offered for your convenience.

Rule 3. The amendments to Rule 3(d) are conforming amendments to the proposed amendments to Rule 4(a)(4) and 4(b) and to the proposed addition of paragraph (c) to Rule 4.

Rule 3.1. The amendments to Rule 3.1 reflect the change in title from magistrate to magistrate judge.

Rule 4. Two major amendments to Rule 4 are proposed. The first amendment is intended to eliminate the trap that 4(a)(4) creates for litigants who file notices of appeal before the disposition of one of the post trial motions enumerated in that paragraph. Currently 4(a)(4) treats such notices of appeal as null and requires litigants to file new notices of appeal after disposition of the motions. If a party fails to file a new notice of appeal, the court of appeals lacks jurisdiction to hear the appeal. The proposed amendment would hold notices of appeal filed before disposition of the post trial motions in abeyance and such notices would ripen into effective notices upon disposition of the last of the post trial motions.

The second major amendment is the addition of paragraph (c) that would make notices of appeal filed by inmates confined in institutions timely if they are deposited in the institutions' internal mail systems, with postage prepaid, on or before the filing date. This method of filing affects the time for filing cross appeals. In civil cases, the time for filing a cross appeal ordinarily runs from the date on which the first notice of appeal is filed. If an inmate's notice of appeal is filed by depositing it in an institution's mail system, it is possible

that the notice of appeal will not arrive in the district court until several days after the "filing" date and perhaps even after the time for filing a cross appeal has expired. To avoid that occurrence paragraph (c) provides that when an institutionalized person files a notice of appeal by depositing it in the institution's mail system, the time for filing a cross appeal runs from the district court's receipt of the notice of appeal. A parallel provision is made regarding the time for the government to bring an appeal in criminal cases.

The proposed amendments to Rule 4 include several additional refinements:

1. Subdivision (a)(2) is amended to treat all notices of appeal filed after announcement of decisions or orders but before formal entry of such orders as if the notices of appeal had been filed after such entry. Because the proposed amendment to subdivision (a)(4) recognizes all notices of appeal filed after entry of judgment, even those that are filed while the post trial motions enumerated in (a)(4) are pending, the amendment of this subdivision is consistent with the amendment to subdivision (a)(4) described above.

2. Subdivision (a)(4) also is amended to treat motions under Rule 60 that are made within 10 days after entry of judgment as if they were motions under Rule 59. This eliminates the difficulty of determining whether a post trial motion made within 10 days after entry of a judgment is a motion under Rule 59(e), which tolls the time for filing an appeal, or a motion under Rule 60, which does not toll the time.

3. Subdivision (a)(4) is amended further to exclude motions for costs and attorneys' fees from the class of motions that extend the time for filing a notice of appeal. This change is consistent with recent Supreme Court decisions.

4. Paragraph (b) is amended by adding motions for judgment of acquittal to the list of tolling motions. Such motions are the equivalent of Fed. R. Civ. P. 50(b) motions for judgment notwithstanding the verdict, which toll the running of time for appeal in civil cases.

5. To make it clear in criminal cases that a notice of appeal need not be filed before entry of judgment, another proposed amendment to paragraph 4(b) states that an appeal may be taken within 10 days after the entry of an order disposing of a tolling motion, or within 10 days after the entry of judgment, whichever is later.

6. Paragraph (b) is further amended to state that the filing of a notice of appeal does not divest a district court of jurisdiction to correct a sentence under new 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 disposition of such motion.

Rule 5.1. The amendment to Rule 5.1 reflects the change in title from magistrate to magistrate judge.

Rule 10. The amendment is technical in nature; it corrects a printer's error.

Rule 25. The amendment makes all papers filed by persons confined in institutions timely if deposited in the institutions' mail systems on or before the filing date.

Rule 28. The amendment requires appellants' briefs to include a statement of the standard of review.

Rule 34. The amendment deletes the requirement that an opening argument shall include a statement of the case.

Rule 35. The amendment clarifies the manner in which a majority is calculated for purposes of voting to hear or rehear a case in banc. Vacancies and recusals are not counted when determining whether a majority favors granting an in banc hearing. However, the number of judges participating in the in banc vote must be a majority of the active judges including those who may be recused.

Rule 3. Appeal as of right - How taken

* * *

(d) *Service of 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 thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the last known address of that party~~;-and-t~~. The clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice and the clerk of the district court shall transmit copies of any later docket entries in that case to the clerk of the court of appeals. When an appeal is taken by a defendant 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 on which 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 on which the notice of appeal was received by the clerk. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be 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.

* * *

Committee Note

Note to subdivision 3(d). The amendment requires the district court clerk to transmit to the clerk of the appropriate court of appeals copies of all docket entries in a case following the filing of a notice of appeal. This amendment accompanies the amendment to Rule 4(a)(4) which provides that in a case in which one of the post trial motions enumerated in Rule 4(a)(4) is filed, a notice of appeal filed before the disposition of the motion will become effective upon disposition of the motion. The court of appeals needs to be advised that the filing of a post trial motion has suspended a notice of appeal. The court of appeals also needs to know when the district court has ruled on the motion. Transmitting copies of all docket entries following the filing of a notice of appeal should provide the courts of appeals with the necessary information.

Rule 3.1. Appeals from Judgments Entered by Magistrates Judges in Civil Cases

When the parties consent to a trial before a magistrate judge pursuant to 28 U.S.C. § 636(c)(1), an appeal from a judgment entered upon the direction of a magistrate judge shall be heard by the court of appeals pursuant to 28 U.S.C. § 636(c)(3), unless the parties, in accordance with 28 U.S.C. § 636(c)(4), consent to an appeal on the record to a judge of the district court and thereafter, by petition only, to the court of appeals. Appeals to the court of appeals pursuant to 28 U.S.C. § 636(c)(3) shall be taken in identical fashion as appeals from other judgments of the district court.

Committee Note

The amendment conforms the rule to the change in title from magistrate to magistrate judge made by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5117 (1990).

Rule 4. Appeal as of right - When taken

(a) *Appeals in civil cases.*-

* * *

(2) ~~Except as provided in (a)(4) of this Rule 4, a~~ A notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If ~~a timely notice of appeal is filed by~~ a party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If any party makes a timely motion under the Federal Rules of Civil Procedure ~~is filed in the district court by any party~~: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment, other than for award or determination of costs or attorney's fees; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order ~~denying a new trial or granting or denying any other such motion~~ disposing of the last of all such motions. If a motion under Rule 60 of the Federal Rules of Civil Procedure is served within 10 days after the entry of the judgment, the motion shall be treated as a motion under Rule 59 for purposes of this paragraph (a)(4). ~~A~~

~~notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.~~ A notice of appeal filed after entry of the judgment but before disposition of any of the above motions shall be in abeyance and shall become effective upon the date of the entry of an order that disposes of the last of all such motions. An appeal from an order disposing of any of the above motions requires amendment of the party's previously filed notice of appeal in compliance with Rule 3(c). Any such amended notice of appeal shall be filed within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last of all such motions.

* * *

(b) *Appeals in criminal cases.*- In a criminal case a defendant shall file the notice of appeal ~~by a defendant shall be filed~~ in the district court within 10 days after the entry of (i) the judgment or order appealed from or (ii) 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 shall be treated as filed after such entry and on the day thereof. If a timely motion under the Federal Rules of Criminal Procedure is made: (i) for judgment of acquittal, (ii) for ~~in~~ arrest of judgment, ~~or~~ (iii) for a new trial on any ground other than newly discovered evidence, or (iv) 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, ~~has been made~~ an appeal from a judgment of conviction may be taken within 10 days after the entry of an order ~~denying the motion~~ disposing of the last of all such motions, or within 10 days after the entry of the judgment of conviction, whichever is later. ~~A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment.~~ A notice of appeal filed after announcement of a decision, sentence, or order but before disposition of any of the above motions shall be in abeyance and shall become effective upon the date of the entry of an order that disposes of the last of all such motions, or upon 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 shall be filed in the district court within 30 days after ~~the entry of~~ (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 in 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.

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 disposition of such motion.

(c) *Appeals filed by inmates confined in institutions.*- 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 civil cases in which the first notice of appeal is filed in the manner provided in this paragraph (c), the 14 day period provided in (a)(3) of this Rule 4 for other parties to file notices of appeal shall run from the date the first notice of appeal is received by the district court. In criminal cases in which a defendant files a notice of appeal in the manner provided in this paragraph (c), the 30 day period for the government to file its notice of appeal shall run from the entry of the judgment or order appealed from or from the receipt of the defendant's notice of appeal by the district court.

Committee Note

Note to Subdivision (2). The amendment treats all notices of appeal filed after announcement of decisions or orders but before formal entry of such orders as if the notices of appeal had been filed after such entry. The amendment deletes the language that made subdivision (a)(2) inapplicable to notices of appeal filed after announcement of the disposition of post trial motions enumerated in (a)(4) but before the entry of such orders, see, Acosta v. Louisiana Dept. of Health & Human Resources, 478 U.S. 251 (1986) (per curiam); and Alerte v. McGinnis, 898 F.2d 69 (7th Cir. 1990). Because the amendment of subdivision (a)(4) recognizes all notices of appeal filed after entry of judgment, even those that are filed while the post trial motions enumerated in (a)(4) are pending, the amendment of this subdivision is consistent with the amendment of subdivision (a)(4).

Note to Subdivision (a)(3). The amendment is technical in nature, no substantive change is intended.

Note to Subdivision (a)(4). The 1979 amendment of this subdivision created a trap for unsuspecting litigants who file notices of appeal before post trial motions, or while post trial motions are pending. The 1979 amendment requires parties to file new notices of appeal after disposition of the motions. Unless a new notice is filed, the court of appeals lacks jurisdiction to hear the appeal. Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982). Many litigants, especially pro se litigants, fail to file the second notice of appeal and several courts have expressed dissatisfaction with the rule. See, e.g., Averhart v. Arrendondo, 773 F.2d 919 (7th Cir. 1985); Harcon Barge Co. v. D & G Boat Rentals, Inc., 746 F.2d 278 (5th Cir. 1984), *cert. denied*, 479 U.S. 930 (1986).

The amendment provides that notices of appeal filed before disposition of the specified post trial motions will become effective upon disposition of the motions. A notice of appeal filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion, is, in effect, suspended until the disposition of the motion. Upon disposition of the motion, the previously filed notice of appeal becomes effective to grant jurisdiction to a court of appeals. The Committee realizes that holding notices of appeal in abeyance will create a new species of appeal that is not truly "pending" and recommends that for statistical purposes appeals held in abeyance not be counted as pending. A new statistical classification may be appropriate.

Because notices of appeal will ripen into effective appeals upon disposition of post trial motions, in some instances there will be appeals from judgments that have been altered

substantially because the motions were granted in whole or in part. Many such appeals will be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. However, the appellee also may move to have the appeal stricken. When responding to such a motion, the appellant would have an opportunity to state that even though some relief sought in a post trial motion was granted, the appellant still plans to pursue the appeal. The appellant's response would provide the appellee with sufficient notice of the appellants' intentions that the Committee does not believe that an additional notice of appeal is needed.

The amendment provides that a notice of appeal filed before the disposition of a post trial tolling motion is sufficient to bring the underlying case to the court of appeals. If the judgment is altered upon disposition of a post trial motion, however, and a party wishes to appeal from the disposition of the motion, the party must amend the notice of appeal to so indicate

Subdivision (a)(4) also is amended to treat motions under Rule 60 that are made within 10 days after entry of judgment, as if they were motions under Rule 59. This eliminates the difficulty of determining whether a post trial motion made within 10 days after entry of a judgment is a motion under Rule 59(e), which tolls the time for filing an appeal, or a motion under Rule 60, which does not toll the time. The amendment is consistent with the practice in several circuits that treat all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4). See, e.g., Rados v. Celotex Corp., 809 F.2d 170 (2d Cir. 1986); Skagerberg v. Oklahoma, 797 F.2d 881 (10th Cir. 1986); Finch v. City of Vernon, 845 F.2d 256 (11th Cir. 1988). However, to conform to recent Supreme Court decisions, Buchanan v. Stanships, Inc., 485 U.S. 265 (1988); Budinich v. Becton Dickinson and Co., 486 U.S. 196 (1988), the amendment excludes motions for costs and attorney's fees from the class of motions that extend the filing time.

Note to subdivision (b). The amendment grammatically restructures the portion of this subdivision that lists the types of motions that toll the time for filing an appeal This restructuring is intended to make the rule easier to read. No substantive change is intended other than to add motions for judgment of acquittal under Criminal Rule 29 to the list of tolling motions. Such motions are the equivalent of a Fed. R. Civ. P. 50(b) motions for judgment notwithstanding the verdict, *which toll the running of time for appeals in civil cases.*

The proposed amendment also eliminates an ambiguity from the *third sentence of this subdivision. The third sentence currently* provides that if one of the specified motions is filed, the time

for filing an appeal will run from the entry of any order denying the motion. That sentence, like the parallel provision in Rule 4(a)(4), was intended to toll the running of time for appeal if one of the post trial motions is timely filed. However, in criminal cases the time for filing the motions runs not from entry of judgment (as it does in civil cases), but from the verdict or finding of guilt. Thus, in a criminal case, a post trial motion may be disposed of more than 10 days before sentence is imposed, *i.e.* before the entry of judgment. United States v. Hashagen, 816 F.2d 899, 902 N.5 (3d Cir. 1987). To make it clear that a notice of appeal need not be filed before entry of judgment, the proposed amendment states that an appeal may be taken within 10 days after the entry of an order disposing of the motion, or within 10 days after the entry of judgment, whichever is later. The amendment also changes the language in the third sentence which provides that an appeal may be taken within 10 days after the entry of an order denying the motion and says instead that an appeal may be taken within 10 days after the entry of an order disposing of the last of such motions. (Emphasis added) The change recognizes that there may be multiple post trial motions filed and that although one or more motions may be granted in whole or in part, a defendant may still wish to pursue an appeal.

The amendment also states that notices of appeal filed before disposition of any of the post trial tolling motions shall become effective upon disposition of the motions. In most circuits this language simply restates the current practice, see United States v. Cortes, 895 F.2d 1245 (9th Cir. 1990). However, two circuits have questioned that practice in light of the language of the rule, see United States v. Gargano, 826 F.2d 610 (7th Cir. 1987), and United States v. Jones, 669 F.2d 559 (8th Cir. 1982), and the committee wishes to clarify the rule. The amendment is consistent with the proposed amendment of Rule 4(a)(4).

Subdivision (b) is further amended in light of new Fed. R. Crim. P. 35(c) which authorizes sentencing courts to correct arithmetic, technical, or other clear errors in sentencing within 7 days after the imposition of sentence. The Committee believes that a sentencing court should be able to act under Criminal Rule 35(c) even if a notice of appeal has already been filed and that a notice of appeal should not be affected by the filing of a motion under Rule 35(c) or by correction of sentence pursuant to Rule 35(c).

Note to subdivision (c). In Houston v. Lack, 487 U.S. 266 (1988), the Supreme Court held that *pro se* prisoners' notices of appeal are "filed" at the moment of delivery to prison authorities for forwarding to the district court. The amendment reflects that decision. The language of the amendment is similar to that in Supreme Court Rule 29.2.

Permitting inmates to file notices of appeal by depositing the notices in institutional mail systems requires adjustment of the rules governing the filing of cross appeals. In a civil case the time for filing a cross appeal ordinarily runs from the date on which the first notice of appeal is filed. If an inmate's notice of appeal is filed by depositing it is an institution's mail system, it is possible that the notice of appeal will not arrive in the district court until several days after the "filing" date and perhaps even after the time for filing a cross appeal has expired. To avoid that, subdivision (c) provides that in civil cases when institutionalized persons file notices of appeal by depositing them in institutions' mail systems, the time for filing cross appeals shall run from the district courts' receipt of the notices of appeal. A parallel provision is made regarding the time for the government to bring appeals in criminal cases.

Rule 5.1. Appeals 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 pursuant to 28 U.S.C. § 636(c)(4) to a judge of the district court 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. . . .

Committee Note

The amendment conforms the rule to the change in title from magistrate to magistrate judge made by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5117 (1990).

Rule 10. The record on appeal

* * *

(b) *The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.* -

* * *

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in (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. If the appellee deems a transcript ~~or~~ of other parts of the proceedings to be necessary, the appellee 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 such 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.

Committee Note

The amendment is technical and no substantive change is intended.

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, and except further that papers filed by inmates confined in institutions are timely filed if they are deposited in the institutions' internal mail systems on or before the last day for filing. Timely filing of papers by inmates confined in institutions may be shown by notarized statements or declarations 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 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.

Committee Note

The amendment accompanies new subdivision (c) of Rule 4 and extends the holding in Houston v. Lack, 487 U.S. 266 (1988), to all papers filed in the courts of appeals by persons confined in institutions.

Rule 28. Briefs

(a) *Brief of the appellant.*- The brief of the appellant shall contain under appropriate headings and in the order here indicated:

* * *

(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. The argument also shall include a concise statement of the applicable standard of review for each issue, which may be presented in the discussion of each issue or under a separate heading preceding the discussion of the issues.

* * *

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

* * *

Committee Note

Note to subdivision (a)(5). The amendment requires appellants' briefs to state the standard of review applicable to each issue on appeal. Five circuits currently require such statements and those circuits' experience indicates that requiring a statement of the standard of review generally results in arguments being properly shaped in light of the standard.

Rule 34. Oral argument

* * *

(c) *Order and content of argument.*- The appellant is entitled to open and conclude the argument. ~~The opening argument shall include a fair statement of the case.~~ Counsel will not be permitted to read at length from briefs, records or authorities.

* * *

Committee Note

Subdivision (c). The amendment deletes the requirement that the opening argument shall include a fair statement of the case. The Committee proposed the change because in some circuits the court does not want appellants to give such statements. In those circuits the rule is not followed and is misleading. However, the Committee does not want the deletion of the requirement to indicate disapproval of the practice. Those circuits that desire a statement of the case may continue the practice.

Rule 35. Determination of causes by the court in banc

(a) *When hearing or rehearing in banc will be ordered.*- A majority of the circuit judges presently appointed who are in regular active service and who are not disqualified from participating in the case may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc, provided that the participating judges constitute a majority of the presently appointed judges in regular active service.

Committee Note

The circuits are divided as to whether vacancies and recusals are counted in determining whether a majority of the judges in regular active service has ordered a case to be heard or reheard in banc. The amendment establishes a uniform rule that vacancies and recusals are not counted, *i.e.*, that the base from which the majority is determined consists only of the presently appointed judges in regular active service who are not disqualified. The amendment also establishes a quorum requirement that the number of judges participating in an in banc vote must constitute a majority of the active judges, including those who may be recused. Without such a quorum requirement, if seven of twelve active judges were disqualified, for example, an in banc could be ordered by a three-to-two vote among the five judges available to sit.