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

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

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

DATE: June 2, 1992

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

1. Proposed amendments to Federal Rules of Appellate Procedure 3, 3.1, 4, 5.1, 10, 25, 28, and 34, approved by the Advisory Committee on Appellate Rules at its April 30, 1992 meeting. These proposed amendments were published in August 1991. A public hearing was scheduled for December 4, 1991 in Chicago, Illinois but was canceled for lack of interest. The Advisory Committee has reviewed the written comments and, in some instances, altered the proposed amendments in light of the comments. The Advisory Committee recommends withdrawing the proposed amendments to Rule 35 but requests that the Standing Committee approve the other published rules, in their amended form, and send them to the Judicial Conference. Part A of this report includes the amended rules. Part B identifies and discusses the primary criticisms and suggestions; it also explains the changes made in the text or notes after publication; and it discusses any disagreement among the Advisory Committee members concerning the changes. Part C is a summary of the written comments received.

2. Proposed amendments to Federal Rules of Appellate Procedure 3(c), 12, and 15, approved by the Advisory Committee on Appellate Rules by telephone conference after its April 30 meeting. Proposed amendments, dealing with the Torres problem, were published under expedited procedures in February 1992 for a three month

period. The Advisory Committee has reviewed the written comments and now suggests different changes in Rule 3(c), proposes a new subdivision for Rule 12, and suggests style changes in Rules 3(c) and 15(a) and (e). Part D of this report contains the revised rules; it also discusses the major criticisms and suggestions made by the commentators; it explains the changes made in the rules and notes after publication; and, it discusses any disagreement among the Advisory Committee members concerning the approach taken in the revised draft. Part E is a summary of the written comments received.

3. Proposed amendments to Federal Rules of Appellate Procedure 35, and 47. These proposals were approved at the Advisory Committee's April 30th meeting and the Advisory Committee requests the Standing Committee's approval of them for publication. If approved, these new proposals could be published along with the proposed amendments approved for publication by the Standing Committee at its January, 1992 meeting (proposed amendments to Appellate Rules 25, 28, 38, 40, and 41). Part F of this report contains the draft amendments to Rules 35 and 47. Part F also contains proposed amendments to Federal Rule of Appellate Procedure 6(b)(2)(i); these amendments conform Rule 6 to the Rule 4(a)(4) amendments.

In response to Judge Gerry's letter of March 24, requesting that each Judicial Conference committee evaluate the need for the Committee, we recommend that the Advisory Committee on the Federal Appellate Rules be maintained and that it retain its present and traditional relationship with the Standing Committee on Practice and Procedure.

cc: Chairs and Reporters other Advisory Committees
Members and Reporter, Advisory Committee on Appellate Rules

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

When the parties consent to a trial before a magistrate judge under ~~pursuant to~~ 28 U.S.C. § 636(c)(1), ~~an appeal from a judgment entered upon the direction of a magistrate shall~~ any appeal from the judgment must be heard by the court of appeals ~~pursuant to~~ in accordance with 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 district judge ~~of the district court~~ and thereafter, by petition only, to the court of appeals, in accordance with 28 U.S.C. §636(c)(4). ~~Appeals to the court of appeals pursuant to~~ An appeal under 28 U.S.C. § 636(c)(3) ~~shall~~ must be taken in identical fashion as an appeals from any 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). Additional style changes are made; no substantive changes are intended.

Rule 4. Appeal as of Right - When Taken

(a) Appeals in a Civil Cases.-

(1) Except as provided in paragraph (a)(4) of this Rule, ~~I~~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 ~~shall~~ 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~~ must note thereon the date ~~on which it was~~ when the clerk received the notice and ~~transmit~~ send it to the clerk of the district court and ~~it shall be deemed~~ the notice will be treated as filed in the district court on the date so noted.

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

(3) If ~~a timely notice of appeal is filed by a~~ one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date ~~on which~~ when 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 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: ~~is filed in the district court by any party:~~

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

~~(ii)~~ (B) ~~under Rule 52(b)~~ to amend or make additional findings of fact under Rule 52(b), whether or not ~~an alteration of~~ granting the motion would alter the judgment; ~~would be required if the motion is granted;~~

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

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

(E) ~~under Rule 59~~ for a new trial under Rule 59,

and to a Rule 60 motion served within 10 days after the entry of judgment. ~~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. 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.~~ A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. An amended notice of appeal must be filed 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 ~~shall~~ will be required for ~~such~~ filing an amended notice.

* * *

(b) Appeals ~~in a Criminal Cases~~.- In a criminal case, a defendant must file the notice of appeal ~~by a defendant shall be filed~~ in the district court within 10 days after the entry either of ~~(i)~~ the judgment or order appealed from, or ~~(ii)~~ 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--~~shall be~~ is treated as filed ~~after such entry and on the day thereof~~ 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 ~~in~~ arrest of judgment; ~~or~~

(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,

~~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. 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 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 ~~shall~~ must 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~~ 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.

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.

(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.

Committee Note

Note to Paragraph (a)(1). The amendment is intended to alert readers to the fact that paragraph (a)(4) extends the time for filing an appeal when certain posttrial motions are filed. The Committee hopes that awareness of the provisions of paragraph (a)(4) will prevent the filing of a notice of appeal when a posttrial tolling motion is pending.

Note to Paragraph (a)(2). The amendment treats a notice of appeal filed after the announcement of a decision or order, but before its formal entry, as if the notice had been filed after entry. The amendment deletes the language that made paragraph (a)(2) inapplicable to a notice of appeal filed after announcement of the disposition of a posttrial motion enumerated in paragraph (a)(4) but before the entry of the order, see Acosta v. Louisiana Dep't of Health & Human Resources, 478 U.S. 251 (1986) (per curiam); Alerte v. McGinnis, 898 F.2d 69 (7th Cir. 1990). Because the amendment of paragraph (a)(4) recognizes all

notices of appeal filed after announcement or entry of judgment--even those that are filed while the posttrial motions enumerated in paragraph (a)(4) are pending--the amendment of this paragraph is consistent with the amendment of paragraph (a)(4).

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

Note to Paragraph (a)(4). The 1979 amendment of this paragraph created a trap for an unsuspecting litigant who files a notice of appeal before a posttrial motion, or while a posttrial motion is pending. The 1979 amendment requires a party to file a new notice of appeal after the motion's disposition. 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 a notice of appeal filed before the disposition of a specified posttrial motion will become effective upon disposition of the motion. A notice 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 motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.

Because a notice of appeal will ripen into an effective appeal upon disposition of a posttrial motion, in some instances there will be an appeal from a judgment that has been altered substantially because the motion was 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. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a posttrial motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, 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 posttrial tolling motion is sufficient to

bring the underlying case, as well as any orders specified in the original notice, to the court of appeals. If the judgment is altered upon disposition of a posttrial motion, however, and if a party wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a party files an amended notice, no additional fees are required because the notice is an amendment of the original and not a new notice of appeal.

Paragraph (a)(4) is also amended to include, among motions that extend the time for filing a notice of appeal, a Rule 60 motion that is served within 10 days after entry of judgment. This eliminates the difficulty of determining whether a posttrial motion made within 10 days after entry of a judgment is a Rule 59(e) motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time. The amendment comports with the practice in several circuits of treating 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., Finch v. City of Vernon, 845 F.2d 256 (11th Cir. 1988); Rados v. Celotex Corp., 809 F.2d 170 (2d Cir. 1986); Skagerberg v. Oklahoma, 797 F.2d 881 (10th Cir. 1986). To conform to a recent Supreme Court decision, however--Budinich v. Becton Dickinson and Co., 486 U.S. 196 (1988)--the amendment excludes motions for attorney's fees from the class of motions that extend the filing time unless a district court, acting under Rule 58, enters an order extending the time for appeal. This amendment is to be read in conjunction with the amendment of Fed. R. Civ. P. 58.

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 a motion for judgment of acquittal under Criminal Rule 29 to the list of tolling motions. Such a motion is the equivalent of a Fed. R. Civ. P. 50(b) motion for judgment notwithstanding the verdict, which tolls the running of time for an appeal in a civil case.

The proposed amendment also eliminates an ambiguity from the third sentence of this subdivision. Prior to this amendment, the third sentence provided that if one of the specified motions was filed, the time for filing an appeal would 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 posttrial motions is timely filed.

In a criminal case, however, 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 posttrial 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 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 providing that an appeal may be taken within 10 days after the entry of an order denying the motion; the amendment says instead that an appeal may be taken within 10 days after the entry of an order disposing of the last such motion outstanding. (Emphasis added) The change recognizes that there may be multiple posttrial 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 a notice of appeal filed before the disposition of any of the posttrial tolling motions becomes 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.), cert. denied, 495 U.S. 939 (1990). Two circuits, however, 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 a sentencing court to correct any arithmetical, technical, or other clear errors in sentencing within 7 days after imposing the 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 Rule 35(c) motion or by correction of a sentence under Rule 35(c).

Note to subdivision (c). In Houston v. Lack, 487 U.S. 266 (1988), the Supreme Court held that a pro se prisoner's notice of appeal is "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 an inmate to file a notice of appeal by depositing it in an institutional mail system 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 when 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 problem, subdivision (c) provides that in a civil case 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. The amendment makes a parallel change regarding the time for the government to appeal in a criminal case.

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~~ under 28 U.S.C. § 636(c)(4) to a district 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~~ 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. ~~If the~~ An appellee ~~deems~~ who believes that a transcript ~~or~~ of other parts of the proceedings ~~to be~~ is 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~~ 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.

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~~ must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing ~~shall not be~~ is not timely unless ~~the papers are received by the clerk~~ the clerk receives the papers within the time fixed for filing, except that briefs and appendices ~~shall be deemed~~ are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except~~ing~~ special delivery, is ~~utilized~~ used. 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 ~~which~~ that may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge ~~shall~~ must note thereon the date of filing and ~~shall~~ thereafter ~~transmit~~ give 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) Appellant's Brief. ~~of the appellant.-~~ The brief of the appellant ~~shall~~ must contain, under appropriate headings and in the order here indicated:

* * *

(5) An argument. The argument may be preceded by a summary. The argument ~~shall~~ must contain the contentions of the appellant ~~with respect to~~ 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.

* * *

(b) Appellee's Brief. ~~of the Appellee.-~~ The brief of the appellee ~~shall~~ must conform to the requirements of ~~subdivisions~~ paragraphs (a)(1)-(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.~~ 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.

* * *

Committee Note

Note to paragraph (a)(5). The amendment requires an appellant's brief to state the standard of review applicable to each issue on appeal. Five circuits currently require these statements. Experience in those circuits indicates that requiring a statement of the standard of review generally results in arguments that are 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~~ may not read at length from briefs, records, or authorities.

* * *

Committee Note

Subdivision (c). The amendment deletes the requirement that the opening argument must 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. Nevertheless, 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.

ISSUES AND CHANGES
Proposed Amendments to the Federal Rules of Appellate Procedure
Published August, 1991

Rule 3

There were no comments on the proposed amendments to Rule 3. The proposed amendments to Rule 3 are interrelated to the proposed amendments to Rule 4.

The changes approved by the Advisory Committee in Rule 3 after its publication were suggested by the Standing Committee's Style Subcommittee. The apparent intent of the Style Subcommittee is to review and revise those rules that the advisory committees propose amending. The Advisory Committee for Appellate Rules was favorably impressed with the work done by the Style Subcommittee, and for the most part adopted its suggestions. However, the Advisory Committee has some hesitation about the advisability of making style changes in some but not all rules. For example, the Style Subcommittee put rule headings and subheadings in initial capitals in each of the rules containing proposed amendments. Will that mean that until the advisory committee has proposed amendments as to each of the 48 appellate rules, there will be inconsistent capitalization of the headings? In Rule 3, the Advisory Committee's proposed amendment affects only subdivision (d), as a result there is a proposal to put initial capitals in the heading of subdivision (d), but not subdivisions (a), (b), (c), or (e). The Advisory Committee could easily recommend changing the headings of the other subdivisions of Rule 3 to initial capitals--making Rule 3 internally consistent--but other suggested alterations of a rule, or part of a rule, can not be integrated into the remaining rules without more substantive reflection.

Rather than individually list the style changes that have been made in the rules and the committee notes, a copy of the Style Subcommittee's proposed amendments is attached as an appendix to Part B.

The Advisory Committee unanimously approved many, but not all, of the changes recommended by the Style Subcommittee. Those changes that were approved, were approved unanimously and have been incorporated into the revised draft of Rule 3. This memorandum will discuss only the suggestions that were not adopted by the Advisory Committee. The line references here are to the line numbers on the Style Subcommittee's draft.

1. At line 3, it was suggested that "serve notice of the filing ... by mailing a copy" be changed to "send a copy of." The Advisory Committee did not adopt this suggestion because the term "service" is a term of art with substantive implications that need further exploration. Similarly at lines 28, 31, and 38, the verb "serve" is retained and not replaced by "sent." Also at line 44, the verb "mails" is retained and not replaced by "are sent."

2. At several points throughout the rule, it was suggested that "district clerk" or "appellate clerk" replace "clerk of the district court" or "clerk of the court of appeals." The Advisory Committee decided to retain "clerk of the district court" and "clerk of the court of appeals" to avoid confusion. The term "district clerk" could include a bankruptcy clerk, and "appellate clerk" could refer to a clerk in a district court whose assignment is to prepare the district court papers for appeal.

3. At line 13, the Style Subcommittee suggested deleting "named in the notice." The Advisory Committee is of the view that the notice should designate the court to which the party believes an appeal should be taken. The rule should clearly indicate where the clerk of the district court should send a notice of appeal. It is for the court of appeals to determine whether it has jurisdiction under the applicable statute.

Rule 3.1

There were no comments on the proposed amendment to Rule 3.1 The Advisory Committee unanimously approved all of the Style Subcommittee's recommendations and the changes have been incorporated in the revised draft.

Rule 4

The proposed amendments to Rule 4 serve two main purposes: first, to eliminate the trap for a litigant who files a notice of appeal before a posttrial motion or while a posttrial motion is pending; and second, to "codify" the Supreme Court's decision in Houston v. Lack, holding that a notice of appeal filed by an inmate confined in an institution is timely if it is deposited in the institution's internal mail system, with postage prepaid, on or before the filing date.

No comments were submitted concerning subdivision 4(c),

dealing with inmate filings, or subdivision 4(b), dealing with appeals in criminal cases. Five commentators offered suggestions for improving subdivision 4(a). Four of them generally supported the proposed amendments; their suggestions were "fine tuning." One commentator suggested taking an entirely different approach to the 4(a)(4) trap; the committee considered but rejected his suggestion.

The changes made after publication are:

1. "Except as provided in paragraph (a)(4) of this Rule" is added to the beginning of paragraph (a)(1). This cross-reference is intended to alert a reader to the fact that the time for filing a notice of appeal may be delayed by the provisions of paragraph (a)(4).

2. At line 39-40 of this amended draft (line 24 of the published draft), the rule states that a motion for attorney's fees will extend the time for filing a notice of appeal if a district judge enters an order, under Rule 58, extending the time for appeal.[1] Two changes have been made here; first, the description of a Rule 58 order is changed. The published draft described a Rule 58 order as one "delaying entry of judgment and extending the time for appeal." In fact, a Rule 58 order usually will be entered after a district court has entered judgment; therefore, a Rule 58 order extends the time for appeal, it does not delay entry of judgment. Thus the amended description deletes the reference to "delaying entry of judgment."

   Second, lines 39-40 of the amended rule state that a district court may enter a Rule 58 order extending the time for appeal until the district court awards attorney's fees. The published rule stated (at lines 21-25) that a district court could enter a Rule 58 order extending appeal time until the district court awards <u>costs</u> or attorney's fees. Because proposed Rule 58 does not authorize a district court to delay finality of a judgment to award costs, the reference to costs has been deleted.

---

[1] The Civil Rule 58 order referred to is contained in a proposed amendment to that rule which is at the same stage of development as the proposed amendments to Appellate Rule 4(a). If any changes are made in proposed Civil Rule 58, the cross-reference in proposed Appellate Rule 4(a) will need to be reexamined.

3. At lines 52-53 the words "effective to appeal from the judgment or order, or part thereof, specified in the notice of appeal" have been added. The Advisory Committee believes that this change, in conjunction with the following sentence, makes it clear that the first-filed notice of appeal covers only those judgments or orders specified in the notice, and that to obtain review of an order disposing of a posttrial motion the notice of appeal must be amended to specify that order.

4. Line 55 states that a party must amend a previously filed notice of appeal to obtain "[a]ppellate review of" an order disposing of a posttrial tolling motion. The published draft (at line 43) stated that "an appeal from" such orders requires amendment of any previously filed notice of appeal. Because, in some circuits, a decision disposing of certain the posttrial motions is not independently appealable but is reviewable only on appeal from the underlying judgment, it is more accurate to speak of "appellate review of" such orders.

5. At line 51, the words "announcement or" have been added between "after" and "entry." This change reinforces the general rule in paragraph (a)(2) that a notice filed after announcement of a decision or order but before entry of the order is treated as filed after the entry.

6. Lines 61-62 state that "[n]o additional fees are required for filing an amended notice of appeal."

7. As with the other rules, the Advisory Committee adopted most of the suggestions made by the Style Subcommittee. This memorandum discusses only those instances when the Advisory Committee disagreed with or altered the suggestions made by the Style Subcommittee.

   a. The Style Subcommittee suggested (line 6 of its draft) that the rule refer to notices filed after the judge announces a decision (emphasis added). The Advisory Committee changed that to after the "court" announces a decision (line 17 of the amended rules).

   b. At lines 9-10 and 93-94 of the Style Subcommittee draft, it is suggested that the rule treat notices filed after announcement but before entry as filed "on the date of entry." The Advisory Committee has changed that to "on the date of and after the entry" (lines 20 and 71 of the amended rules).

c. At line 24 of the Style Subcommittee draft, it is suggested that the rule state that the time for appeal runs from the entry of the "order disposing of the last such motion." The Advisory Committee added the word "outstanding" (line 29 of the amended rules) before the period to eliminate ambiguity. Without the modifier, it is possible to read the phrase as referring to the posttrial motion filed last even though earlier filed motions have not yet been decided. The same language appears at lines 68, 80, 100, and 130 of the Style Subcommittee draft and the changes appear at lines 55, 61, 76, and 95 of the amended rules.

d. At lines 139 to 142, the Advisory Committee decided not to make the changes suggested by the Style Subcommittee because the Advisory Committee added a new item to its agenda dealing with the relationship of these lines to 18 U.S.C. § 3731 and the Advisory Committee does not want to make any changes in these lines until it has had further opportunity to consider that item.

e. At page 13 of the Style Subcommittee's draft, the Style Subcommittee suggested that the note accompanying paragraph (a)(3) should state that the amendment "merely tightens the phrasing" rather than stating that the amendment "is technical in nature." Because there is a long tradition of referring to style changes as "technical" and because both the public and the Congress are familiar with and comfortable with that phrasing, the Advisory Committee decided to retain the reference to the changes as "technical in nature."

8. Several changes have been made to the Committee Notes. Most of the changes simply conform the notes to the changes made in the text of the rule. In addition, the Advisory Committee has dropped language suggesting that a special statistical category be created for notices of appeal held in abeyance under the new rule. (The last two sentences of the second paragraph explaining paragraph (a)(4) have been deleted.)

No one on the Committee favored the alternate approach suggested by one commentator. The recommendation was to retain current Rule 4(a)(4) and allow ad hoc relief by amending Rule 26. The Committee rejected the suggestion for two reasons.

First, the committee favors an approach that eliminates the

trap[2], over one that gives a court discretion to "rescue" a litigant caught in the trap.

Second, it is not clear that the commentator's suggestion could work. Specifically, the commentator suggested amending Rule 26 to authorize a party caught in the 4(a)(4) trap to ask a court to suspend that provision in Rule 4 which invalidates a notice of appeal filed prior to the disposition of a posttrial tolling motion. The suggestion assumes that it is Rule 4(a)(4) that makes a notice of appeal a nullity if it is filed during the pendency of one of the posttrial tolling motions. While it is true that 4(a)(4) states a notice is a nullity if it is filed during the pendency of any of the named motions, there is a line of cases indicating that, at least as to some of the motions, it is the motions themselves that make the appeal premature. The motions suspend the finality of the underlying judgment, making appeal premature. See United States v. Dieter, 429 U.S. 6, 8 (1976) (per curiam); In re X-Cel, Inc., 823 F.2d 192 (7th Cir. 1987). If it is the motion--not Rule 4--that makes appeal premature, suspending the provision in Rule 4 will not cure the problem. The approach taken in the published draft avoids that problem by providing that a notice is held in abeyance and becomes effective upon disposition of the motion.

Rule 5.1

There were no comments submitted on the proposed amendments to Rule 5.1 that change "magistrate" to "magistrate judge." The Advisory Committee unanimously accepted all of the changes suggested by the Style Subcommittee and they have been incorporated in the amended draft.

Rule 10

There were no comments submitted regarding the proposed amendment to Rule 10; the amendment corrects a printer's error. The Advisory Committee unanimously accepted most of the changes

---

[2] Rule 4(a)(4) currently provides that if a notice of appeal is filed before the district court disposes of all posttrial tolling motions, the notice of appeal is a nullity and a new notice of appeal must be filed after the disposition of the motions. Many litigants, especially those whose motions are denied, fail to file new notices of appeal and their right to appeal is lost.

suggested by the Style Subcommittee and those changes have been incorporated in the amended draft.

The Advisory Committee altered the Style Subcommittee's suggestions at lines 13 through 15 of the Subcommittee's draft. The Style Subcommittee suggested that the second sentence of paragraph (b)(3) state: "An appellee who desires a transcript of other parts of the proceedings shall . . . file and serve on the appellant a designation the additional parts . . .." The Advisory Committee concluded that dropping the word "necessary" from the second sentence of paragraph (b)(3) would be a substantive change. The Advisory Committee unanimously agreed to change the sentence as follows: "An appellee who believes that a transcript of other party of the proceeding is necessary, shall . . .." (See lines 11-13 of the amended draft.)

The Advisory Committee also retained the "technical" amendment language in the Committee Note.

Rule 25

The proposed amendments to Rule 25 extend the holding in Houston v. Lack to all papers filed by persons confined in institutions. No comments were submitted regarding these amendments. The Advisory Committee unanimously adopted all of the Style Subcommittee's suggestions and they have been incorporated into the amended draft.

Rule 28

The proposed amendment to Rule 28 requires that a party's opening brief include a statement of the standard of review. Only one comment was received and it was not directed at the substance of the amendment. The commentator urged that the Advisory Committee further amend Rule 28 to state that the requirements of Rule 28 are exclusive and cannot be altered or supplemented by local rules. Although one member of the Advisory Committee agreed with the commentator, the Advisory Committee did not adopt the suggestion because, at this time, it has not concluded its discussions about uniformity and the proper role of local rules. Local experimentation with the contents of briefs has proven to be a good testing ground for new requirements. The proposed amendment, as well as the recently added jurisdictional statement requirement, were both prompted by positive experience with local rules.

The Advisory Committee unanimously adopted the Style Subcommittee's suggestions and the changes have been incorporated in the amended draft.

Rule 34

The proposed amendment deletes the requirement that an opening argument include a statement of the case. No comments were submitted. The Advisory Committee unanimously adopted the Style Subcommittee's suggestions and the changes have been incorporated in the amended draft.

Rule 35

The proposed amendment to Rule 35 would create a uniform method for calculating a majority for purposes of hearing or rehearing a case in banc. The proposal does not count vacancies or recusals when determining whether a majority favors granting an in banc hearing. However, it provides that the number of judges participating in an in banc vote must be a majority of the active judges, including any who may be recused.

Five adverse comments were received. The Chief Judges of four circuits wrote in opposition of the proposal. Three of the chief judges believe that the method used by a circuit to convene an in banc hearing is a uniquely internal function. They further note that the courts of appeals have historically had the power to define the base from which a majority is determined and that no compelling reason has been advanced in support of the proposed change. The fourth chief judge opposes the amendment primarily because it would lower significantly the number of judges needed to convene an in banc hearing; he also expresses support for allowing each circuit to continue to determine its own procedure for convening an in banc hearing. The fifth commentator opposes the approach taken in the published draft because, in his opinion, it allows too small a number of judges to convene the court in banc, but he, unlike the chief judges, favors a uniform rule. This commentator would include recused judges in the base so that a circuit could convene in banc only when a majority of all judges in regular active service favor the in banc hearing.

One commentator, who commented favorably upon all the published drafts, supports the amendment but without any substantive comments.

As a result of the strong opposition, the Advisory

Committee voted to withdraw the proposed amendment; seven members favored withdrawal, none opposed it, and one member abstained. The abstaining member believes that a uniform rule should govern such a fundamental matter as the process used to convene a court in banc.

DRAFT
4-21-92

PRELIMINARY DRAFT
OF PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 3. Appeal as of Right — How Taken[1]

* * * * *

(d) Service of *[Serving]* the notice *[Notice]* of appeal *[Appeal]*. — The clerk of the district court shall serve notice of the filing of [send a copy of[2]] a notice of appeal by mailing a copy thereof to [each party's] counsel of record of each party other than the appellant [(apart from the appellant's)], or, if a party is not represented by counsel, to the party's last known address[.] of that party, ~~and t~~. The [district] clerk shall transmit forthwith [forthwith send] 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 [The district clerk] shall [likewise] transmit [send] copies [a copy] of any later docket entries [entry] in that [the] case to the [appellate] clerk[.] of the court of appeals. When an appeal is taken by a defendant [a

---

[1] The Style Subcommittee has uniformly put rule headings in initial capitals.

[2] The Style Subcommittee wishes to alert the Appellate Rules Advisory Committee to this change. The use of "send" is perhaps a substantive change, but the wording seems more likely than "mail" to endure as technology advances. To simplify, we likewise recommend "send" instead of "transmit."

defendant appeals] in a criminal case, the clerk of the district court [district clerk] shall also serve [send] a copy of the notice of appeal upon [to] the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served [sent] the date on which [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 on which the notice of appeal was received by the clerk [when the clerk received the notice of appeal]. Failure of the clerk [The clerk's failure] to serve [send] notice shall [does] not affect the validity of the appeal. Service shall be [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 [are sent[3]], with the date of mailing.

* * * * *

[3] The passive-voice verb is a superior alternative to repeating "clerk" in this way.

COMMITTEE NOTE

Note to subdivision [paragraph] 3(d).[4] The amendment requires the district court clerk to transmit [send] to the [appropriate appellate] clerk of the appropriate court of appeals copies [a copy of every] of all docket entries in a case following [after] 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 [when] one of the post trial [posttrial] motions enumerated in Rule 4(a)(4) is filed, a notice of appeal filed before the disposition of the motion will become [becomes] effective upon disposition of the motion. The court of appeals needs to be advised that the filing of a post trial [posttrial] 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 [Sending] copies of all docket entries following [after] the filing of a notice of appeal [is filed] should provide the courts of appeals with the necessary information.

---

[4] Bryan Garner, the consultant to the Style Subcommittee, has spoken with Judge Pointer and Dean Carrington about the use of "subdivision" and "paragraph" — terms used inconsistently in some of the drafts that the Subcommittee is working on. We've learned that, since at least 1938, the standard order has been as follows:

Rule 1

(a) Subdivision

(1) Paragraph

(A) Subparagraph

(i) Item.

The Subcommittee has therefore made the references in these amendments consistent with the established policy of the federal drafters. Where a specific paragraph is referred to (e.g., (a)(4)), it is preceded by "paragraph" instead of "subdivision."

Rule 3.1. Appeals [Appeal] from [a] Judgments [Judgment] Entered by [a] Magistrates Judges [Judge] in [a] Civil Cases [Case]

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

If any party makes a timely motion under the Federal Rules of Civil Procedure: (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; (iv) under Rule 54 for costs or attorney's fees if a district court under Federal Rule of Civil Procedure 58 enters an order delaying entry of judgment and extending the time for appeal; or (v) under Rule 59 for a new trial, or if any party serves a motion under Rule 60 of the Federal Rules of Civil Procedure within 10 days after the entry of judgment, the time for appeal for all parties shall run from the entry of the order disposing of the last of all such motions.

Using a bulleted list (with letters, for ease of reference) not only displays the points better, but also improves the sentence structure:

If any party makes a timely motion of a type in the list that follows, the time for appeal for all parties runs from the entry of the order disposing of the last such motion. 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 costs or attorney's fees under Rule 54 if a district court under Rule 58 delays entry of judgment and extends the time for appeal; and
(E) for a new trial under Rule 59, or if any party serves a Rule 60 motion within 10 days after the entry of judgment.

Rule 4. Appeal as of Right — When Taken

(a) *Appeals [Appeal] in [a] civil [Civil] cases [Case].* —

* * * * *

(2) ~~Except as provided in (a)(4) of this Rule 4, a~~ A notice of appeal filed after the announcement of [judge announces] a decision or order but before the entry of the judgment or order ~~shall be~~ [is] treated as filed after such entry and on the day thereof [on the date of entry[5]].

(3) If ~~a timely notice of appeal is filed by~~ a [one] party timely files a [timely] notice of appeal, any other party may file a notice of appeal within 14 days after the date on which [when] 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 [of a type specified immediately below, the time for

---

[5] The Style Subcommittee would like the Appellate Rules Committee to consider this suggested revision. We want to ensure that it will not change the substance of the rule.

appeal for all parties runs from the entry of the order disposing of the last such motion. This provision applies to a timely motion[‘] under the Federal Rules of Civil Procedure[:] ~~is filed in the district court by any party~~

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

(B) under Rule 52(b) to amend or make additional findings of fact [under Rule 52(b)], whether or not an alteration of [granting the motion would alter] the judgment[;] would be required if the motion is granted;

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

(D) under Rule 54 for costs or attorney's fees [under Rule 54] if a district court under Federal Rule of Civil Procedure 58 enters an order delaying [delays] entry of judgment and extending [extends] the time for appeal; or

---

[‘] See footnote 5.

(E) under Rule 59 for a new trial [under Rule 59], or if any party serves a [Rule 60] motion under Rule 60 of the Federal Rules of Civil Procedure within 10 days after the entry of judgment[.], the time for appeal for all parties shall run [runs] 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. ~~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 [is ineffective until] the date of the

entry of an order that disposes of the last of all such motions [disposing of the last such motion]. An appeal from an order disposing of any of the above motions requires amendment of the party's [the party, in compliance with Appellate Rule 3(c), to amend a] previously filed notice of appeal[.] in compliance with Rule 3(c). Any such [An] amended notice of appeal shall [must] 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 [motion].

* * * * *

(b) *Appeals [Appeal] in [a] criminal [Criminal] cases [Case].* — In a criminal case[,] a defendant shall [must] file the notice of appeal ~~by a defendant shall be filed~~ in the district court within 10 days after the entry [either] of (i) the judgment or order appealed from[,] or [of] (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 [is] treated as filed after such entry and on the day thereof [on the date when the judgment is entered[7]]. If a [defendant makes a] timely motion [specified immediately below, in accordance with] under the Federal Rules of Criminal Procedure[, an appeal from a judgment of conviction must be taken within 10 days after the entry of an order disposing of the last such motion, 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 ~~in~~ arrest of judgment[;] ~~or~~

(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

---

[7] The Style Subcommittee would like the Appellate Rules Committee to consider this suggested change. We want to ensure that it will not change the substance of the rule.

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 [the court announces] a decision, sentence, or order[,] but before disposition [it disposes] of any of the above motions[,] shall be in abeyance and shall become effective upon [is ineffective until] the date of the entry of an order that disposes [disposing] of the last of all such motions [motion], or upon [until] the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Appellate 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 [must] 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 [any defendant files] a notice of appeal[.] by any defendant.

A judgment or order is entered within the meaning of this subdivision when it is entered in [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.

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 [entry of the order disposing of the] motion.

(c) Appeals by [an] Inmates [Inmate] Confined [Confined] in [an] Institutions [Institution]. — If an inmate [a person] 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 cases [case] in which the first notice of appeal is filed in the manner provided in this paragraph [subdivision] (c), the 14 day [14-day] period provided in [paragraph] (a)(3) of this Rule 4 for [an]other parties [party] to file [a] notices [notice] of appeal shall run [runs] from the date [when] the [district court receives the] first notice of appeal[.] is received by the district court. In [a] criminal cases [case] in which a defendant

files a notice of appeal in the manner provided in this paragraph [subdivision] (c), the 30 day [30-day] period for the government to file its notice of appeal shall run [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[.] by the district court.

COMMITTEE NOTE

Note to Subdivision [Paragraph (a)](2). The amendment treats all notices [a notice] of appeal filed after [the] announcement of [a] decisions [decision] or orders [order,] but before [its] formal entry[,] of such orders as if the notices of appeal [notice] had been filed after such entry. The amendment deletes the language that made subdivision [paragraph] (a)(2) inapplicable to notices [a notice] of appeal filed after announcement of the disposition of post trial motions [a posttrial motion] enumerated in [paragraph] (a)(4) but before the entry of such orders [the order], see, Acosta v. Louisiana Dept. [Dep't] 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 [paragraph] (a)(4) recognizes all notices of appeal filed after entry of judgment,[—]even those that are filed while the post trial [posttrial] motions enumerated in [paragraph] (a)(4) are pending,[—]the amendment of this subdivision [paragraph] is consistent with the amendment of subdivision [paragraph] (a)(4).

Note to Subdivision [Paragraph] (a)(3). The amendment is technical in nature, [merely tightens the phrasing;] no substantive change is intended.

Note to Subdivision [Paragraph] (a)(4). The 1979 amendment of this subdivision [paragraph] created a trap for [an] unsuspecting litigants [litigant] who file notices [files a notice] of appeal before post trial motions [a posttrial motion], or while post trial motions are [a posttrial motion is] pending. The 1979 amendment requires parties [a party] to file new notices [a new notice] of appeal after [the motion's] 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 [a notice] of appeal filed before [the] disposition of the [a] specified post trial motions [posttrial motion] 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 [motion is disposed of, whereupon] . Upon disposition of the motion, the previously filed notice of appeal becomes effective to grant [effectively places] jurisdiction to a [in the] court of appeals. The Committee realizes that holding notices [a notice] of appeal in abeyance will create a new species of appeal that is not truly "pending" and recommends that[,] for statistical purposes[,] appeals [an appeal] held in abeyance not be counted as pending. A new statistical classification may be appropriate.

Because notices [a notice] of appeal will ripen into [an] effective appeals [appeal] upon disposition of post trial motions [a posttrial motion], in some instances there will be appeals [an appeal] from judgments [a judgment] that have [has] been altered substantially because the motions were [motion was] 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, [But] the appellee also may [also] move to have [strike] 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 [posttrial] motion was granted, the appellant still plans to pursue the appeal. The [Since the] appellant's response would provide the appellee with sufficient notice of the appellants' [appellant's] 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 [posttrial] 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 [posttrial] motion, however, and [if] a party wishes to appeal from the disposition of the motion, the party must amend the notice of appeal to so indicate.

Subdivision [Paragraph] (a)(4) also is [also] amended to include[, among motions that extend the time for filing a notice of appeal,] motions [a Rule 60 motion] under Rule 60 that are [is] served within 10 days after entry of judgment[.] among the motions that extend the time for filing a notice of appeal. This eliminates the difficulty of determining whether a post trial [posttrial] motion made within 10 days after entry of a judgment is a motion under Rule 59(e) [motion], which tolls the time for filing an appeal, or a motion under Rule 60 [motion], which historically has not tolled the time. The amendment is consistent [comports] with the practice in several circuits that treat [of treating] 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.*, Finch v. City of Vernon, 845 F.2d 256 (11th Cir. 1988); Rados v. Celotex Corp., 809 F.2d 170 (2d Cir. 1986); Skaderberg v. Oklahoma, 797 F.2d 881 (10th Cir. 1986). However, to [To] conform to recent Supreme Court decisions, [however —]Buchanan v. Stanships, Inc., 485 U.S. 265 (1988); [and] 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 unless a district court, acting under Rule 58, enters an order delaying the entry of judgment and extending the time for appeal. This amendment is to be read in conjunction with the amendment of Fed. R. Civ. P. 58.

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 [a motion] for judgment of acquittal under Criminal Rule 29 to the list of tolling motions. Such motions are [a motion is] the equivalent of a Fed. R. Civ. P. 50(b) motions [motion] for judgment notwithstanding the verdict, which toll [tolls] the running of time for appeals in civil cases [an appeal in a civil case].

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 [posttrial] motions is timely filed. However, in criminal cases [In a criminal case, however,] 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 [posttrial] motion may be disposed of more than 10 days before sentence is imposed, i.e. [i.e.,] before the entry of judgment. United States v. Hashagen, 816 F.2d 899, 902 N.5 [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 [providing] that an appeal may be taken within 10 days after the entry of an order denying the motion and[;] [the amendment] says instead that an appeal may be taken within 10 days after the entry of an order disposing of the last of such motions [motion]. (Emphasis added) [(emphasis added).] The change recognizes that there may be multiple post trial [posttrial] 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 [a notice] of appeal filed before [the] disposition of any of the post trial [posttrial] tolling motions shall become [becomes] effective upon disposition of the motions. In most circuits this language simply restates the current practice, see [. See] United States v. Cortes, 895 F.2d 1245 (9th Cir. 1990). However, two [Two] circuits[, however,] 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 [The] committee [therefore] 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 [a] sentencing courts [court] to correct [any] arithmetic [arithmetical], technical, or other clear errors in sentencing within 7 days after the imposition of [imposing the] 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) [motion] or by correction of [a] sentence pursuant to [under] Rule 35(c).

Note to subdivision (c). In Houston v. Lack, 487 U.S. 266 (1988), the Supreme Court held that [a] *pro se* prisoners' [prisoner's] notices [notice] of appeal are [is] "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 [a notice] of appeal by depositing the notices [it] in [an] institutional mail systems [system] requires adjustment of the rules governing the filing of cross appeals [cross-appeals]. In a civil case[,] the time for filing a cross appeal [cross-appeal] ordinarily runs from the date on which [when] 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 [cross-appeal] has expired. To avoid that [problem], subdivision (c) provides that in civil cases [a civil case] when [an] institutionalized persons file notices [person files a notice] of appeal by depositing them [it] in [the] institutions' [institution's] mail systems [system], the time for filing cross appeals [a cross-appeal] shall run [runs] from the district courts' [court's] receipt of the notices of appeal [notice]. A parallel provision is made [The amendment makes a parallel change] regarding the time for the government to bring appeals in criminal cases [appeal in a criminal case].

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 [under] 28 U.S.C. § 636(c)(4) to a district 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 [Transcript] of proceedings [Proceedings]; duty of appellant to order; notice to appellee if partial transcript is ordered [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 [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. If the [An] appellee deems [who desires] 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 [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.

* * * * *

COMMITTEE NOTE

The amendment is technical and [merely tightens the phrasing;] 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 [must] be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be [is not] timely unless the papers are received by the clerk [the clerk receives the papers] within the time fixed for filing, except that briefs and appendices shall be [are] deemed [treated as] filed on the day of mailing if the most expeditious form of delivery by mail, excepting [except] special delivery, is utilized

[used], and except further that papers [Papers] filed by [an] inmates confined in institutions are [an institution are] timely filed if they are deposited in the institutions' [institution's] internal mail systems [system] on or before the last day for filing. Timely filing of papers by [an] inmates confined in institutions [an institution] may be shown by [a] notarized statements or declarations [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 which [that] may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall [must] note thereon the date of filing and shall thereafter transmit [give] 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) *[Appellant's] Brief of the appellant*. — The brief of the appellant shall [must] contain[,] under appropriate headings and in the order here indicated:

* * * * *

(5) An argument. The argument may be preceded by a summary. The argument shall [must] contain the contentions of the appellant with respect to [on] the issues presented, and the reasons therefor, with citations to the authorities, statutes[,] and parts of the record relied on. The argument also shall [must also] include [for each issue] a concise statement of the applicable standard of review for each issue, which[; this statement] may be presented [appear] in the discussion of each issue or under a separate heading preceding [placed before] the discussion of the issues.

* * * * *

(b) *[Appellee's] Brief of the Appellee*. — The brief of the appellee shall [must] conform to the requirements of subdivisions [paragraphs] (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.

[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.]

* * * * *

COMMITTEE NOTE

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

Rule 34. Oral Argument

* * * * *

(c) *Order and content [Content] of argument [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 [may not] read at length from briefs, records[,] or authorities.

* * * * *

COMMITTEE NOTE

Subdivision (c). The amendment deletes the requirement that the opening argument shall [must] 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, [Nevertheless,] 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~~ [a Cause] by the Court in Banc[*]

(a) *When hearing or rehearing in banc will be ordered [When a Hearing or Rehearing in Banc Will Be Ordered].* — A majority of the circuit judges ~~who are~~ currently 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, except that no in banc hearing or rehearing may be ordered if the number of judges not disqualified is less than a majority of those currently in regular active service. ~~Such a~~ [A] hearing or rehearing [in banc] is not favored and ordinarily will not be ordered except [in two circumstances:] ~~(1)~~ when consideration by the full court is necessary to secure or maintain

---

[*] The phrase "in banc" could be rendered either "In Banc" or "in Banc" in a title. The Style Subcommittee has rendered it as if the "in" were a preposition instead of a particle.

Incidentally, the majority of the Subcommittee prefers the spelling "en banc" — the predominant spelling in the United States. But, given the spelling in the statute ("in banc"), the Subcommittee has decided not to create an inconsistency.

uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

* * * * *

COMMITTEE NOTE

The circuits are divided as to [differ on] whether vacancies and recusals are [should be] 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. [i.e.], that the base from which the majority is determined consists only of the judges currently in regular active service who are not disqualified. The amendment also establishes a quorum requirement that the number of nondisqualified judges 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.

Part C
Summary of comments
Re: rules published 8/91

COMMENTS
PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE
PUBLISHED AUGUST, 1991

SUMMARY OF COMMENTS REGARDING
PROPOSED AMENDMENTS TO FED. R. APP. P. 4

Six commentators submitted remarks on the proposed amendments to Fed. R. App. P. 4.

One commentator supports the proposed amendments without further elaboration.

Four commentators support the approach taken in the proposed amendments but suggest language changes:

1) two commentators suggest adding language that clarifies whether an additional fee must be paid when filing an amendment indicating intent to appeal from an order disposing of a posttrial motion;
2) two commentators suggest clarifying the nature and form of an amended notice with regard to
   - whether it is a new notice of appeal that must be separately docketed or whether it is an amendment of the notice in an existing appeal, and
   - whether it should be styled "Notice of Appeal," "Amendment to Notice of Appeal," or "Amended Notice of Appeal" and what level of formality is required in the body of the notice;
3) one commentator suggests adding a cautionary note to rule 4(a)(1) that would discourage filing notices of appeal while posttrial motions are pending;
4) one commentator notes that some decisions disposing of post-trial motions are not appealable independent of an appeal from the decision in the underlying case and suggests a language change consistent with that fact;
5) one commentator suggests a language change that would emphasize that the first-filed notice of appeal is sufficient to appeal the decision in the case but an amendment is needed to perfect an appeal from any of the postjudgment orders; and
6) one commentator suggests eliminating the language in 4(a)(4)(iv) regarding "delaying entry of judgment" and substituting in its place language that more accurately reflects the proposed change in Fed. R. Civ. P. 58.

One commentator favors an entirely different approach to loss of the right to appeal that can be created by the 4(a)(4) trap. He suggests making no change in Rule 4 but amending Rule

26. The Rule 26 amendment would allow a court to suspend that portion of Rule 4 which states a notice of appeal is a nullity if it is filed before disposition of the posttrial motions. He suggests that the suspension should be granted unless the opposing party can demonstrate prejudice or show cause for not doing so. If the approach taken in the published draft is used, the commentator suggests language changes 1) because a motion for attorneys' fees is not a motion "under Rule 54"[3], 2) because a district court cannot enter an order "delaying entry of judgment", and 3) because there is no time limit for filing motions for attorneys' fees.[4]

---

[3] A proposed amendment to Fed. R. Civ. P. 54, published concurrently with the proposed amendment to Fed. R. App. P. 4, would make a motion for attorneys' fees a Rule 54 motion.

[4] A proposed amendment to Fed. R. Civ. P. 54, published concurrently with the proposed amendment to Fed. R. App. P. 4, would impose a 14 day time limit on filing motions for attorneys' fees.

Part C
Summary of comments
Re: rules published 8/91

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 4

1. Mr. Gilbert F. Ganucheau
Clerk
United States Court of Appeals
600 Camp Street
New Orleans, Louisiana

Generally supports the approach taken in the amendment but suggests:

A. Clarifying whether the amendment needed to appeal from an order disposing of a posttrial motion is a new notice that must be docketed separately or an amendment that is filed in the existing appeal. He recommends that it be treated as an amendment to an existing appeal.

B. Clarifying whether an additional fee must be paid when filing an amendment indicating intent to appeal from an order disposing of a posttrial motion.

C. Adding a cautionary note to rule 4(a)(1) to discourage filing a notice of appeal while a post-trial motion is pending.

2. Mark Alan Hart, Esquire
Chair, Appellate Courts Committee of the Los Angeles County Bar Association
19360 Rinaldi Street, Suite 353
Northridge, California 91326

Supports all the proposed changes.

3. Professor Peter Lushing
Benjamin N. Cardozo School of Law
Yeshiva University
Brookdale Center
55 Fifth Avenue
New York, New York 10003

Notes that some decisions disposing of posttrial motions are not independently appealable but are reviewable only on appeal from the judgment in the underlying case. He suggests a language change consistent with that fact.

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

Generally supports the approach taken in the draft but suggests:

A. specifying how a party makes the "amendment" required to appeal from denial of a posttrial motion (in an "Amendment to Notice of Appeal" or in a "Notice of Appeal" or even in an "Amended Notice of Appeal?");

B. clarifying whether an additional filing fee will be charged when an amended notice of appeal is filed.

5. Luther T. Munford, Esquire
Chair, Federal and Local Rules Subcommittee of the ABA Litigation Section's Appellate Practice Committee
2829 Lakeland Drive
P.O. Box 55507
Jackson, Mississippi 39296-5507

Favors a different approach to loss of the right to appeal that can be created by the 4(a)(4) trap. He suggests keeping the current rule but amending Fed. R. App. P. 26(b). The Rule 26 amendment would allow a court to suspend that portion of Rule 4(a)(4) that makes a notice of appeal a nullity if it is filed before disposition of the posttrial motions. He suggests that the suspension should be granted unless the opposing party can demonstrate prejudice or show good cause for not doing so.

With regard to new 4(a)(4)(iv), Mr. Munford notes that a motion for attorneys' fees is not a motion "under Rule 54," that a district court cannot enter an order "delaying entry of judgment," and that the rule needs some time restriction. [Reporter's note: Proposed Civil Rules 54 and 58 are responsive to the first and third portions of the comments summarized in this paragraph.]

6. Elizabeth A. Phelan, Esquire
Appellate Practice Subcommittee of the Litigation Section of the Colorado Bar Association
1881 Ninth Street, Suite 210
Boulder, Colorado 80302

"Strongly" supports the proposed changes but suggests

language clarifying that the first-filed notice of appeal must be amended to perfect an appeal from any of the post-judgment orders. Suggests eliminating the language in 4(a)(4)(iv) regarding "delaying entry of judgment" and substituting in its place "granting tolling effect to the motion" or some other similar language that more accurately reflects the proposed change in Fed. R. Civ. P. 58.

SUMMARY OF COMMENTS REGARDING
PROPOSED AMENDMENTS TO FED. R. APP. P. 28

There were two comments on the proposed requirement that an opening brief include a statement of the standard of review.

One commentator simply supported this proposal along with all of the other proposed amendments to the appellate rules without further elaboration.

The other commentator urged the inclusion of a statement that the requirements of Rule 28 regarding the contents of briefs are exclusive and cannot be altered or supplemented by local rules. In other words, the commentator wants the rule to prohibit circuit by circuit variations from the requirements of Rule 28.

Part C
Summary of comments
Re: rules published 8/91

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 28

1. Mark Alan Hart, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
19360 Rinaldi Street, Suite 353
Northridge, California 91326

Supports this proposed amendment as well as all others.

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

Does not oppose the proposed requirement that an opening brief include a statement of the standard of review. Urges the committee to state that the requirements of Fed. R. App. P. 28 regarding the contents of briefs are exclusive and cannot be altered or supplemented by local rule.

SUMMARY OF COMMENTS REGARDING
PROPOSED AMENDMENT OF FED. R. APP. P. 35

Six commentators submitted remarks concerning the proposed amendment of Fed. R. App. P. 35.

One commentator supports this proposed amendment, as well all other proposed amendments to the appellate rules, without further comment.

One commentator supports development of a uniform rule but believes that recusals should be counted when determining whether a majority of a court favors in banc review. He suggests that, at a minimum, a circuit should convene in banc only if a majority of two-thirds of the members of the circuit favor the in banc. (The draft requires participation by a majority of the members and a favorable vote by a majority of them.) Another commentator also opposes the proposed amendment because it lowers significantly the number of judges needed to bring about an in banc; but rather than favoring development of a uniform rule, he expresses mild support for allowing each circuit to continue to determine its own procedure.

Three commentators oppose not only the approach taken in the draft but any rulemaking that would curtail the ability of the circuits to define for themselves the base from which a majority is determined for purposes of convening an in banc hearing.

Part C
Summary of comments
Re: rules published 8/91

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 35

1. Honorable Stephen Breyer
Chief Judge
United States Court of Appeals
U.S. Courthouse Room 1617
Boston, Massachusetts 02109

Opposes the proposed amendment because it significantly lowers the number of judges needed to bring about an in banc. He expresses mild support for allowing each circuit to continue having its own rule governing the process used to convene an in banc hearing.

2. Mark Alan Hart, Esquire
Chair, Appellate Courts Committee
Los Angeles County Bar Association
19360 Rinaldi Street, Suite 353
Northridge, California 91326

Supports this proposed amendment as well as all others.

3. Honorable Monroe G. McKay
Chief Judge
United States Court of Appeals
6012 Wallace Bennett Federal Building
Salt Lake City, Utah 84138-1181

Endorses Chief Judge Sloviter's statement in opposition to amendment of Rule 35.

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

Supports resolving by rule the question of whether vacancies and recusals should be counted in determining whether a majority of judges have voted to hear or rehear a case in banc but opposes the approach taken in the published draft. The commentator favors maximum participation by judges in an in banc proceeding. At a minimum, he suggests requiring participation by at least two-thirds of the total membership of a circuit.

5. Honorable Helen W. Nies
Chief Judge
United States Court of Appeals
717 Madison Place, N.W.
Washington, D.C. 20439

Endorses Chief Judge Sloviter's statement in opposition to the proposed amendment of Fed. R. App. P. 35.

6. Honorable Dolores K. Sloviter
Chief Judge
United States Court of Appeals
601 Market Street
Philadelphia, Pennsylvania 19106

Opposes the proposed amendment on the grounds that defining the body that establishes circuit precedent is a uniquely local function and the courts of appeals should retain their power to define individually the base from which a majority of the court is counted for purposes of convening an in banc hearing.

Except that Mr. Hart's letter expressed support for all of the proposed amendments, there were no comments submitted regarding the proposed amendments to the following rules:

1. Rule 3 (conforming amendments to the changes proposed in Rule 4)
2. Rule 3.1 and 5.1 (changing "magistrate" to "magistrate judge")
3. Rule 10 (correcting a printer's error)
4. Rule 25 (extending the ruling in Houston v. Lack to all papers filed by persons confined in institutions so that filing is timely if papers are deposited in the institution's mail systems on or before the filing date)
5. Rule 34 (deleting the requirement that an opening argument shall include a statement of the case).

Part D
Rules published February 1992
Issues and changes and
Revised drafts - June 1992

PROPOSED AMENDMENTS - FED. R. APP. P. 3(c) & 15(a) & (e)
Issues and changes
Revised drafts

Rule 3(c) of the Federal Rules of Appellate Procedure requires that a notice of appeal "specify the party or parties taking the appeal." In Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), the Supreme Court held that a court of appeals has no jurisdiction to hear the appeal of a party not properly identified as an appellant and that the phrase "et al.," is insufficient to identify an unnamed party as an appellant. Id. at 318. Following the Torres decision, the courts of appeals have struggled with how much specificity is sufficient to identify an appellant. A rule change is important because of the current confusion among the courts of appeals.

Because of the importance of the Torres problem, at its January 1992 meeting, the Standing Committee approved immediate publication of the proposed amendments to Fed. R. App. P. 3(c) and 15(a) and (e), as well as Forms 1, 2, and 3. Because the Standing Committee believes that the Torres problem is sufficiently important to justify shortening the usual publication period, the Committee voted to publish the rules and forms only for three months rather than the usual six months. (Although subpart (e) of Rule 15 is not related to the Torres question, publication of all the suggested amendments to Rule 15 at one time was approved.) Public hearings were scheduled for April 8, 1992, but were canceled due to lack of interest.

The published drafts require that each appellant be "named" in the notice of appeal, except in class actions. Although the Standing Committee approved publication of the draft amendments to Rules 3 and 15, the Standing Committee requested that the Advisory Committee continue to explore other alternatives that might better preserve as many appeals as possible.[5]

---

[5] A special note accompanying the published rules states:
The Committee, after receiving public comment, may explore other variations of the proposed amendment here submitted and may recommend a modified amendment without asking for further public comment, Accordingly, the Committee welcomes suggestions of other means to identify appellants in a notice of appeal.

There has been a division of opinion among the members of the Advisory Committee regarding the best way to resolve "the Torres problem."

At the December 1991 meeting a majority of the Advisory Committee supported the published draft -- requiring that each appellant be named -- because it is definitive. The naming requirement allows both the court and all parties to know precisely who is taking the appeal. Consequently, the rule is easy to administer. Naming also requires each litigant to make an explicit choice about taking an appeal. Arguably, the draft resolves the ambiguity of the present rule by telling lawyers and litigants that shorthand methods will not suffice.

The published draft accomplishes these goals by incurring costs, costs that some of the Advisory Committee consider unacceptable. The greatest is the possibility that the right of appeal will be lost because of an inadvertent omission of a party's name. One can also argue that a requirement that a notice of appeal list all names will simply be overlooked by a practicing lawyer because in all other filings with a district court after the complaint such terms as "et al." are sufficient.

For these reasons, some members of the Advisory Committee have opposed the approach taken in the published draft and have favored alternatives that would make it harder for a party to lose a right to appeal through mistaken nomenclature. One such alternative, explored briefly at the Committee's December meeting and in more depth at its April meeting, attempts to resolve the problem of the lost appellant by providing, in essence, that once any party brings an appeal all other litigants are parties to the appeal. Drafts prepared by both Judge Easterbrook and Professor Mooney, modeled on Supreme Court Rule 12.4, were considered at the Advisory Committee's April meeting.

The Supreme Court model leaves to a court of appeals the task of sorting out those parties who actually have an interest in being active in the appellate proceeding. It also requires that a court of appeals realign the parties for purposes of briefing schedules, etc. The clerks of the courts of appeals met in late February and discussed the possibility of amending Rule 3(c) along the lines of Sup. Ct. R. 12.4. The clerks and chief deputies unanimously agreed that given the volume in the courts of appeals, this task would be a formidable one. It is this volume problem that may make the analogy to the Supreme Court's practice limp. Because most petitions for certiorari are denied,

the Supreme Court needs to deal with the realignment problem in only a relatively few cases. Nevertheless, the Advisory Committee agrees that some administrative cost incurred to save an appeal is salutary. Indeed, in its work on Rule 4(a)(4), it settled on an approach that creates some administrative costs in order to ensure that appeals are not lost through inadvertence.

Following the close of the comment period, the Advisory Committee had a telephone conference to discuss the comments and to attempt to reconcile the two differing viewpoints. Two of the seven commentators opposed the approach taken in the published draft; the other five commentators offered suggestions for refining the draft. The Committee tried to balance sensibly the very real concerns of definiteness, certainty, and ease of administration against the possibility of inadvertent and excusable loss of appellate rights. As a result, it proposes new amendments to Rule 3(c) and to Rule 12.

Rule 3. Appeal as of Right--How Taken

* * *

(c) Content of the Notice of Appeal.-- ~~The~~ A notice of appeal ~~shall~~ must specify the party or parties taking the appeal by naming each appellant either in 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 ~~, shall~~ designate the judgment, order, or part thereof appealed from, and ~~shall~~ must name the court to which the appeal is taken. An appeal ~~shall~~ 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.

Committee Note

Note to subdivision (c). The amendment is intended to reduce the amount of satellite litigation spawned by the Supreme Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). In Torres the Supreme Court held that the language in Rule 3(c) requiring a notice of appeal to "specify the party or parties taking the appeal" is a jurisdictional requirement and that naming the first named party and adding "et al.," without any further specificity is insufficient to identify the appellants. Since the Torres decision, there has been a great deal of litigation regarding whether a notice of appeal that contains some indication of the appellants' identities but does not name the appellants is sufficiently specific.

The amendment states a general rule that specifying the parties should be done by naming them. Naming an appellant in an otherwise timely and proper notice of appeal ensures that the appellant has perfected an appeal. However, in order to prevent the loss of a right to appeal through inadvertent omission of a party's name or continued use of such terms as "et al.," which are sufficient in all district court filings after the complaint, the amendment allows an attorney representing more than one party the flexibility to indicate which parties are appealing without naming them individually. The test established by the rule for determining whether such designations are sufficient is whether

it is objectively clear that a party intended to appeal. A notice of appeal filed by a party proceeding 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 clearly indicates a contrary intent.

In class actions, naming each member of a class as an appellant may be extraordinarily burdensome or even impossible. In class actions if class certification has been denied, named plaintiffs may appeal the order denying the class certification on their own behalf and on behalf of putative class members, United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); or if the named plaintiffs choose not to appeal the order denying the class certification, putative class members may appeal, United Airlines, Inc. v. McDonald, 432 U.S. 385 (1980). If no class has been certified, naming each of the putative class members as an appellant would often be impossible. Therefore the amendment provides that in class actions, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as a representative of the class.

Finally, the rule makes it clear that dismissal of an appeal should not occur when it is otherwise clear from the notice that the party intended to appeal. If a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing ~~of~~ the Record

* * *

(b) Filing a Representation Statement.--Within 10 days after filing a notice of appeal, or at such other time designated by a court of appeals, the attorney who filed the notice of appeal must file with the clerk of the court of appeals a statement naming each party represented on appeal

by that attorney.

~~(b)~~ (c) Filing ...

Committee Note

Note to new subdivision (b). This amendment is a companion to the amendment of Rule 3(c). The Rule 3(c) amendment allows an attorney who represents more than one party on appeal to "specify" the appellants by general description rather than by naming them individually. The requirement added here is that whenever an attorney files a notice of appeal, the attorney must soon thereafter file a statement indicating all parties represented on the appeal by that attorney. Although the notice of appeal is the jurisdictional document and it must clearly indicate who is bringing the appeal, the representation statement will be helpful especially to the court of appeals in identifying the individual appellants.

The rule allows a court of appeals to require the filing of the representation statement at some time other than specified in the rule so that if a court of appeals requires a docketing statement or appearance form the representation statement may be combined with it.

Changes Since Publication

Obviously the new draft is significantly different from the published draft. The new draft makes it clear that naming each appellant is the surest way to perfect an appeal on behalf of each of them; however, the draft gives an attorney representing more than one party flexibility to use general descriptive terms as long as the notice makes it clear who intends to appeal. The companion amendment to Rule 12, requiring a representation statement, is intended to assist the court of appeals and the other parties in identifying the individual appellants.

Two commentators suggested that the rule should require listing the names of the parties in the body of the notice and that naming parties in the caption should not be sufficient. The draft continues to provide that naming in the caption is sufficient. It would create an unnecessary trap to treat the names in the caption as insufficient.

A provision is added to the rule dealing with pro se appellants. A notice of appeal filed by a pro se appellant is

sufficient to perfect an appeal on behalf of the signer's spouse and minor children if they are parties, unless the notice indicates a contrary intent.

With regard to class actions, the published rule provided that it would be sufficient for a notice to indicate that it is filed on behalf of the class. The revised draft requires that the notice name one person qualified to bring the appeal as representative of the class.

No substantive changes are made in Rule 15. Only two comments were submitted regarding Rule 15; both support the approach taken in the draft which requires that a petition for review or enforcement of agency orders name each party seeking review. Both comments were from persons who oppose the naming requirement in Rule 3. They support the naming requirement in Rule 15 principally because the notice is the first document filed with any court. The Committee note accompanying subdivision (a) is amended because it previously stated that subdivision (a) was a conforming amendment to Rule 3(c). Style changes are made in Rule 15, consistent with the changes recommended by the Style Subcommittee in other rules.

Only one minor change is made in the published forms even though substantive changes have been made in Rule 3(c), and Forms 1 and 2 are governed by Rule 3(c). The published forms indicate that each appellant/petitioner should be named in the body of the notice of appeal. Although that requirement has been relaxed in Rule 3, naming remains the preferred method and the published amendments to the forms remain appropriate. However, because Rule 3(c) authorizes alternative means an asterisk and footnote referring the reader to Rule 3(c) have been added to Forms 1 and 2.

Rule 15. Review or Enforcement of Agency Orders - 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" ~~shall~~ will include agency, board, commission, or officer) ~~shall~~ must be obtained by filing with the clerk of a court of appeals ~~which~~ 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" shall include a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal). The petition ~~shall specify the parties~~ 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 notice of appeal also must ~~and shall~~ 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 ~~shall~~ must be named respondent. The United States ~~shall~~ will also be

~~deemed~~ a respondent if ~~so~~ required by statute, even though not ~~so~~ 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.

* * *

(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.

Committee Note

Subdivision (a). The amendment is a companion to the amendment of Rule 3(c). Both Rule 3(c) and Rule 15(a) state that a notice of appeal or petition for review must name the parties seeking appellate review. Rule 3(c), however, provides an attorney who represents more than one party on appeal the flexibility to describe the parties in general terms rather than naming them individually. Rule 15(a) does not allow that flexibility; each petitioner must be named. A petition for review of an agency decision is the first filing in any court and, therefore, is analogous to a complaint in which all parties must be named.

Subdivision (e). The amendment adds subdivision (e). Subdivision (e) parallels Rule 3(e) that requires the payment of fees when filing a notice of appeal. The omission of such a requirement from Rule 15 is an apparent oversight. Five circuits have local rules requiring the payment of such fees, see, e.g., Fifth Cir. Loc. R. 15.1, and Fed. Cir. Loc. R. 15(a)(2).

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff)
)
v.) Notice of Appeal
)
C.D., Defendant)

Notice is hereby given that ~~C.D., defendant above named,~~ [_____ (here name all parties taking the appeal) _____, (plaintiffs) (defendants) in the above named case,*] hereby appeals to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the ____ day of _____, 19__.

(s)_____
Attorney for ~~C.D.~~ [___]
[Address:_____]

* See Rule 3(c) for permissible ways of identifying appellants.

In the proposed forms, it is suggested that the text that is stricken be deleted and that bracketed material be added.

Form 2. Notice of Appeal to a Court of Appeals From a Decision of the [United States] Tax Court

~~TAX COURT OF THE UNITED STATES~~

[UNITED STATES TAX COURT]
Washington, D.C.

A.B., Petitioner	)	
	)	
v.	)	Docket No. _____
	)	
Commissioner of Internal Revenue, Respondent	)	

Notice of Appeal

Notice is hereby given that ~~A.B.~~ [_____ here name all parties taking the appeal* _____], hereby appeals to the United States Court of Appeals for the _____ Circuit from (that part of) the decision of this court entered in the above captioned proceeding on the _____ day of _____, 19__ (relating to _____).

(s)_____
Counsel for ~~A.B.~~ [_____]
[Address:_____]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 3. Petition for Review of Order of an Agency, Board, Commission or Officer

United States Court of Appeals for the _____ Circuit

A.B., Petitioner }
}
v. } Petition for Review
XYZ Commission, Respondent }

~~A.B.~~ [_____(here name all parties bringing the petition)_____] hereby petitions the court for review of the Order of the XYZ Commission (describe the order) entered on _____, 19__.

[(s)]_____
Attorney for Petitioners
Address:_____

Part E
Summary of comments
Re: rules published 2/92

COMMENTS
PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE
PUBLISHED FEBRUARY 1992

SUMMARY OF COMMENTS REGARDING
PROPOSED AMENDMENTS TO FED. R. APP. P. 3(c)

Seven commentators submitted remarks on the proposed amendments to Fed. R. App. P. 3(c).

Two commentators opposed the general approach taken in the published draft; the remaining commentators suggested refinements of the proposed draft.

Both commentators opposing the approach taken in the published draft favored approaches that would better protect a party's right to appeal. Judge Easterbrook suggested amending Rule 3(c) in a manner analogous to that used Supreme Court Rules 12.4 and 18.2 so that all parties to the proceeding in the court whose judgment is to be reviewed are automatically parties in the court of appeals. Mr. Levy of the Public Citizen Litigation group suggested amending Rule 3 to state that use of "such phrases as 'all plaintiffs,' 'the plaintiffs,' 'plaintiffs A, B, et al.,' or 'all defendants except X' shall suffice to specify all such parties who are described by the phrase and who are represented by the attorney signing the notice."

The other five commentators made specific suggestions for improving the draft amendments:

1. Two commentators questioned the adequacy of the portion of the amendment dealing with class actions. One of them suggested that the rule should require the designation of at least one person qualified to take the appeal, and the other suggested that the rule require the notice of appeal to name each class representative or proposed class representative who seeks to prosecute the appeal.
2. One commentator suggested that requiring a notice of appeal to "name each party taking the appeal" is capable of ambiguity in situations where multiple parties are represented by separate counsel who would file separate notices.
3. One commentator suggests that the parties should be named in the body of the notice, that naming in the caption should not be an option.
4. Another commentator agreed that the parties should be named in the body of the notice; he also suggested that

the rule require a statement that an appeal is being taken, and that the Foman standard of "prejudice" should be incorporated in the rule.

Part E
Summary of comments
Re: rules published 2/92

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 3(c)

1. Honorable Frank H. Easterbrook
United States Circuit Judge
319 South Dearborn Street
Chicago, Illinois 60604

Judge Easterbrook notes that the proposed amendment clarifies the level of specificity needed to identify the parties taking an appeal so that any lawyer who reads the rule can file an effective notice of appeal. However, Judge Easterbrook notes that the clarity achieved by the change would come at the expense of parties whose lawyers do not read the rule and thus fail to follow it. He suggests taking a different approach. Unless there is evidence that such an approach causes prejudice to other parties or disrupts the administration of the courts, Judge Easterbrook advocates adopting a rule that will protect meritorious claims to the greatest extent possible. He suggests amending Rule 3(c) along the line of Supreme Court Rules 12.4 and 18.2 so that all parties to the proceeding in the court whose judgment is to be reviewed are automatically parties in the court of appeals.

Judge Easterbrook favors the amendments to Rule 15, because it makes sense to require identification - for the first time in <u>any</u> court - of the persons contesting an administrative decision.

2. Honorable Ruth Bader Ginsburg
United Stated Circuit Judge
United States Court of Appeals
Washington, D.C. 20001

Judge Ginsburg questions the adequacy of that portion of the amendment dealing with class actions. She suggests that the rule should require the designation of <u>at least one person qualified to take the appeal</u>.

3. Paul A. Levy, Esquire
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036

Public Citizen believes that the proposed rule substitutes

one trap for another. Public Citizen suggests amending Rule 3 to state that "[u]se of such phrases as 'all plaintiffs,' 'the plaintiffs,' 'plaintiffs A, B, et. al.,' or 'all defendants except X' shall suffice to specify all such parties who are described by the phrase and who are represented by the attorney signing the notice."

4. Professor Robert J. Martineau
University of Cincinnati
College of Law
Cincinnati, Ohio 45221-0040

Professor Martineau suggests stylistic changes and three substantive changes. He suggests that naming the appellants in the caption should not be sufficient and that the rule should require naming each appellant in the body of the notice. He also suggests that the rule should require a notice of appeal to state that an appeal is being taken. He further suggests incorporating the "prejudiced" standard established by the Supreme Court in Foman v. Davis, 371 U.S. 178, 181 (1962) for finding a notice of appeal so defective as to require dismissal.

5. George W. Morton, Jr., Esquire
Morton, Thomforde & Morton
620 Market Street
Knoxville, Tennessee 37902

Mr. Morton states that "name each party taking the appeal" is capable of ambiguity in situations where multiple parties are represented by separate counsel and he suggest that changing the language to "name the party taking an appeal might be less ambiguous.

6. Honorable Paul M. Rosenberg
United States Magistrate Judge
244 U.S. Courthouse
101 W. Lombard Street
Baltimore, Maryland 21201-2675

Magistrate Judge Rosenberg believes that the rule should require the parties to be named in the body of a notice of appeal and not in the caption because the caption may be used as a matter of course.

7. Richard C. Warmer, Esquire
O'Melveny & Myers
555 13th Street, N.W.
Washington, D.C. 20004-1109

Mr. Warmer suggests that in class action appeals, the rule should require the notice of appeal to name each class representative or proposed class representative who seeks to prosecute the appeal.

Part E
Summary of comments
Re: rules published 2/92

SUMMARY OF COMMENTS ON
PROPOSED AMENDMENTS TO FED. R. APP. P. 15

Three persons submitted comments on the proposed amendments to Fed. R. App. P. 15. Two commentators support the proposed amendments to Rule 15 even though they oppose the parallel proposed amendments to Rule 3. These two commentators support the requirement that a petition for review of an agency decision list the name of each person seeking review of the agency decision because the petition for review is the first filing in any court and therefore it is analogous to a complaint filed in a district court. The third commentator supported the proposed amendment but suggested that the rule should require listing the names in the body of the petition/notice and that listing names in the caption should not be sufficient.

Part E
Summary of comments
Re: rules published 2/92

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 15

1. Honorable Frank H. Easterbrook
Circuit Judge
United States Court of Appeals
219 South Dearborn Street
Chicago, Illinois 60604

Supports the requirement that a notice of appeal name the persons contesting the administrative decision because the notice is the first filing in any court and, therefore, is analogous to a complaint filed in a district court.

2. Paul A. Levy, Esq.
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036

Supports the proposed amendment requiring that the notice of appeal name each petitioner because it is the first filing with a court and it is filed in a court of appeals rather than in a district court.

3. Honorable Paul M. Rosenberg
United States Magistrate Judge
244 U.S. Courthouse
101 W. Lombard Street
Baltimore Maryland 21201-2675

Magistrate Judge Rosenberg believes that the rule should require the parties to be named <u>in the body</u> of a notice of appeal and not in the caption.

NEW PROPOSALS

At the Advisory Committee's April 30, 1992, meeting the Committee approved proposed amendments to two additional rules, Rules 35 and 47.

The **proposed amendment of Rule 35** inserts language stating that the pendency of a suggestion for rehearing in banc does not extend the time for filing a petition for certiorari. The Advisory Committee believes that the amendment should eliminate confusion arising from the distinction, with regard to the time for filing a petition for certiorari, between a petition for panel rehearing and a suggestion for rehearing in banc.

A petition for panel rehearing suspends the finality of a court of appeals judgment until a rehearing is denied or a new judgment is entered following the rehearing. Therefore, the time for filing a petition for certiorari runs from the date of the denial of the petition or the entry of a subsequent judgment. In contrast, a suggestion for rehearing in banc does not toll the running of time for seeking certiorari.

When a suggestion for rehearing in banc is filed without a petition for rehearing, a litigant often wrongly assumes that the filing time for a petition for certiorari is extended and delays filing a petition for certiorari until the time for filing has passed. The amendment places a warning in Rule 35, that the time is not extended.

The **proposed amendment of Rule 47** was prepared at the request of the Standing Committee to require uniform numbering of local rules and deletion of all language in local rules that merely repeats the language of the national rules. In addition, the proposed amendment states that internal operating procedures should not be used as disguised local rules.

Rule 35. Determination of a Causes by ~~the~~ a Court in Banc

(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~~ when 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 petition or otherwise. The pendency of such a suggestion, whether or not included in a petition for rehearing, ~~shall~~ will not affect the finality of the judgment of the court of appeals, extend the time for filing a petition for certiorari, or stay the issuance of the mandate.

Committee Note

Subdivision (c). The amendment makes no substantive change; it simply includes within the text of the appellate rules the rule enunciated in Supreme Court Rule 13.4. The committee hopes that inclusion of this language will alert litigants and lawyers to the fact that, although a petition for panel rehearing suspends the finality of a court of appeals judgment and extends the time for filing a petition for certiorari, a suggestion for rehearing in banc does not extend the time for filing a petition for certiorari.

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

After giving appropriate public notice and opportunity for comment, ~~E~~ each court of appeals by action of a majority of the circuit judges in regular active service may ~~from time to time~~ make and amend rules governing its practice ~~not in~~ - that are consistent with, but not repetitive of, these ~~rules~~ Federal Rules of Appellate Procedure. ~~In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules.~~ All generally applicable directions to parties or their lawyers regarding practice before a court must be in local rules rather than internal operating procedures or standing orders. Any local rule that relates to a topic covered by the Federal Rules of Appellate Procedure must be numbered to correspond to the related federal rule. ~~Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.~~ The clerk of each court of appeals must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended. In all cases not provided for by rule, a court of appeals may regulate its practice in any manner not inconsistent with these federal rules.

Committee Note

The primary purpose of these amendments is to make local rules more accessible. The amendments make three basic changes. First, the rule mandates a uniform numbering system under which local rules are keyed to the national rule. For example, Rule 27 or these rules governs motions; if a court of appeals prescribes a rule governing motions, the court of appeals must number the rule in a manner that indicates that the local rule relates to motions, such as Circuit Rule 27 or Local Rule 27.1. If a local rule on a topic covered by the federal rules uses the same number, notice of the existence of the local rule and accessibility to it are improved. In addition, tying the number of a local rule to the corresponding national rule should eliminate the perceived need to repeat language from the national rules in the local rules.

Second, the rule also requires courts of appeals to delete from their local rules all language that merely repeats the national rules. Repeating the requirements of a national rule in a local rule obscures the local variation. Eliminating the repetition will leave only the local variation and the existence of a local rule will signal a special local requirement. In addition, the restriction prevents the interpretation difficulties that arise when there are minor variations in the wording of a national and a local rule.

Third, the rule requires a court of appeal to observe the distinction between a rule and an internal operating procedure. An internal operating procedure should not contain a directive to a lawyer or a party; an internal operating procedure should deal only with how a court conducts its internal business. Placing a practice oriented provision in the internal operating procedures may cause a practitioner, especially one from another circuit, to overlook the provision.

The opening phrase of the rule regarding publication and a period for comment before adoption of a rule simply reflects procedures mandates by the 1988 amendment of 28 U.S.C. § 2071.

Part F
New proposals June, 1992

At the Advisory Committee's April 30th meeting, the Committee also approved amending Rule 6(b)(2)(i) to conform that provision to the proposed amendment to Rule 4(a)(4). The Committee referred the rule to the Bankruptcy Advisory Committee for its consideration. With the concurrence of the Chair and Reporter of the Bankruptcy Advisory Committee, the Advisory Committee on Appellate Rules submits these changes for your consideration.

Rule 6. ~~Appeals in bankruptcy cases from final judgments and orders of district courts or of bankruptcy appellate panels~~ Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or of a Bankruptcy Appellate Panel.

* * *

(b)(2)(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 ~~is filed~~ in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties ~~shall~~ runs from the entry of the order ~~denying the rehearing or the entry of the subsequent judgment~~ 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. An amended notice of appeal must be filed 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.

Committee Note

Note to Subparagraph (b)(2)(i). The amendment accompanies concurrent changes to Rule 4(a)(4). Although Rule 6 never included language such as that being changed in Rule 4(a)(4), language that made a notice of appeal void if it was filed before, or during the pendency of, certain posttrial motions, courts have found that a notice of appeal is premature if it is filed before the court disposes of a motion for rehearing. See, e.g., In re X-Cel, Inc., 823 F.2d 192 (7th Cir. 1987); In re Shah, 859 1463 (10th Cir. 1988). The committee wants to achieve the same result here as in Rule 4, the elimination of a procedural trap.