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

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TO: Honorable Alicemarie Stotler, Chair, and Members of the Standing Committee on Rules of Practice and Procedure

FROM: Honorable James K. Logan, Chair
Advisory Committee on Appellate Rules

DATE: June 5, 1995

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

I. Action Items

A. Proposed amendments to Federal Rules of Appellate Procedure 21, 25, 26, and 27, approved by the Advisory Committee on Appellate Rules at its April 17 and 18 meeting. The Advisory Committee requests that the Standing Committee approved these amended rules and forward them to the Judicial Conference.

The proposed amendments were published in September 1994. A public hearing was scheduled for January 23, 1995, in Denver, Colorado. Because there were no requests to appear, the hearing was canceled. The Advisory Committee has reviewed the written comments and, in some instances, altered the proposed amendments in light of the comments.

- Part A(1) of this Report summarizes the proposed amendments.
- Part A(2) includes the text of the amended rules.
- Part A(3) is the Gap Report, indicating the changes that have been made since publication.
- Part A(4) summarizes the comments.

B. Proposed amendments to Federal Rules of Appellate Procedure 26.1, 28, 29, 32, 35, and 41, approved by the Advisory Committee on Appellate Rules at its April 17 and 18 meeting. The Advisory Committee requests the Standing Committee's approval of these proposed amendments for publication.

The Advisory Committee actually requests republication of Rules 28 and 32. Those rules were also published last September along with the rules discussed in part A of this report. After considering the written comments, the Committee recommends what it believes are significant changes in these published rules and requests republication to provide an additional period for public comment.

The Advisory Committee requests initial publication of proposed amendments to Rules 26.1, 29, 35, and 41.

- Part B(1) of this report summarizes the proposed amendments.
- Part B(2) includes the text of the proposed amendments.
- Part B(3) is the Gap Report for Rules 28 and 32.
- Part B(4) summarizes the public comments on Rules 28 and 32.

II. Information Items

Part II of this report includes the Advisory Committee's Table of Agenda Items which indicates the status of proposed amendments under consideration by the Committee.

III. Minutes

Part III of the report is draft minutes of the Advisory Committee Meeting held April 17 and 18 in Pasadena, California. The minutes have not yet been approved by the Advisory Committee.

cc with enclosures: Members of the Advisory Committee on Appellate Rules

SUMMARY OF PROPOSED RULE AMENDMENTS TO BE FORWARDED TO THE JUDICIAL CONFERENCE

1. Amendments to Rule 21 governing petitions for mandamus are proposed. The rule is amended so that the trial judge is not named in the petition and is not treated as a respondent. The trial court clerk is, however, served with a copy of both the petition and the order disposing of the petition. The judge is permitted to appear to oppose issuance of the writ only if the court of appeals invites or orders the judge to do so. The proposed amendments also permit a court of appeals to invite an amicus curiae to respond to the petition.

2. The proposed amendments to Rule 25 provide that in order to file a brief or appendix using the mailbox rule, the brief or appendix must be mailed by First-Class Mail or dispatched to the clerk by a commercial carrier for delivery within three calendar days. The amendments also require that a party using the mailbox rule must certify in the proof of service that the brief or appendix was mailed or delivered to the commercial carrier on or before the last day for filing. Subdivision (c) is also amended to permit service on other parties by commercial carrier. Amended subdivision (c) further provides that when reasonable, service on other parties should be by a manner at least as expeditious as the manner used to file the paper with the court.

3. The proposed amendment to Rule 26 makes the three-day extension for responding to a document served by mail also applicable whenever the party being served does not receive the document on the date of service recited in the proof of service.

4. Rule 27, governing motions, is entirely rewritten. The amendments require that any legal argument necessary to support the motion must be contained in the motion; no separate brief is permitted. The time for responding to a motion is expanded from 7 days to 10 days. The amendments also make it clear that a reply to a response may be filed; a reply must be filed within 5 days after service of the response. A motion or a response to a motion must not exceed 20 pages and a reply to a response must not exceed 10 pages. The form requirements are moved from Rule 32(b) to subdivision (d) of this rule. Subdivision (e) makes it clear that a motion will be decided without oral argument unless the court orders otherwise.

PROPOSED RULE AMENDMENTS TO BE FORWARDED TO THE JUDICIAL CONFERENCE[1]

Rule 21. Writs of Mandamus and Prohibition, ~~Directed to a Judge or Judges~~ and Other Extraordinary Writs

1 (a) ~~*Mandamus or prohibition to a judge or judges;*~~
2 ~~*petition for writ; service and filing.*~~ *Mandamus or*
3 *Prohibition to a Court: Petition, Filing, Service, and*
4 *Docketing.*
5 (1) ~~Application for a writ of mandamus or of~~
6 ~~prohibition directed to a judge or judges~~
7 ~~shall be made by filing~~ A party
8 petitioning for a writ of mandamus or
9 prohibition directed to a court shall file a
10 petition ~~therefor~~ with the circuit clerk ~~of~~
11 ~~the court of appeals~~ with proof of service
12 on ~~the respondent judge or judges and on~~
14 all parties to the ~~action~~ proceeding in the
15 trial court. The party shall also file a copy

[1] The shaded text indicates changes made by the Advisory Committee after publication.

16 with the clerk of the trial court. All
17 parties to the proceeding in the trial court
18 other than the petitioner are respondents
19 for all purposes.
20 (2) ~~The petition shall contain a statement of~~
21 ~~the facts necessary to an understanding of~~
22 ~~the issues presented by the application; a~~
23 ~~statement of the issues presented and of~~
24 ~~the relief sought; a statement of the~~
25 ~~reasons why the writ should issue; and~~
26 (A) The petition must be titled "In re
27 [name of petitioner]."
28 (B) The petition must state:
29 (i) the relief sought;
30 (ii) the issues presented;
31 (iii) the facts necessary to
32 understand the issues
33 presented by the petition;
34 and
35 (iv) the reasons why the writ
36 should issue.

37 (C) The petition must include copies of
38 any order or opinion or parts of
39 the record ~~which~~ that may be
40 essential to ~~an~~ understanding ~~of~~ the
41 matters set forth in the petition.
42 (3) ~~Upon receipt of~~ When the clerk receives
43 the prescribed docket fee, the clerk shall
44 docket the petition and submit it to the
45 court.
46 (b) *Denial; Order Directing Answer; Briefs; Precedence.*
47 ~~If the court is of the opinion that the writ should~~
48 ~~not be granted, it shall deny the petition.~~
49 ~~Otherwise, it shall order that an answer to the~~
50 ~~petition be filed by the respondents within the~~
51 ~~time fixed by the order. The order shall be~~
52 ~~served by the clerk on the judge or judges named~~
53 ~~respondents and on all other parties to the action~~
54 ~~in the trial court. All parties below other than~~
55 ~~the petitioner shall also be deemed respondents~~
56 ~~for all purposes. Two or more respondents may~~
57 ~~answer jointly. If the judge or judges named~~

58 ~~respondents do not desire to appear in the~~
59 ~~proceeding, they may so advise the clerk and all~~
60 ~~parties by letter, but the petition shall not thereby~~
61 ~~be taken as admitted.~~
62 (1) The court may deny the petition without
63 an answer. Otherwise, it must order the
64 respondent, if any, to answer within a
65 fixed time.
66 (2) The clerk must serve the order to respond
67 on all persons directed to respond.
68 (3) Two or more respondents may answer
69 jointly.
70 (4) The court of appeals may invite or order
71 the trial court judge to respond or may
72 invite an amicus curiae to do so. The trial
73 court judge may not respond unless invited
74 or ordered to do so by the court of
75 appeals.
76 (5) If briefing or oral argument is required, ~~T~~
77 the clerk shall advise the parties, and
78 when appropriate, the trial court judge or

79 amicus curiae. ~~of the dates on which briefs~~
80 ~~are to be filed, if briefs are required, and~~
81 ~~of the date of oral argument.~~
82 (6) The proceeding ~~shall~~ must be given
83 preference over ordinary civil cases.
84 (7) The circuit clerk shall send a copy of the
85 final disposition to the clerk of the trial
86 court.
87 (c) *Other Extraordinary Writs.* Application for an
88 extraordinary writs other than one of those
89 provided for in subdivisions (a) and (b) of this
90 rule ~~shall~~ must be made by filing a petition ~~filed~~
91 with the circuit clerk ~~of the court of appeals~~ with
92 proof of service on the ~~parties named as~~
93 respondents. Proceedings on such application
94 ~~shall~~ must conform, so far as is practicable, to the
95 procedure prescribed in subdivisions (a) and (b)
96 of this rule.
97 (d) *Form of Papers; Number of Copies.*-- All papers
98 may be typewritten. An original and three copies
99 must be filed unless the court requires the filing

100 of a different number by local rule or by order in

101 a particular case.

Committee Note

In most instances, a writ of mandamus or prohibition is not actually directed to a judge in any more personal way than is an order reversing a court's judgment. Most often a petition for a writ of mandamus seeks review of the intrinsic merits of a judge's action and is in reality an adversary proceeding between the parties. See, *e.g.*, *Walker v. Columbia Broadcasting System, Inc.*, 443 F.2d 33 (7th Cir. 1971). In order to change the tone of the rule and of mandamus proceedings generally, the rule is amended so that the judge is not treated as a respondent. The caption and subdivision (a) are amended by deleting the reference to the writs as being "directed to a judge or judges."

Subdivision (a). Subdivision (a) applies to writs of mandamus or prohibition directed to a court, but it is amended so that a petition for a writ of mandamus or prohibition does not bear the name of the judge. The amendments to subdivision (a) speak, however, about mandamus or prohibition "directed to a court." This language is inserted to distinguish subdivision (a) from subdivision (c). Subdivision (c) governs all other extraordinary writs, including a writ of mandamus or prohibition directed to an administrative agency rather than to a court and a writ of habeas corpus.

The amendments require the petitioner to file a copy of the petition with the clerk of the trial court. This will alert the trial court to the filing of the petition. This is necessary because the trial court judge is not treated as a respondent and, as a result, is not served. A companion amendment is made in subdivision (b). It requires the circuit clerk to send a copy of the disposition of the petition to the trial court clerk.

Subdivision (b). The amendment provides that even if relief is requested of a particular judge, the judge may not respond unless the court invites or orders the judge to respond.

The court of appeals ordinarily will be adequately informed not only by the opinions or statements made by the trial court judge contemporaneously with the entry of the challenged order but also by the arguments made on behalf of the party opposing the relief. The latter does not create an attorney-client relationship between the party's attorney and the judge whose action is challenged, nor does it give rise to any right to compensation from the judge.

If the court of appeals desires to hear from the trial court judge, however, the court may invite or order the judge to respond. In some instances, especially those involving court administration or the failure of a judge to act, it may be that no one other than the judge can provide a thorough explanation of the matters at issue. Because it is ordinarily undesirable to place the trial court judge, even temporarily, in an adversarial posture with a litigant, the rule permits a court of appeals to invite an *amicus curiae* to provide a response to the petition. In those instances in which the respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response, participation of an *amicus* may avoid the need for the trial judge to participate.

Subdivision (c). The changes are stylistic only. No substantive changes are intended.

Rule 25. Filing, Proof of Filing, and Service, and Proof of Service

1 (a) *Filing.*

2 (1) *Filing with the Clerk.* A paper required or
3 permitted to be filed in a court of appeals
4 must be filed with the clerk.

5 (2) *Filing: Method and Timeliness.*

6 (A) *In general.* Filing may be
7 accomplished by mail addressed to
8 the clerk, but filing is not timely
9 unless the clerk receives the papers
10 within the time fixed for filing. ;
11 ~~except that~~

12 (B) *A brief or appendix.* ~~briefs and~~
13 ~~appendices are treated as filed on~~
14 ~~the day of mailing if the most~~
15 ~~expeditious form of delivery by~~
16 ~~mail, except special delivery, is~~
17 ~~used~~ A brief or appendix is timely
18 filed, however, if on or before the
19 last day for filing, it is:

20 (i) mailed to the clerk by First-
21 Class Mail, or other class of
22 mail that is at least as
23 expeditious, postage
24 prepaid; or
25 (ii) dispatched to the clerk for
26 delivery within 3 calendar
27 days by a third-party
28 commercial carrier.
29 (C) *Inmate filing.* ~~Papers~~ A paper filed
30 by an inmate confined in an
31 institution ~~are~~ is timely filed if
32 deposited in the institution's
33 internal mail system on or before
34 the last day for filing. Timely filing
35 of ~~papers~~ a paper by an inmate
36 confined in an institution may be
37 shown by a notarized statement or
38 declaration (in compliance with 28
39 U.S.C. § 1746) setting forth the
40 date of deposit and stating that

41 first-class postage has been
42 prepaid.
43 (D) *Electronic filing.* A court of appeals
44 may, by local rule, permit papers to
45 be filed or signed by electronic
46 means, provided such means are
47 consistent with technical standards,
48 if any, established by the Judicial
49 Conference of the United States.
50 A paper filed by electronic means
51 in accordance with this rule
52 constitutes a written paper for the
53 purpose of applying these rules.
54 (3) *Filing a Motion with a Judge.* If a motion
55 requests relief that may be granted by a
56 single judge, the judge may permit the
57 motion to be filed with the judge~~.~~; ~~in~~
58 ~~which event~~ the judge shall note ~~thereon~~
59 the filing date on the motion and
60 ~~thereafter~~ give it to the clerk. ~~A court of~~
61 ~~appeals may, by local rule, permit papers~~

62 ~~to be filed by facsimile or other electronic~~
63 ~~means, provided such means are~~
64 ~~authorized by and consistent with~~
65 ~~standards established by the Judicial~~
66 ~~Conference of the United States.~~
67 (4) *Clerk's Refusal of Documents.* The clerk
68 must not refuse to accept for filing any
69 paper presented for that purpose solely
70 because it is not presented in proper form
71 as required by these rules or by any local
72 rules or practices.
73 * * * * *
74 (c) *Manner of Service.* Service may be personal, ~~or~~
75 by mail, or by third party commercial carrier for
76 delivery within 3 calendar days. When
77 reasonable considering such factors as the
78 immediacy of the relief sought, distance, and cost,
79 service on a party must be by a manner at least
80 as expeditious as the manner used to file the
81 paper with the court. Personal service includes
82 delivery of the copy to a ~~clerk or other~~

83 responsible person at the office of counsel.
84 Service by mail or by commercial carrier is
85 complete on mailing or delivery to the carrier.
86 (d) *Proof of Service; Filing.* A paper Papers
87 presented for filing must contain an
88 acknowledgment of service by the person served
89 or proof of service in the form of a statement of
90 the date and manner of service and of the names
91 of the person served, certified by the person who
92 made service. Proof of service may appear on or
93 be affixed to the papers filed. When a brief or
94 appendix is filed by mailing or dispatch in
95 accordance with Rule 25(a)(2)(B), the proof of
96 service must also state the date and manner by
97 which the document was mailed or dispatched to
98 the clerk.
99 * * * * *

Committee Note

Subdivision (a). The amendment deletes the language requiring a party to use "the most expeditious form of delivery by mail, except special delivery" in order to file a brief using the

mailbox rule. That language was adopted before the Postal Service offered Express Mail and other expedited delivery services. The amendment makes it clear that it is sufficient to use First-Class Mail. Other equally or more expeditious classes of mail service, such as Express Mail, also may be used. In addition, the amendment permits the use of commercial carriers. The use of private, overnight courier services has become commonplace in law practice. Expedited services offered by commercial carriers often provide faster delivery than First-Class Mail; therefore, there should be no objection to the use of commercial carriers as long as they are reliable. In order to make use of the mailbox rule when using a commercial carrier, the amendment requires that the filer employ a carrier who undertakes to deliver the document in no more than three calendar days. The three-calendar-day period coordinates with the three-day extension provided by Rule 26(c).

Subdivision (c). The amendment permits service by commercial carrier if the carrier is to deliver the paper to the party being served within three days of the carrier's receipt of the paper. The amendment also expresses a desire that when reasonable, service on a party be accomplished by a manner as expeditious as the manner used to file the paper with the court. When a brief or motion is filed with the court by hand delivering the paper to the clerk's office, or by overnight courier, the copies should be served on the other parties by an equally expeditious manner – meaning either by personal service, if distance permits, or by overnight courier, if mail delivery to the party is not ordinarily accomplished overnight. The reasonableness standard is included so that if a paper is hand delivered to the clerk's office for filing but the other parties must be served in a different city, state, or region, personal service on them ordinarily will not be expected. If use of an equally expeditious manner of service is not reasonable, use of the next most expeditious manner may be. For example, if the paper is filed by hand delivery to the clerk's office but the other parties reside in distant cities, service on them need not be personal but in most instances should be by overnight courier. Even that may not be required, however, if the number of parties that must be served would make the use of

overnight service too costly. A factor that bears upon the reasonableness of serving parties expeditiously is the immediacy of the relief requested.

Subdivision (d). The amendment adds a requirement that when a brief or appendix is filed by mail or commercial carrier, the certificate of service state the date and manner by which the document was mailed or dispatched to the clerk. Including that information in the certificate of service avoids the necessity for a separate certificate concerning the date and manner of filing.

Rule 26. Computation and Extension of Time

* * * * *

1 (c) *Additional Time after Service by Mail or*
2 *Commercial Carrier.* Whenever a party is required or
3 permitted to do an act within a prescribed period after
4 service of a paper upon that party, and the paper is
5 served by mail, 3 calendar days shall be are added to the
6 prescribed period unless the paper is delivered on or
7 before the date of service stated in the proof or
8 acknowledgement of service.

Committee Note

The amendment is a companion to the proposed amendments to Rule 25 that permit service on a party by commercial carrier. The amendments to subdivision (c) of this rule make the three-day extension applicable not only when service is accomplished by mail, but whenever delivery to the party being served occurs later than the date of service stated in the proof or acknowledgement of service. When service is by mail or commercial carrier, the proof of service recites the date of mailing or delivery to the commercial carrier. If the party being served receives the paper on a later date, the three-day extension applies. If the party being served receives the paper on the same date as the date of service recited in the proof of service, the three-day extension is not available.

The amendment also states that the three-day extension is three calendar days. Rule 26(a) states that when a period prescribed or allowed by the rules is less than seven days,

intermediate Saturdays, Sundays, and legal holidays do not count. Whether the three-day extension in Rule 26(c) is such a period, meaning that three-days could actually be five or even six days, is unclear. The D.C. Circuit, recently held that the parallel three-day extension provided in the Civil Rules is not such a period and that weekends and legal holidays do count. *CNPQ v. Inter-Trade, 50 F.3d 56 (D.C.Cir. 1995).* The Committee believes that is the right result and that the issue should be resolved. Providing that the extension is three calendar days means that if a period would otherwise end on Thursday but the three-day extension applies, the paper must be filed on Monday. Friday, Saturday, and Sunday are the extension days. Because the last day of the period as extended is Sunday, the paper must be filed the next day, Monday.

Rule 27. Motions

1 ~~(a) *Content of motions; response.* Unless~~
2 ~~another form is elsewhere prescribed by these rules, an~~
3 ~~application for an order or other relief shall be made by~~
4 ~~filing a motion for such order or other relief with proof~~
5 ~~of service on all other parties. The motion shall contain~~
6 ~~or be accompanied by any matter required by a specific~~
7 ~~provision of these rules governing such a motion, shall~~
8 ~~state with particularity the grounds on which it is based,~~
9 ~~and shall set forth the order or relief sought. If a~~
10 ~~motion is supported by briefs, affidavits or other papers,~~
11 ~~they shall be served and filed with the motion. Any~~
12 ~~party may file a response in opposition to a motion other~~
13 ~~than one for a procedural order [for which see~~
14 ~~subdivision (b)] within 7 days after service of the motion,~~
15 ~~but motions authorized by Rules 8, 9, 18 and 41 may be~~
16 ~~acted upon after reasonable notice, and the court may~~
17 ~~shorten or extend the time for responding to any motion.~~
18 ~~(b) *Determination of motions for procedural*~~
19 ~~*orders.* Notwithstanding the provisions of (a) of this~~
20 ~~Rule 27 as to motions generally, motions for procedural~~

21 ~~orders, including any motion under Rule 26(b), may be~~
22 ~~acted upon at any time, without awaiting a response~~
23 ~~thereto, and pursuant to rule or order of the court,~~
24 ~~motions for specified types of procedural orders may be~~
25 ~~disposed of by the clerk. Any party adversely affected by~~
26 ~~such action may by application to the court request~~
27 ~~consideration, vacation or modification of such action.~~
28 ~~(c) *Power of a single judge to entertain motions.* In~~
29 ~~addition to the authority expressly conferred by these~~
30 ~~rules or by law, a single judge of a court of appeals may~~
31 ~~entertain and may grant or deny any request for relief~~
32 ~~which under these rules may properly be sought by~~
33 ~~motion, except that a single judge may not dismiss or~~
34 ~~otherwise determine an appeal or other proceeding, and~~
35 ~~except that a court of appeals may provide by order or~~
36 ~~rule that any motion or class of motions must be acted~~
37 ~~upon by the court. The action of a single judge may be~~
38 ~~reviewed by the court.~~
39 ~~(d) *Form of Papers; Number of Copies.* All papers~~
40 ~~relating to a motion may be typewritten. An original~~
41 ~~and three copies must be filed unless the court requires~~

42 ~~the filing of a different number by local rule or by order~~
43 ~~in a particular case.~~

44 (a) *In General.*
45 (1) *Application for Relief.* An application for
46 an order or other relief is made by motion
47 unless these rules prescribe another form.
48 (2) *Content of a Motion.*
49 (A) *Grounds and relief sought.* A
50 motion must state with particularity
51 the grounds for the motion and the
52 relief sought. The motion must
53 contain the legal argument
54 necessary to support it.
55 (B) *Accompanying documents.* If a
56 motion is supported by affidavits or
57 other papers, they must be served
58 and filed with the motion.
59 (i) Only affidavits and papers
60 necessary for determining
61 the motion may be

62 attached.

63 (ii) An affidavit must contain

64 only factual information, not

65 legal argument.

66 (iii) A motion seeking

67 substantive relief must

68 include a copy of the trial

69 court's opinion or agency's

70 decision as a separately

71 identified exhibit.

72 (C) *Documents not required.*

73 (i) A separate brief supporting

74 or responding to a motion

75 must not be filed.

76 (ii) A notice of motion is not

77 required.

78 (iii) A proposed order is not

79 required.

80 (3) *Response.*

81 (A) Any party may file a response to a

82 motion. Rule 27(a)(2) applies to a

83 response. The response must be
84 filed within 10 days after service of
85 the motion unless the court
86 shortens or extends the time. with
87 the following exceptions:
88 (i) a motion for a procedural
89 order is governed by Rule
90 27(b); and
91 (ii) a motion authorized by
92 Rules 8, 9, 18, or 41 may be
93 acted upon after reasonable
94 notice.
95 (B) A response may include a motion
96 for affirmative relief. The time for
97 response to the new motion, and
98 for reply to that response, are
99 governed by Rule 27(a)(3)(A) and
100 (a)(4). The title of the response
101 must, under Rule 27(d)(2)(D), alert
102 the court to the request for relief.
103 (4) *Reply to Response.* The moving party may

104 file a reply to a response. A reply must
105 be filed no later than 5 days after service
106 of the response, unless the court shortens
107 or extends the time. A reply must not
108 reargue propositions presented in the
109 motion or present matters that do not
110 reply to the response.
111 (b) *Disposition of a Motion for a Procedural Order.* A
112 motion for a procedural order -- including any
113 motion under Rule 26(b) -- may be acted upon at
114 any time without awaiting a response. A court
115 may, by rule or by order in a particular case,
116 authorize the clerk to dispose of motions for
117 specified types of procedural orders. A party
118 adversely affected by the court's, or the clerk's,
119 disposition may file a motion requesting
120 reconsideration, vacation, or modification of such
121 action. Timely opposition to a motion that is
122 filed after the motion is granted in whole or in
123 part does not constitute a request to reconsider,
124 vacate, or modify the disposition; a motion

125 requesting that relief must be filed.

126 (c) *Power of a Single Judge to Entertain a Motion.* A

127 single judge of a court of appeals may act on any

128 motion, but may not dismiss or otherwise

129 determine an appeal or other proceeding. A

130 court of appeals may provide by rule or by order

131 in a particular case that only the court may act on

132 any motion or class of motions. The court may

133 review the action of a single judge.

134 (d) *Form of Papers, Page Limits, and Number of*

135 *Copies.*

136 (1) *In Writing.* A motion must be in writing

137 unless the court permits otherwise.

138 (2) *Format.*

139 (A) A motion, response, or reply may

140 be produced by any duplicating or

141 copying process that produces a

142 clear black image on white paper.

143 The paper must be opaque,

144 unglazed paper, 8-1/2 by 11 inches.

145 (B) The text must not exceed 6-1/2 by

146 9-1/2 inches and must be double
147 spaced. Quotations more than two
148 lines long may be indented and
149 single-spaced. Headings and
150 footnotes may be single-spaced.
151 (C) The pages must be stapled or
152 bound at the upper-left-hand
153 corner.
154 (D) A cover is not required but there
155 must be a caption that includes the
156 case number, the name of the
157 court, the title of the case, and a
158 brief descriptive title indicating the
159 purpose of the motion and
160 identifying the party or parties for
161 whom it is filed.
162 (3) *Page limits.* A motion or a response to a
163 motion must not exceed twenty pages,
164 exclusive of the corporate disclosure
165 statement and accompanying documents
166 authorized by Rule 27(a)(2)(B), unless the

167 court permits or directs otherwise. A
168 reply to a response must not exceed ten
169 pages.
170 (4) *Number of Copies.* An original and three
171 copies must be filed unless the court
172 requires the filing of a different number
173 by local rule or by order in a particular
174 case.
175 (e) *Oral Argument.* A motion will be decided without
176 oral argument unless the court orders otherwise.

Committee Note

The rule has been entirely rewritten.

Subdivision (a). Paragraph (1) retains the language from the old rule indicating that an application for an order or other relief is made by filing a motion unless another form is required by some other provision in the rules.

Paragraph (2) outlines the content of a motion. It begins with the general requirement from the old rule that a motion must state with particularity the grounds supporting it and the relief requested. It adds a requirement that all legal arguments should be presented in the body of the motion; a separate brief or memorandum supporting or responding to a motion must not be filed. The Supreme Court uses this single document approach. Sup. Ct. R. 21.1. In furtherance of the requirement that all legal argument must be contained in the body of the motion, paragraph (2) also states that an affidavit that is

attached to a motion should contain only factual information and not legal argument.

Paragraph (2) further states that whenever a motion requests substantive relief, a copy of the trial court's opinion or agency's decision must be attached.

Although it is common to present a district court with a proposed order along with the motion requesting relief, that is not the practice in the courts of appeals. A proposed order is not required and is not expected or desired. Nor is a notice of motion required.

Paragraph (3) continues the provisions of the old rule concerning the filing of a response to a motion except that the time for responding has been expanded to 10 days rather than 7 days. Because the time periods in the rule apply to a substantive motion as well as a procedural motion, the longer time period may help reduce the number of motions for extension of time, or at least provide a more realistic time frame within which to make and dispose of such a motion. A party filing a response in opposition to a motion may also request affirmative relief. It is the Committee's judgment that it is permissible to combine the response and the new motion in the same document. Indeed, because there may be substantial overlap of arguments in the response and in the request for affirmative relief, a combined document may be preferable. If a request for relief is combined with a response, the caption of the document must alert the court to the request for relief. The time for a response to such a new request and for reply to that response are governed by the general rules regulating responses and replies.

Paragraph (4) is new. It permits the filing of a reply to a response. Two circuits currently have rules authorizing a reply. If there is urgency to decide the motion, the moving party may waive the right to reply or may file the reply very quickly. As a general matter, a reply must not "reargue propositions presented in the motion or present matters that do not reply to the response." Sometimes, matters relevant to the motion arise after the motion is filed; treatment of such matters

in the reply is appropriate even though strictly speaking it may not reply to the response.

Subdivision (b). This subdivision remains substantively unchanged except to clarify that one may file a motion for reconsideration, etc., of a disposition by either the court or the clerk. A new sentence is added indicating that if a motion is granted in whole or in part before the filing of timely opposition to the motion, the filing of the opposition is not treated as a request for reconsideration, etc. A party wishing to have the court reconsider, vacate, or modify the disposition must file a new motion that addresses the order granting the motion.

Although the rule does not require a court to do so, it would be helpful if, whenever a motion is disposed of before receipt of any response from the opposing party, the ruling indicates that it was issued without awaiting a response. Such a statement will aid the opposing party in deciding whether to request reconsideration. The opposing party may have mailed a response about the time of the ruling and be uncertain whether the court has considered it.

Subdivision (c). The changes in the subdivision are stylistic only. No substantive changes are intended.

Subdivision (d). This subdivision has been substantially revised. Paragraph (1) states that a motion must be in writing unless the court permits otherwise. The writing requirement has been implicit in the rule; the Committee decided to make it explicit. There are, however, instances in which a court may permit oral motions. Perhaps the most common such instance would be a motion made during oral argument in the presence of opposing counsel; for example, a request for permission to submit a supplemental brief on an issue raised by the court for the first time at oral argument. Rather than limit oral motions to those made during oral argument or, conversely, assume the propriety of making even extremely complex motions orally during argument, the Committee decided that it is better to leave the determination of the propriety of an oral motion to the court's discretion. The provision also would not disturb the

practice in those circuits that permit certain procedural motions, such as a motion for extension of time for filing a brief, to be made by telephone and ruled upon by the clerk.

The format requirements have been moved from Rule 32(b) to this rule. No cover is required, but a caption is needed as well as a descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed.

Paragraph (3) establishes page limits; twenty pages for a motion or a response, and ten pages for a reply. Three circuits have established page limits by local rule. The rule does not establish special page limits for those instances in which a party combines a response to a motion with a new request for affirmative relief. Because a combined document most often will be used when there is substantial overlap in the argument in opposition to the motion and in the argument for the affirmative relief, twenty pages may be sufficient in most instances. If it is not, the party may request additional pages. If ten pages is insufficient for the original movant to both reply to the response, and respond to the new request for affirmative relief, two separate documents may be used or a request for additional pages may be made.

Paragraph (4) is unchanged.

Subdivision (e). This new provision makes it clear that there is no right to oral argument on a motion. Seven circuits have local rules stating that oral argument of motions will not be held unless the court orders it.

GAP REPORT
CHANGES MADE AFTER PUBLICATION

1. RULE 21

Several changes have been made in Rule 21.

a. A sentence has been added at lines 15 and 16. The new language requires the party petitioning for mandamus to file a copy of the petition with the clerk of the trial court. The Advisory Committee wanted the trial court judge to have notice of the petition. To be consistent with the fact that the judge is not treated as a respondent, the copy is sent to the trial court clerk rather than directly to the judge.

b. At line 70, language was added authorizing a court of appeals to "invite" the judge's participation as well to order it.

c. A sentence has been added at lines 72-75. The new language states that the trial judge may not respond unless requested to do so by the court of appeals. In the published rule the judge's inability to participate without court of appeals authorization was implicit but not stated directly except in the Committee Note.

d. Paragraph (b)(7) is new. It requires the circuit clerk to send a copy of the order disposing of the petition to the clerk of the trial court. This change is a companion to the change requiring the petitioner to file a copy of the petition with the trial court. Filing the petition in the trial court will result in its docketing. Receipt of the order disposing of the petition will notify the trial court that the mandamus proceeding has been completed.

e. Several stylistic changes were adopted.

   i. At lines 9 and 43, "must" was changed to "shall".

   ii. At lines 10 and 11, and line 91, "clerk of the court of appeals" was changed to "circuit clerk".

   iii. Lines 26 and 27 were combined as subparagraph (A) and the words "The petition must were" were inserted at line 28 before the word "state". At line 37, the words "The petition must" were inserted before the word "include".

   iv. The numbered paragraphs of subdivision (b) were rearranged. Paragraph (4) of the new draft (beginning at line 70) had been paragraph (2) of the published draft.

   v. At line 76, the word "briefs" was changed to "briefing" and the

word "are" was changed to "is".

vi. At lines 87 and 88, the plural subject was changed to singular and the words "one of" were added.

vii. At line 90, the word "shall" was changed to "must" because the sentence is passive.

viii. At line 90, the sentence was changed so that application is not made by "petition filed" with the clerk, but by "filing a petition" with the clerk.

ix. At line 92, the words "parties named as" were deleted.

2. **Rule 25**

Several changes have been made in Rule 25.

a. The caption of the rule has been amended to read: "Filing, Proof of Filing, Service, and Proof of Service. This change was made to alert the reader to the fact that when the mailbox rule is used for filing a brief or appendix, a certificate reciting the date and manner of filing is required by an amendment to subdivision (d).

b. New language is added at lines 21 through 23. The language makes the mailbox rule applicable not only to First-Class Mail but also to any other class of mail that "is at least as expeditious." This makes the mailbox rule applicable if Express Mail or Priority Mail are used but does not make their use mandatory.

c. New language is added at lines 25 through 27. The published rule made the mailbox rule applicable when a party used a "reliable commercial carrier" to deliver a brief or appendix to the court. Several commentators objected to the adjective "reliable". The new language makes the mailbox rule applicable when a brief or appendix is dispatched to the clerk "for delivery within 3 calendar days by a third-party commercial carrier." The change eliminates the possibility of satellite litigation about reliability as well as the possibility of using a reliable but purposely slow carrier. Parallel language changes were made at lines 75 and 76 dealing with service by commercial carrier. The 3-calendar-day period coordinates with the amendments to Rule 26 regarding the 3-day extension of time for responding after service.

d. The sentence at lines 76 through 81 has been amended. Several commentators objected to the provision requiring that "when feasible" service should be accomplished in as expeditious a manner as the manner used to file the paper with the court. The provision now calls for comparable service "when reasonable considering such factors as the immediacy of the relief sought, distance, and cost." The

Committee believes that this language provides better guidance.

e. Subdivision (2)(B) of the published rule required a party using the mailbox rule to provide a certificate that it was mailed or delivered to a reliable commercial carrier on or before the last day for filing. That provision has been rewritten and moved to subdivision (d). The certification requirement was moved to subdivision (d) so that it could be combined with the proof of service.

f. Stylistic changes were made:
   i. At line 19, the word "was" was replaced by "is:".
   ii. At lines 20 and 21, initial caps were used for "First-Class Mail".
   iii. At line 58, the word "must" was changed to "shall".
   iv. At line 82, the words "clerk or other" were omitted.
   v. At line 86, the word "Papers" was made singular.
   vi. At line 90, the word "names" was made singular.

3. **RULE 26**

Several changes have been made in Rule 26.

a. The published amendment gave a party who must respond within a specified time after service of a document 3 additional days to respond when service is by "reliable commercial carrier" as well as when service is by mail. Because the distinction between personal service and other kinds of service is not always clear, the words "and the paper is served by mail" were deleted from lines 4 and 5, and new language has been added at lines 6 through 8. These changes make the 3-day extension available whenever a document is not delivered to the party being served on the same day that it is "served." The 3-day extension was created because service by mail is complete on the date of mailing. Since the party being served by mail does not receive the paper on that date, an extension is provided. Making the extension available whenever the party does not receive the document on the date it is served achieves the original objective and avoids the confusion arising from the need to know the type of service.

b. At line 5, the word "calendar" was added before the word "days." That change makes it clear that weekends and holidays are counted because the 3-day extension period is not covered by the provision in Rule 26(a) that weekends and holidays do not count when a period is less than 7 days.

c. Stylistic changes were also made:
   i. At line 2, the word "Whenever" was changed to "When".

ii. At line 3, the words "do an" were omitted.

4. **Rule 27**

a. At line 84, the time for filing a response to a motion was changed from 7 to 10 days. At line 105, the time for filing a reply was changed from 3 to 5 days. The rule covers a broad spectrum of motions from simple procedural motions, such as a motion for an extension of time, to dispositive motions, such as a motion for summary affirmance or reversal. The Committee believes that the 7 day period for a response is too short for substantive motions. But because of the difficulty of distinguishing between substantive/nonsubstantive or dispositive/nondispositive motions, the Committee decided it is better to have a single set of time limitations. The Committee lengthened the time periods, however, to help reduce the number of motions for extension of time and to provide a more realistic time within which to make and dispose of such a motion.

b. Lines 95 through 102 are new. These lines expressly authorize inclusion of a request for affirmative relief in a response to a motion. The provision states that the time for response to the new request and for a reply to that response are governed by the general rule.

c. The rule permits a court to act upon a motion for a procedural order without awaiting a response from the opposing party. The published rule stated that if timely opposition to a motion is filed after the motion is granted, the opposition does not constitute a request to reconsider, vacate, or modify the disposition. Lines 123 through 125 have been amended to state directly that a party must file a new motion to request such relief. Although that was implicit in the published draft, the redraft makes it explicit.

d. Because the use of carbon paper has become extremely rare, the proposed language dealing with carbon copies was omitted.

e. Stylistic changes were made.

   i. Line 47 was changed to active voice so that it reads "unless these rules prescribe another form".

   ii. At line 60, the words "the determination of" were replaced by the word "determining".

   iii. At line 63, the word "may" was changed to "must" in order to remove an ambiguity.

   iv. At lines 68 and 69, the words "the lower court opinion or agency decision" were changed to "the trial court's opinion or

agency's decision".

v. Lines 81 through 102 were restructured in light of the new language added at lines 95 through 102 (See b. above). Subparagraph (A) begins at line 81 and continues through line 94. The new language constitutes subparagraph (B). At lines 86 and 87 the word "but" was replaced with the words "with the following exceptions:".

vi. The caption of subdivision (b), line 111, was changed from "Determination of a Motion for a Procedural Order" to "Disposition of a Motion for a Procedural Order".

vii. At line 128, the words "request for relief that under these rules may properly be sought by motion" were deleted and replaced by the word "motion". Also at line 128, the words "a single judge must" were deleted and replaced by the word "may".

viii. Lines 131 through 133 were changed to the active voice. At line 131 the words "only the court may act on" were inserted after the word "that", and at line 132 the words "must be acted upon by the court" were deleted. At lines 132 and 133, the words "court may review the" were inserted after the word "The" and before the word "action". At line 133, the words "may be reviewed by the court" were stricken.

SUMMARY
COMMENTS RECEIVED ON PROPOSED AMENDMENTS

1. RULE 21 - Mandamus

Of the 14 commentators on the published rule, 7 support the rule without qualification. Three other commentators support the proposed amendments but suggest revisions. Four commentators oppose the revisions.

a. Opposition

Three of the four commentators who oppose the rule amendments do so because they believe that the trial judge should have the right to participate in a mandamus proceeding. The fourth person states that he sees no need for the change.

i. The trial judge's right to respond

Specifically, Judge Duff states that removing the trial judge may allow the parties to ignore the institutional interests of the district court, to misrepresent the facts to the appellate court, and to impugn the reputation of the trial judge. Judge Will emphasizes that the judge may be the principal or only party with an interest in opposing the mandamus. If the judge is not a party to the proceeding, Judge Will asks whether the judge will have standing to petition for certiorari in the event that mandamus is granted. Neither Judge Will nor Judge Duff object to deleting the trial judge's name from the title of the case, but they are concerned with precluding the judge from receiving notice of the filing of a petition, from responding to the petition, and from having standing to seek review of the issuance of the writ.

The arguments presented by Judges Duff and Will in opposition to the amendments are the same as those that led to the publication in October 1993 of the preceding draft. The earlier published draft required service on the judge and permitted the judge to participate whenever the judge thought it appropriate. At its April 1994 meeting, following publication of that draft and based upon the comments received at that time, the Advisory Committee -- by divided vote -- decided to publish the current draft that permits a trial judge to respond to a petition for mandamus only when ordered to do so by the court of appeals.

ii. Other issues

Professor Hoffheimer opposes even deleting the judge as a respondent. Professor Hoffheimer believes that the need to serve the judge may discourage the commencement of the proceedings, and they should be rare.

Professor Hoffheimer also states that the judge has an interest in receiving notice of the petition and that there may be a jurisdictional problem in enforcing specific relief directed against a trial judge who has not been served. Professor Hoffheimer further notes that the proposed amendments may be incompatible with the statutory grant of jurisdiction under 28 U.S.C. § 1651(b) to issue alternative writs. He asks whether an alternative writ can be granted if the party has not been joined. He believes that the changes are so radical that they would be better made by Congress.

b. Support

Seven commentators support the amendments without qualification. Three others support them but make suggestions for improvement.

The suggestions for improvement are as follows:

i. The New Jersey State Bar Association notes that the rule authorizes a court of appeals to "order" the trial judge to respond. The association recommends that the rule also authorize a court to "invite" the trial judge to participate. Such an amendment would permit a court of appeals to give the trial judge the option to participate while not requiring the judge to become involved. The association also suggests that a copy of the petition should be mailed to the trial judge so that the judge has notice of the filing.

ii. The American Bar Association (ABA) Section of Litigation supports the amendments but suggests that the rule be amended in the following ways:
- The Committee Note states that a trial judge may not respond to a petition for mandamus unless the court orders the judge to respond. The sections recommends that if such a prohibition is intended, it should be clearly stated in the text of the rule.
- A reply to a response should be permitted.
- Subdivision (b)(2) should explain:
  - the procedure for identification and invitation of an amicus

curiae;
- how and when the petitioner will be notified of the amicus' participation; and
- how the involvement of an amicus will affect the timing of the decision.

- Subdivision (b) should be amended to prohibit adoption of a local rule that requires a party to file other than 3 copies of a petition.

iii. The United States Postal Service also supports the amendment but expresses a concern similar to the ABA Litigation Section's third suggestion. The postal service states that the rule should provide guidance concerning the circumstances in which a court may appropriately invite an amicus to participate. The postal service suggests that a court should involve an amicus only in "those instances in which the respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response." The postal service also suggests that the rule should address the qualifications of those who may be asked to serve as an amicus.

2. RULE 25 - Filing and Service

Of the 16 commentators on the published rule, four support the published amendments without qualification and seven generally support the amendments but suggest further revision. Only one commentator expresses general opposition to the amendments while four express opposition to the requirement that service on other parties be by a manner at least as expeditious as the manner of filing with the court.

a. Opposition

i. General

One commentator opposes extending the "mailbox rule" (applicable to the filing of a brief or appendix) to the use of a "reliable commercial carrier." The commentator believes that this and other changes to Rule 25 inappropriately place the emphasis upon the receipt of a brief by the clerk rather than upon what the commentator believes is the more critical time, the receipt of a brief by opposing counsel.

ii. Service

The published amendments to subdivision (c) permitted service by "reliable commercial carrier" in addition to the current methods – personal service or mailing. The proposed amendments also stated that "[w]hen feasible, service on a party must be by a manner at least as expeditious as the manner of filing with the court." Four commentators oppose requiring service in as expeditious a manner as the manner of filing with the court.[2]

- One of those commentators states that the rule treats all methods of service as equivalent and there is no justification for placing a limitation on the use of any method.
- Another states that the change is unnecessary because the time for serving and filing a responding brief or motion paper runs from the time of service and is, therefore, subject to the Rule 26(c) extension whenever service is other than personal.
- A third believes that the rule is unclear; he asks if service may be accomplished by First-Class Mail on an opposing party who lives out of state when a paper is personally delivered to the clerk's office for filing. He suggests deleting the sentence.
- A fourth commentator states that there is not a sufficient problem to warrant the costs of the proposal but that if such a change is made it should be confined to instances in which the party seeks immediate action.

b. Support

Four commentators support the proposed amendments without qualification. Seven commentators are supportive of the amendments but suggest additional revisions.

i. Type of mail service

The current rule provides that a brief is treated as filed on the day of mailing "if the most expeditious form of delivery by mail, except special delivery, is used." That language was adopted before the Postal Service offered Express Mail and other expedited delivery services. The Committee wanted to make it clear that use of First-Class Mail is sufficient. The published amendment provided that a brief is timely filed if, on or before the day for filing, it is mailed by First-Class Mail. Three commentators point out that a literal reading of the rule would make the "mailbox

[2] As will be discussed below, four commentators state their specific support for the requirement.

rule" inapplicable if the party mailed its brief to the court by Express Mail. Since Express Mail and two-day mail service are generally more expeditious than First-Class Mail, the rule should not preclude their use. The United States Postal Service recommends either adding the term Express Mail to the proposed rule or replacing "First-Class Mail" with "United States Mail." Another commentator suggests making the mailbox rule applicable to First-Class Mail and "other classes of mail that are at least equally expeditious."

ii. Reliable commercial carriers

The published amendment made the mailbox rule applicable when a brief or appendix is delivered to a "reliable commercial carrier." While most of the commentators support the change, four noted that disputes about the reliability of a carrier are likely to arise. The United States Postal Service notes that the provision does not violate the Private Express Statutes but because of the satellite litigation it believes likely to arise concerning "reliability," the Postal Service suggests deleting the provision in its entirety. The other three commentators suggest either deleting the adjective "reliable" or defining it. For example, a "reliable" carrier might be one that guarantees delivery as quickly as First-Class Mail.

iii. Service

The published amendments to subdivision (c) required that "when feasible," service on a party be accomplished "by a manner at least as expeditious as the manner of filing." Four commentators expressed their support for that specific change. Although they support that amendment of subdivision (c), two of those four commentators, as well as two others, suggest refinement of that provision.

- One commentator states that the language of the rule is unclear and that it would be better to state that service must be accomplished "in the same manner" as filing with the court. The same commentator suggests deleting the word "feasible" because it can be misunderstood and misinterpreted.
- One commentator suggests that the standard should be more precise and suggests that the rule require as expeditious service not simply "when feasible" but "when feasible and reasonable, considering such things as distance and extraordinary cost . . ."
- Another commentator opposes requiring personal service when a brief or motion is filed with a clerk of court by hand delivery. The commentator points out that hand delivery on a party or attorney residing in a different state, city, or region may be both difficult and costly to arrange. The commentator suggests amending the language to make it applicable "[w]hen filing with the court is made by mail or commercial carrier, service on a party

must be by a manner at least as expeditious . . ."

- A fourth commentator does not oppose requiring personal service when a paper is filed by hand delivering it to the court but suggests amending the committee note to state that when a "brief or motion is filed with the court by hand or by overnight courier, the copies . . ."

iv. Miscellaneous

One commentator suggests that the rule should permit the consolidation of the certification of mailing with the certificate of service.

Another commentator suggests that the mailbox rule should be extended to a paper filed in connection with a motion or a petition for rehearing.

Another commentator notes that subdivision (b) requires service "on counsel" if a party is represented by counsel. The commentator suggests that if a party is represented by two or more different firms, that one of them should be designated as the "service attorney" and an opposing party need only serve the "service attorney."

The Association of the Bar of the City of New York is concerned about the proposed language in 25(a)(2)(D) authorizing local rules governing electronic filing. (The language is virtually identical to that in proposed amendments to Civil Rule 5(e), and Bankruptcy Rule 5005(a)(2).) The association is concerned that the proposed amendment does not impose any controls on the rules local courts may develop and that there is no provision for monitoring those local rules to determine which of them are most effective. The committee recommends that the rule be amended to require that any local rule must provide for such things as public access to files, accuracy of electronically stored documents, and security and integrity of the files.

3. Rule 26 - Computation and Extension of Time

The published amendment of this rule gave a party who must respond within a specified time after service of a document three additional days to respond when service is by a "reliable commercial carrier," just as a party has a 3-day extension when service is by "mail." Of the twelve commentators on the proposed amendment to Rule 26, five support the amendments without qualification and three support the amendments but suggest further refinement of them. Three commentators oppose the amendments and one suggests that the three day extension provided for a

response when service is by mail is insufficient.

a. Opposition

The United States Postal Service suggests that the Committee should delete the provision making the three-day extension applicable when a document is served by a "reliable commercial carrier." In fact, the Postal Service opposes not only the applicability of the extension but service by commercial carriers. See the preceding discussion about Rule 25. The Postal Service believes that the provision will spawn satellite litigation dealing with the "reliability" of a carrier and the relevance of a party's assumption about a carrier's reliability and that the change is not necessary. Another commentator concurs; he opposes the reference to a "reliable commercial carrier" as ambiguous and unnecessary.

A third commentator opposes the amendment stating that the proposal highlights the fact that there is no clear dividing line between personal service and other kinds of service. He uses the following example. If a lawyer uses a messenger to serve a brief or motion on a party and the messenger either signs a certification under Rule 25(d) or obtains an "acknowledgment of service," service is personal. If a lawyer gives a brief to a private courier service instructing that it be delivered the next day and, having done so, the agent signs a statement certifying that [s]he left the document at the opposing attorney's office with a "clerk or other responsible person," is not that also personal service? The commentator suggests that the real difference between "personal" service, and service by "mail" or by "commercial carrier" rests upon who signs the proof of service. In all instances someone personally delivers the paper. If it is true that the hallmark of personal service is that the proof of service is signed by the person who personally delivered the document to the opposing party or his/her counsel, the commentator asks how a recipient of the document will know whether the 3 day extension is available.

The third commentator notes that adding 3 days will discourage the use of overnight service. He suggests adding one 1 day and requiring use of one-day service, or measuring the time for responding from the date of receipt if some reliable indication of such receipt can be obtained. He asks whether dropping a package in a private carrier's pick-up box counts as "delivery to the carrier" or whether the package must be taken to the carrier's office. He also suggests clarifying the interrelationship of subdivisions (a) and (c).

b. Support

Five commentators support the proposed amendments without qualification and three others expressly support the amendments but suggest additional refinements. Many of the commentators note that even though it is not authorized by the existing rules, service by commercial carriers is common.

The commentators who support the change but offer suggestions for further revision suggest the following:

i. The adjective "reliable" should be dropped from the reference to commercial carriers as it can be misunderstood and misinterpreted.
ii. That it is unnecessary to add 3 days rather than 1 or 2 if service is made by overnight or second-day carrier.
iii. The rule should define "reliable commercial carrier."

c. Miscellaneous

One commentator suggests that the 3-day extension is not enough time to add to the deadline for responding to a paper that is served by mail. The commentator states that mail from the west coast to Washington often takes five days.

4. RULE 27 - Motions

Of the 18 commentators on the amended rule, five express unqualified support, another five support the amendments but offer suggestions for further improvement. Three commentators do not indicate either general support or opposition, but provide suggestions for further amendment. Only one commentator opposes the suggested revisions as a whole; three others express opposition to one or more provisions in the amended rule.

a. Opposition

Only one commentator states that Rule 27 should stay "as is." He believes that motion practice in the courts of appeals should not be encouraged. He also specifically opposes the requirement that a copy of the trial court decision accompany the motion because it may be lengthy and part of the joint appendix. He also states that the use of a typewriter, now permitted in Rule 27(d), is not carried forward to the proposed rule.

Other commentators expressed opposition to specific portions of the amended rule.

i. Time period for responsive pleadings

The State Bar of Arizona believes that the time periods for responding to a motion (7 days) and for replying to a response (3 days) are too short. The association suggests that those time periods be raised to 10 days for a response to a motion and 5 days for a reply to a response. The association notes that the deadlines apply to substantive motions and that a motion for extension of time is not adequate because a decision on a motion for extension may not be rendered until after the time limits in the rule have passed.

Another commentator who expresses general support for the proposed amendments "strongly urges" that the 7-day period for filing a response to a motion be expanded to 21 days when the motion is a dispositive motion for summary affirmance or reversal. The commentator states that 7 days is sufficient for non-dispositive motions.

ii. Procedural rulings made without waiting for response

Subdivision (b) of Rule 27 currently provides that a motion for a procedural order may be acted on without awaiting a response. A party who is adversely affected by such action may request reconsideration, vacation, or modification of the action. Those provisions are retained in the published version of the rule.

Three commentators, Public Citizen, the Assistant Attorney General of Alaska, and Leslie R. Weatherhead, Esq., object to portions of subdivision (b). Subdivision (b) states that if a motion for a procedural order is decided before the time for filing a response has expired, the timely filing of an opposing response is not considered a request for reconsideration. The assistant attorney general states that the timely filing of opposition should require de novo reconsideration of the motion and the opposing party should not be required to file a motion for reconsideration.

Public Citizen poses a more fundamental objection, that the rule should not permit a court to rule on a motion before the opposing party responds. Public Citizen states that once a ruling is made, the burden effectively shifts to the opposing party to show why it should not have issued even though, ordinarily, the burden would be on the party seeking the motion. Public Citizen suggests that an ex parte ruling should be permitted only if the party filing the motion has sought the consent of the other party. In those instances in which the other party refuses to consent, the

rule should require the movant to serve the opposing party by telecopier or overnight delivery and a ruling should be permitted only after a set amount of time (less than the ordinary 7 days), sufficient to allow the adversary to deliver a quick response.

Another commentator joins Public Citizen stating that in all non-exigent circumstances, a court should not render a decision without giving both sides an opportunity to be heard. She too states that if, by not waiting, a court makes an erroneous ruling, the wronged party has the burden of changing the status quo.

iii. Local rules re: number of copies

Public Citizen also opposes the provision in (d)(4) permitting local rules on the number of copies of a motion that must be filed. The American Bar Association Section of Litigation also recommends deletion of that provision.

b. Support and miscellaneous suggestions

Five commentators provide unqualified support; five others support the amendment but suggest some adjustments. The general sentiment of those supporting the amendments are that they make the rule clearer and more in keeping with modern practice.

Those who support the amendments, or make no general statement either supporting or opposing the amendments offered the following suggestions:

i. Including a request for affirmative relief in a response

The American Bar Association Section of Litigation approves the amendments but recommends that paragraph (a)(3) be amended. Paragraph (a)(3) governs a response to a motion. The section recommends that the rule:

- state that a party filing a response in opposition to a motion may request affirmative relief in the response;
- require that the title of the document alert the court to the request for relief; and
- provide that the time for a response to such a new request and for a reply to that response be governed by the general rules regulating responses and replies.

ii. Request for reconsideration following ex parte ruling

The American Bar Association Section of Litigation and Public Citizen both

recommend that subdivision (b) state directly that a party must file a new motion to have the court reconsider, vacate, or modify the disposition of a procedural ruling entered prior to the filing of timely opposition.

The Los Angeles County Bar Association Appellate Courts Committee suggests that the rule should require the court to state whether the initial order was granted without considering any opposition. If the court indicates whether it has considered the opposition papers, the party who filed the opposition will know whether its papers were considered and can then decide whether to request reconsideration.

iii. Dispositive motions

One commentator suggests that the rule should address the two main kinds of motions for substantive relief: 1) a motion for summary affirmance or denial, which he says should be granted only "when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists;" and 2) an appellee's motion to dismiss the appeal for lack of appellate jurisdiction.

iv. Content of a reply

Proposed paragraph 27(a)(4) states that a reply "must not reargue propositions presented in the motion or present matters that do not reply to the response." One commentator finds that language too restrictive. He argues that a reply should be able to address matters that arise after the motion is filed.

v. Page limits

The amended rule establishes page limits for a motion, response, and reply. None of the commentators object to the limits. The following suggestions, however, were made:

- that tables and cover pages should be excluded from the page count; (one commentator)
- that the length of motions is not a problem but that if limits are to be included and if Rule 32 adopts a word limit rather than a page limit, Rule 27 should also use a word limit; (one commentator) and
- that the font size, type style, and words per page specifications in Rule 32 should be included in Rule 27, or at least cross-referenced (two commentators).

LIST OF COMMENTATORS
SUMMARY OF THEIR INDIVIDUAL COMMENTS

1. RULE 21

The rule is amended so that the trial judge is not named in the petition and is not treated as a respondent. The judge is permitted to appear to oppose issuance of the writ only if the court of appeals orders the judge to do so. The proposed amendments also permit a court of appeals to invite an amicus curiae to respond to the petition.

1. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611

The section supports the proposed amendment which conforms the rule to actual mandamus practice in many circuits. The section, however, makes several suggestions and observations.

a. Neither subdivision (b)(2) nor the Committee Note explains the procedure for the identification and invitation of an amicus curiae, nor how or when the petitioner will be notified of the amicus' participation, nor how the involvement of an amicus will affect the timing of the decision. The section recommends amendment of subdivision (b) to make the procedures clear.
b. The Committee Note states that the trial judge may not respond unless the court orders the judge to respond, but the text of the rule does not contain any such express prohibition. The section recommends that if such a prohibition is intended, it should be clearly stated in the text of the rule.
c. The section recommends that a reply to a response should be allowed in the same manner as in proposed rule 27(a)(4).
d. The section also recommends that subdivision (b) be amended to delete the ability of a circuit to change the 3 copies requirement by local rule.

2. State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, Arizona 85003-1742

The State Bar of Arizona has no objections to and foresees no particular difficulties with the proposed amendments.

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

The committee supports the proposed change.

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

The committee endorses the amendments.

5. District of Columbia Bar
Section on Courts, Lawyers and the Administration of Justice
Anthony C. Epstein, Co-chair
Jenner & Block
601 Thirteenth Street, N.W., Suite 1200
Washington, D. C. 20005

The section supports the amendments. The section agrees that a trial judge should not be given the option to participate and that if an appellate court believes that the prevailing party below cannot adequately defend the challenged decision, the court should appoint an amicus.

6. Honorable Brian Barnett Duff
United States District Judge
219 South Dearborn Street
Chicago, Illinois 60604

Judge Duff opposes the change that would deprive a trial court judge of the right to participate in a mandamus proceeding to which the court is a party. He cited two instances illustrating that removing the trial judge may allow the

parties to ignore the institutional interests of the district court, to misrepresent to the appellate court facts leading to the mandamus proceeding, and to impugn the reputation of the trial judge.

7. Mary S. Elcano, Esquire
Senior Vice President, General Counsel
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1100

The postal service is concerned about the lack of guidance concerning the circumstances under which a court should invite participation by an amicus and about the qualifications or limitation upon who should serve as an amicus. The postal service suggests that a invitation to an amicus should be limited to "those instances in which respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response."

8. Bruce Comly French, Esquire
165 Tolowa Trail
Lima, Ohio 45805-4124

Mr. French believes that the trial judge should be named in the petition. He sees no need for the change.

9. Associate Professor Michael H. Hoffheimer
Law Center
The University of Mississippi
University, Mississippi 38677

Professor Hoffheimer disagrees with removing the trial judge from mandamus and prohibition proceedings for the following reasons:

1. Such proceedings are disfavored. Treating the trial judge as a respondent who must be served, etc., may indirectly, and appropriately, discourage the commencement of such proceedings.
2. Because relief in such proceedings is normally predicated upon a showing that the trial court has refused to do some ministerial act, a trial judge has an interest in receiving notice of such allegation.
3. There may be a jurisdictional problem in enforcing specific relief directed against a trial judge who has not been served.
4. The proposed amendment may be incompatible with the statutory

grant of jurisdiction, under 28 U.S.C. § 1651(b), to issue alternative writs. He asks whether an alternative writ can be granted if the party has not been joined.

Professor Hoffheimer suggests that the amendments so radically alter practices followed since the Judiciary Act of 1789 that they may exceed the scope of rulemaking authority and that it would be better for the proposed change to be enacted by Congress.

10. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee of the Los Angeles County Bar Association unanimously approves the proposed amendments.

11. National Association of Criminal Defense Lawyers
1627 K Street, N.W.
Washington, D. C. 20006

The association supports the amendments.

12. New Jersey State Bar Association
One Constitution Square
New Brunswick, New Jersey 08901-1500

The association approves the amendment that eliminates the naming of the district judge as a respondent but recommends that the rule be modified to permit a court of appeals to "invite" the trial court judge to respond as well as to order the judge to respond. In other words, the court of appeals should be permitted to give the district judge the option to provide additional information while not requiring the judge to become involved. The association also suggests that a copy of the petition should be mailed to the trial court judge so that the judge has notice of the filing. (Draft language is provided.)

13. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board had no stated objections or concerns.

14. Honorable Hubert L. Will
Senior Judge
United States District Court
219 South Dearborn Street
Chicago, Illinois 60604

Judge Will is concerned about the proposed change that would preclude a district judge from participating as a party in a mandamus proceeding brought against him or her and that the judge will not even be served with a copy of the petition. Judge Will recounts his experience in two mandamus cases that were ultimately decided by the Supreme Court, Will v. United States, 389 U.S. 90 (1967) and Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978). In the latter case he was the principal or only party with an interest in opposing the mandamus. He states that in some instances "judicial prerogatives and process may have more interest in the mandamus proceedings than the non-petitioning nominal parties." Judge Will questions whether the judge would have standing under the proposed rule to petition for certiorari, as he did in the Calvert Insurance case because the judge would not be a party.

Judge Will does not object to deleting the judge's name from the title of the case, but he does object to precluding the judge from receiving notice of the filing of a petition, from responding to the petition, and from having standing to appeal the issuance of the writ.

2. RULE 25

The proposed amendments provide that in order to file a brief or appendix using the mailbox rule, the brief or appendix must be mailed by first-class mail or delivered to a "reliable commercial carrier." The amendments also require a certificate stating that the document was mailed or delivered to the carrier on or before the last day for filing. Subdivision (c) is also amended to permit service on other parties by a "reliable commercial carrier." Amended subdivision (c) further provides that whenever feasible, service on other parties shall be by a manner at least as expeditious as the manner of filing.

1. American Bar Association
   Section of Litigation
   750 North Lake Shore Drive
   Chicago, Illinois 60611

   The section supports the recognition that most lawyers use commercial carriers.

   The section supports and encourages the adoption of local rules to permit filing by electronic means.

   The section supports the requirement that, when feasible, service be by a manner at least as expeditious as the manner of filing with the court.

2. State Bar of Arizona
   111 West Monroe, Suite 1800
   Phoenix, Arizona 85003-1742

   The State Bar of Arizona has no objections to and foresees no particular difficulties with the proposed amendments.

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

   The committee supports the proposed change.

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

The committee endorses the amendments including the requirement that service be by a manner at least as expeditious as the manner of filing. The committee suggests, however, that subdivision (c) set a more precise standard and state that "when feasible and reasonable, considering such things as distance and extraordinary cost, service on a party must be by a manner at least as expeditious ...."

5. Mary S. Elcano, Esquire
Senior Vice President, General Counsel
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1100

The postal service notes that inasmuch as 39 C.F.R. § 310.1(a)(7)(iii) excludes "papers filed in lawsuits . . . and orders of courts" from the definition of "letter," the private carriage proposed by the amendments would not violate the Private Express Statutes. The service states however, that a literal reading of the rule would give litigants only two choices: First-Class Mail or a "reliable commercial carrier," making Express Mail an unsafe option. The service suggests either adding the term Express Mail to the proposed rule or replacing "First-Class Mail" with "United States Mail." The service states that the second option would eliminate confusion as to whether Priority Mail service could be used. Priority Mail service literally is First-Class Mail but public perception is that it is a distinct service and may lead some litigants to erroneously conclude that the rule does not permit use of Priority Mail.

The postal service, however, suggests deleting the change relating to the use of a "reliable commercial carrier." The service believes that collateral litigation will arise concerning whether a particular carrier should be considered "reliable" and also about the relevance of a filer's assumption that a particular carrier is "reliable."

The service also notes that the proposed rule uses the term "first-class mail" but that correct usage calls for initial caps: i.e. "First-Class Mail."

6. Joseph W. Halpern, Elizabeth A. Phelan, & Heather R. Hanneman, Esquires
Holland & Hart
555 Seventeenth Street, Suite 2900
Denver, Colorado 80202-3979

Mr. Halpern, Ms. Phelan, and Ms. Hanneman agree that when a party files a brief or motion with a court by overnight courier that service on an opposing party should be by a method that is at least as expeditious as overnight delivery. They oppose requiring service by hand delivery when a brief or motion is filed with a clerk of court by hand delivery. Hand delivery on parties or attorneys residing in different states, cities, or regions may be both difficult and costly to arrange. They suggest that the second sentence of 25(c) should state: "When filing with the court is made by mail or commercial carrier, service on a party must be by a manner at least as expeditious as the manner of filing with the court whenever feasible."

7. Honorable Paul J. Kelly, Jr.
United States Circuit Judge
P.O. Box 10113
Santa Fe, New Mexico 87504-6113

Judge Kelly is troubled by the provision that "when feasible, service on a party must be by a manner at least as expeditious as the manner of filing with the court." He believes that the language creates ambiguity. He asks whether personal delivery of papers to the clerk's office for filing may be followed by first-class mail to the opposing party who lives out of state? If a document is hand delivered to the clerk's office for filing, is personal delivery to lawyers within the same city required? He states that there should not be litigation over what was "feasible." He suggests deleting the sentence.

8. Honorable Cornelia G. Kennedy
United States Circuit Judge
U.S. Courthouse
Detroit, Michigan 48226

Judge Kennedy questions the need to have service effected in at least as expeditious a manner as that used to file with the court. Having once decided that all the methods of service should be allowed because they are equivalent, she sees no justification for placing this limitation on the use of one method or the other.

9. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee unanimously approves the proposed amendment but recommends deleting the adjectives "reliable" and "feasible" because they can be misunderstood or misinterpreted. The committee also suggests that the language requiring that service "be by a manner at least as expeditious as the manner of filing with the court" is unclear. It would be more clear to say that service must be in the same manner as filing with the court. At a minimum, the committee suggests that the committee note should provide some illustration of how the rule should be applied.

10. Gordon P. MacDougall, Esquire
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. MacDougall sees no need to permit delivery by "reliable commercial carrier." He also opposes the revision because it places "emphasis on receipt of briefs by the Clerk, when it is receipt of briefs by opposing counsel which is more critical." Mr. MacDougall also opposes the style revisions because he believes they make "filing" paramount to "service"; he believes that under the current rule the primary emphasis is on "service" and that "filing" has a lesser role. He states that there is not a good reason for separate subsections on electronic filing or inmate filing.

11. John S. Moore, Esquire
Valikanje, Moore & Shore, Inc., P.S.
405 East Lincoln Avenue
P.O. Box C2550
Yakima, Washington 98907

Mr. Moore approves of the proposed amendments without further comment.

12. National Association of Criminal Defense Lawyers
1627 K Street, N.W.
Washington, D. C. 20006

The association supports the amendments. The association points out, however, that in addition to first class mail, the rule should authorize priority

mail and express mail. Although first class mail is "sufficient," the rule seems to preclude "other classes of mail that are at least equally expeditious." The section suggests that the Advisory Committee consider adding the last quoted language to the rule.

The association states that the certification requirement is better than the last proposal's reliance upon the postmark. The association suggests that the rule should permit consolidation of the certification of mailing with the certificate of service under 25(d).

The association supports the requirement that service be made, when feasible, in a manner at least as expeditious as that used for filing. The association says that such a requirement is a "welcome response to petty gamesmanship." The association recommends amending the committee note to state that when a "brief or motion is filed with the court by hand or by overnight courier, the copies .... [etc.]"

The association supports the progress toward electronic filing.

13. Association of the Bar of the City of New York
Committee on Federal Courts
Patricia M. Hynes, Chair
Milberg Weiss Bershad Hynes & Lerach
One Pennsylvania Plaza
New York, New York 10119-0165

The committee comments on the proposed 25(a)(2)(D), specifically on the provision allowing local rules governing electronic filing without prior approval by the Judicial Conference and without any requirement that the Conference first develop standards to govern the rules. Given the minimal experience that state and federal courts have had with electronic filing and the developing state of technology, the committee agrees that a period of experimentation and at least some temporary diversity is justified. The committee is concerned, however, that the proposed amendment does not impose any controls on the rules local courts may develop. The committee makes several recommendations many of which are based upon the assumption that electronic filing will be used to reduce the courts' burden of document storage and will result, therefore, in electronic filing of documents that will not be subsequently embodied in an officially filed hard copy. The committee recommends that the rule require that any local rule must provide
a) reasonable access to court files by both parties and non-party members

of the public;

b) assurance of the identity of filers and accuracy of the electronically stored document;

c) compatibility with generally available systems for electronic transmission and retrieval of data; and

d) maintenance of the security and integrity of the files.

The committee urges that some form of monitoring of the local experiments be undertaken with the goal of deriving meaningful and objective data as to the experience of the various courts using different systems and procedures.

14. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board suggests that defining the term "reliable commercial carrier" could help avoid ambiguity and disputes between counsel, particularly with regard to "reliability."

15. Public Citizen Litigation Group
2000 P. Street, N.W., Suite 700
Washington, D.C. 20036

Public Citizen suggests that the mailbox rule in 25(a)(2)(B) should extend to a paper filed in connection with motion or a petition for rehearing.

With regard to 24(a)(2)(B)(ii), Public Citizen suggests that the rule should allow use of any mail service that guarantees delivery as quickly as first-class mail. That would permit use of Express Mail or two-day mail and limit use of commercial carriers to those that deliver at least that fast. Public Citizen states that use of the term "reliable" is likely to produce more disputes than it will resolve and should be deleted.

With regard to 25(c) (the service provision) Public Citizen states that there is not a sufficient problem to warrant the costs of the proposal. If filing is accomplished by over-night mail, service must be by overnight mail regardless

of whether the party being served is likely to, or even has a right to, file a response. Public Citizen states that expeditious service should be required only with respect to matters on which the party filing a paper seeks immediate action or for post-argument submissions (such as letters citing supplemental authority under Rule 28(j), when the court may rule at any time. Public Citizen states that a cautionary note in the Committee Note may be sufficient but that if a rule change is made it should be confined to cases in which an immediate decision has been sought.

16. Michael E. Rosman, Esquire
Associate General Counsel
Center for Individual Rights
1300 Nineteenth Street, N.W.
Suite 260
Washington, D.C. 20036

Mr. Rosman supports the extension of the "mailbox rule" (under which a brief is deemed filed on the day of mailing) to delivery to a reliable commercial carrier. He also "heartily support[s]" the proposal to permit service by a reliable commercial carrier noting that the limitation in current Rule 25(c) which only permits service by mail or personal service is routinely ignored by both practitioners and the courts.

Mr. Rosman objects to the statement that "[w]hen feasible, service on a party must be by a manner at least as expeditious as the manner of filing with the court." He does not see any legitimate reason for the rule because the time for serving and filing a responding brief or motion paper runs from the time of service and is, therefore, subject to the Rule 26(c) extension when service is other than personal.

Mr. Rosman suggests that the committee incorporate the following additional amendments:

a. Subdivision (b) requires service "on counsel" if a party is represented by counsel. If a party is represented by two or more different firms, Mr. Rosman suggests that one of them must be designated as the "service attorney" and the opposing attorney need only serve papers on the "service attorney."
b. He suggests that electronic service should be permitted; i.e. service by facsimile, modem transfer of files, or other electronic means.

3. RULE 26

The proposed amendment makes the three-day extension for responding to a document served by mail also applicable when the document is served by a commercial carrier.

1. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611

The section supports the proposed amendment as a practical recognition of the widespread use of commercial carriers.

2. State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, Arizona 85003-1742

The State Bar of Arizona has no objections to and foresees no particular difficulties with the proposed amendments.

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

The committee supports the proposed change.

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

The committee endorses the amendments.

5. Mary S. Elcano, Esquire
Senior Vice President, General Counsel
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1100

The postal service suggests deleting the change relating to the use of a "reliable commercial carrier." The service believes that collateral litigation will arise concerning whether a particular carrier should be considered "reliable" and also about the relevance of a filer's assumption that a particular carrier is "reliable."

6. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee unanimously approves the proposed amendment but recommends deleting the adjective "reliable" because it can be misunderstood or misinterpreted.

7. Gordon P. MacDougall, Esquire
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. MacDougall opposes the reference to "reliable commercial carrier" as ambiguous and unnecessary.

8. John S. Moore, Esquire
Valikanje, Moore & Shore, Inc., P.S.
405 East Lincoln Avenue
P.O. Box C2550
Yakima, Washington 98907

Mr. Moore approves of the proposed amendments without further comment.

9. National Association of Criminal Defense Lawyers
1627 K Street, N.W.
Washington, D. C. 20006

The association does not oppose the rule but does not see why 3 days should be added, rather than 1 (or 2) if delivery is made by overnight (or second-day) carrier.

10. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board supports the amendment but reiterates its suggestion that the rule should define "reliable commercial carrier."

11. Public Citizen Litigation Group
2000 P. Street, N.W., Suite 700
Washington, D.C. 20036

Public Citizen suggests that the 3-day extension may not be enough time to add to the deadline for responding to a paper that is served by mail -- mail from the West Coast to Washington, D.C., often takes five days. With motion, a party may have only 7 days or 3 days to file an opposition or a reply, and the three day extension can be insufficient.

12. Michael E. Rosman, Esquire
Associate General Counsel
Center for Individual Rights
1300 Nineteenth Street, N.W.
Suite 260
Washington, D.C. 20036

Mr. Rosman opposes the amendment that would add three days to the time for responding to a brief or motion if it is served by a reliable commercial carrier. Mr. Rosman notes that permitting service by "reliable commercial carrier" makes it clear that there is no clear dividing line between personal service and other kinds of service. Service is "personal" if a lawyer sends a messenger down the block to serve a brief or motion and the messenger obtains an "acknowledgment of service" or signs a certification pursuant to Rule 25(d). Isn't service personal if a brief is given to a Federal Express agent who is instructed to deliver the brief the next day and the Federal Express agent signs a statement certifying that [s]he left the documents at an

attorney's office with a "clerk or other responsible person" (Rule 25(c)? isn't that also personal service? Commercial carriers, in their competitive effort to obtain business, might be willing to sign such forms.

Mr. Rosman suggests that the difference between "personal" service or service "by mail" or "by commercial carrier" rests upon who signs the certificate of service. In all instances someone personally delivers the paper.

The amendment gives a party three additional days to respond to a document served by commercial carrier. Mr. Rosman asks how the attorney receiving the paper will know whether the clerk who gave the brief to the Federal Express or UPS agent has signed the statement certifying service, or whether the Fed Ex or UPS deliverer is going to sign it. Mr. Rosman additionally asks whether the recipient's signing for the package may be used as an acknowledgment of service?

He further notes that adding 3 days will discourage the use of overnight service because it will provide an opponent with 2 more days to respond than if service had been personal.

He suggests either:

a. adding only one (1) day to the time permitted and requiring use of one-day service; or
b. measuring the time for responding from the date of receipt when some reliable indication of such receipt can be obtained, as it frequently can with commercial carriers.

He notes that there is an ambiguity in the proposed rule. The amendment states that "[s]ervice by mail or by commercial carrier is complete upon mailing or delivery to the carrier." Does dropping a package in a Federal Express pick-up box count as "delivery to the carrier" or must the package be taken to the carrier's office?

Mr. Rosman also suggests that the rule should clarify the interrelationship of subdivisions (a) and (c).

4. RULE 27

Rule 27 is entirely rewritten. The amendments require that any legal argument necessary to support the motion must be contained in the motion; no separate brief is permitted. The amendments also make it clear that a reply to a response may be filed. A motion or a response to a motion must not exceed 20 pages and a reply to a response may not exceed 10 pages. The form requirements are moved from Rule 32(b) to subdivision (d) of this rule. Subdivision (e) makes it clear that a motion will be decided without oral argument unless the court orders otherwise.

1. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611

The section approves the amendments subject to criticisms of subdivisions (a)(3) and (b).

The section recommends amendment of (a)(3) to state expressly that (1) a party filing a response in opposition to a motion may also request affirmative relief in the response document; (2) the title of the document should alert the court to the request for relief; and (3) the time for a response to such a new request and for reply to that response is governed by the general rules regulating responses and replies.

The section also recommends amendment of subdivision (b) to state directly that a party must file a new motion to have the court reconsider, vacate, or modify the disposition of a procedural ruling prior to the filing of timely opposition.

The section also recommends that (d)(4) be amended to delete the ability of a circuit to change the 3 copies requirement by local rule.

2. State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, Arizona 85003-1742

The State Bar of Arizona opposes the time deadlines for responding to a motion (7 days) and for replying to a response (3 days). The deadlines apply even to substantive motions such as a motion to dismiss for lack of subject

matter jurisdiction. The association does not believe that a motion for extension of time adequately meets the objection because a party may not receive a decision of a motion for extension before the time limits in the rule have passed. The association suggests the timetable in the Arizona appellate rules that requires a response within 10 days after service of a motion and a reply within 5 days after service of the response.

The association also questions to language in subdivision (c). Subdivision (c) says that a "separate brief . . . must not be filed" whereas a "notice of motion" and a "proposed order" are "not required." Why is mandatory language used for supporting brief while permissive language is used for notices of motion and proposed orders?

3. District of Columbia Bar
Section on Courts, Lawyers and the Administration of Justice
Anthony C. Epstein, Co-chair
Jenner & Block
601 Thirteenth Street, N.W., Suite 1200
Washington, D. C. 20005

The section generally supports the proposed amendments but "strongly urge[s]" one additional change. The proposed revision leaves unchanged the current requirement that opposition to a motion is due seven days after service of the motion. The section states that the 7-day period is adequate for non-dispositive motions but not for dispositive motions for summary affirmance or reversal. The section states that "[m]any circuits now resolve a substantial percentage of appeals on motions for summary affirmance or reversal." They suggest that the time to respond to dispositive motions should be 21 days. The time to respond to other motions (for example a motion for a stay) would continue to be 7 days.

4. The State Bar of California
The Committee on Appellate Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee supports the proposed change as long as tables and cover pages are excluded from the page count.

5. The State Bar of California
The Committee on Federal Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee endorses the amendments.

6. Mary S. Elcano, Esquire
Senior Vice President, General Counsel
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1100

The postal service notes that format requirements have been moved to this rule from Rule 32 and that the proposed amendments establish a 20 page limit for motions and responses but that the font size and words per page limits in proposed Rule 32 are neither incorporated by reference or explicitly states in this rule. The service suggests that Rule 27 include font size, type style, and number of word specifications consistent with Rule 32.

7. Honorable Cynthia M. Hora
Assistant Attorney General
Office of Special Prosecutions and Appeals
310 K. Street, Suite 308
Anchorage, Alaska 99501-2064

Ms. Hora objects to that portion of subdivision (b) which states if a motion for a procedural order is decided before the time for filing a response has expired, the timely filing of an opposing response is not considered a request for reconsideration. She suggests that the filing of timely opposition should require de novo reconsideration of the motion. If her suggestion were adopted, the opposing party would not need to file a motion for reconsideration.

8. P. Michael Jung, Esquire
Strasburger & Price, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 73202

Mr. Jung points out that events occur during the pendency of an appellate motion that are material to the disposition of the motion. 27(a)(4) states that

a reply "must not reargue propositions presented in the motion or present matters that do not reply to the response." Mr. June states that 27(a)(4) should permit a reply to reference matters that arise after the motion is filed. He gives an example: If a movant seeks to stay an appeal due to a bankruptcy filing, the respondent may oppose the motion on the ground that it anticipates the stay will be lifted; the movant should be able to reply that the bankruptcy court has denied the motion to lift the stay.

9. Honorable Cornelia G. Kennedy
United States Circuit Judge
U.S. Courthouse
Detroit, Michigan 48226

Judge Kennedy asks whether Rule 27 should have a cross-reference to the words-per-page requirement of Rule 32(a)(6). She believes that with only the page limitation and the word processor's ability to reduce spacing, one may need a magnifying glass to read the words.

10. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee unanimously approves the proposed amendments but suggests that the rule should require the court to state whether the initial order was granted without considering any opposition filed. The suggestion is made in light of the last sentence of subdivision (b) which states that "timely opposition to a motion that is filed after the motion is granted in whole or in part does not constitute a request for reconsideration, vacation, or modification of the disposition." If the court indicates that the motion was made without consideration of the opposition, the party who filed the opposition will know that its papers were not considered and can then decide whether to request reconsideration.

11. Gordon MacDougall, Esquire
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. MacDougall states that Rule 27 should stay "as is." He states that motion practice in the courts of appeals should not be encouraged. He opposes the requirement that a copy of the lower court decision be included because it

may be lengthy and part of a joint appendix. He also notes that the use of a typewriter, now permitted in Rule 27(d), is not carried over to the proposed rule.

12. John S. Moore, Esquire
Valikanje, Moore & Shore, Inc., P.S.
405 East Lincoln Avenue
P.O. Box C2550
Yakima, Washington 98907

Mr. Moore approves of the proposed amendments without further comment.

13. National Association of Criminal Defense Lawyers
1627 K Street, N.W.
Washington, D. C. 20006

The association states that the proposed "uniform, modern approach is highly commendable."

14. New Jersey State Bar Association
One Constitution Square
New Brunswick, New Jersey 08901-1500

The association states that the amended rule is a helpful clarification and simplification of the current rule and is basically consistent with motion procedures already employed in the third circuit.

15. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board supports the amendments because they make the rule clearer and easier to follow.

16. Public Citizen Litigation Group
2000 P. Street, N.W., Suite 700
Washington, D.C. 20036

Public Citizen suggests that the rule need not require that a motion be accompanied by a copy of the decision if the decision has already been received by the court of appeals whether with the record itself or with earlier motions. Public Citizen also suggests that there is no need to require service of a copy of the decision below on each party because the parties presumably already have a copy of the decision.

Public Citizen opposes the portion of the rule allowing a procedural ruling without waiting for a response (a provision that exists in the current rule). Public Citizen believes that issuing a ruling subject to reversal on reconsideration may effectively place the burden on the party seeking to have the decision reversed, even if ordinarily the burden of obtaining the ruling would be on the movant. Public Citizen suggests that an ex parte ruling should be permitted only if the party filing the motion has sought the consent of the other party and, if consent is refused, the motion is served by telecopier or overnight delivery. A ruling should be made in such instances (subject to reconsideration) only after a set amount of time (less than the full 7 days) sufficient to allow the adversary to deliver a quick response.

The last paragraph of subdivision (b) appears to require a separate motion to reconsider. If that is correct, Public Citizens suggests that the rule state so expressly. Public Citizen, however, opposes such a requirement especially when a ruling and a response cross in the mail.

Public Citizen does not believe that the length of motions is a problem but states that if the length limits for a brief is to be expressed in number of words, Public Citizen sees no reason for stating the limit for a motion in number of pages.

Public Citizen opposes the provision in (d) (4) encouraging adoption of local rules on the number of copies of motions to be filed.

17. James A. Shapiro, Esquire
1660 North LaSalle, #2401
Chicago, Illinois 60614

Mr. Shapiro suggests that Rule 27 should directly address the two main kinds

of motions for substantive relief: 1) a motion for summary affirmance or reversal; and 2) an appellee's motion to dismiss the appeal. The rule should clearly authorize substantive appellate motions. Summary disposition should be appropriate "when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." *Williams v. Chrans*, 1994 WL 709027 (7th Cir. Dec. 22, 1994). A motion to dismiss an appeal is appropriate only when the court of appeals does not have appellate jurisdiction. Mr. Shapiro provides draft language.

18. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport & Toole
422 West Riverside, Suite 1100
Spokane, Washington 99201-0390

Ms. Weatherhead supports the change that requires all matters relating to a motion to be contained in a single document.

Ms. Weatherhead, however, opposes that portion of the rule (also found in the current rule) that authorizes rulings to be made routinely based on only one party's showing. She states that the rule in all non-exigent cases should be that a court does not decide until both adversaries have been heard. If, by not waiting to hear both sides, a court makes an erroneous ruling, the wronged party has the burden to change the status quo via a rehearing.

SUMMARY OF PROPOSED RULE AMENDMENTS TO BE PUBLISHED FOR COMMENT

1. Rule 26.1 - Corporate Disclosure Statement

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

The proposed amendments delete the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. The amended rule requires disclosure of a parent corporation and any stockholders that are publicly held companies owning 10% or more of the party's stock.

2. Rule 28 - Briefs

The proposed amendments to Rule 28 are necessary to conform it to proposed amendments to Rule 32.

a. Rule 32 is being amended to require that a brief include a certificate of compliance with format, typeface, and length requirements established by that rule. Rule 28(a) and (b) are amended to include that certificate in the list of items that must be included in a brief.

b. Rule 28(g) is amended to delete the page limitations for a brief. The length limitations have been moved to Rule 32.

c. Rule 28(h) is amended so that the cross-reference to 28(a) includes paragraph (7), requiring a summary of argument, and paragraph (8) requiring a certificate of compliance with Rule 32.

3. Rule 29 - Brief of an Amicus Curiae

Rule 29 is entirely rewritten and several significant changes are made.

a. The amended rule requires that the brief be filed with the motion requesting permission to file the brief. In addition to identifying the

movant's interest and stating the general reasons why an amicus brief is desirable, the motion must state the relevance of the matters asserted to the disposition of the case.

b. The amendments make it clear that an amicus brief need not include all of the items required in a party's brief.

c. The amended rule limits an amicus brief to one-half the length of a party's principal brief.

d. An amicus is not permitted to file a reply brief.

4. **Rule 32 - Form of a Brief or Appendix**

Rule 32 is amended in several significant ways.

a. The amended rule permits a brief to be produced using either a monospaced typeface or a proportionately spaced typeface. Monospaced and proportionately spaced typefaces are defined in the rule.

b. The provisions for pamphlet-sized briefs have been deleted.

c. All references to use of carbon copies have been deleted.

d. The rule establishes new length limitations for briefs which are defined separately for proportionately spaced briefs and monospaced briefs. A proportionately spaced brief is limited to a total of 14,000 words and a reply brief must not exceed 7,000 words. In addition, the average number of words per page must not exceed 280 words. The latter limitation is included to ensure that the typeface used is sufficiently large to be easily legible. The length of a monospaced brief may be measured by the same word limits, both overall and per page, applicable to a proportionately spaced brief, or by the total number of pages. If a page count is used rather than a word count, a monospaced principal brief must not exceed 40 pages, and a reply brief must not exceed 20 pages.

e. The rule requires a certificate of compliance with the form, format, typeface, and length provisions of Rule 32(a)(1) through (4).

5. **Rule 35 - En Banc Proceedings**

a. Rule 35 is amended to treat a request for a rehearing en banc like a petition for panel rehearing. As amended, a request for a rehearing en banc also will suspend the finality of a court of appeals' judgment and extend the period for filing a petition for writ of certiorari. The amendments delete the sentence stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate. In keeping with the intent to treat a request for a panel rehearing and a request for a rehearing en banc similarly, the term "petition for rehearing en banc" is substituted for the term "suggestion for rehearing en banc."

b. The amendments also require each petition for en banc consideration to begin with a statement concisely demonstrating that the case meets the criteria for en banc consideration. Intercircuit conflict is cited as a reason for determining that a proceeding involves a question of "exceptional importance" -- one of the traditional criteria for granting an en banc hearing.

c. A petition for en banc review is limited to 15 pages, even when combined with a petition for panel rehearing.

6. **Rule 41 - Mandate**

a. As a companion to the proposed amendments to Rule 35, Rule 41(a)(2) is amended so that a petition for rehearing en banc delays the issuance of the mandate.

b. Proposed Rule 41(a)(2) also provides that a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari delays the issuance of the mandate until the court disposes of the motion.

c. The amended rule makes it clear that the mandate is effective when it is issued.

d. The presumptive period for a stay of mandate is changed from 30 to 90 days.

PROPOSED RULE AMENDMENTS SUBMITTED FOR PUBLICATION

Rule 26.1. Corporate Disclosure Statement

1 (a) *Who Shall File.* ~~Any non-governmental~~
2 ~~corporate party to a civil or bankruptcy case or~~
3 ~~agency review proceeding and any non-~~
4 ~~governmental corporate defendant in a criminal~~
5 ~~case must file a statement identifying all parent~~
6 ~~companies, subsidiaries (except wholly-owned~~
7 ~~subsidiaries), and affiliates that have issued~~
8 ~~shares to the public. The statement must be~~
9 ~~filed with a party's~~ Any nongovernmental
10 corporate party to a proceeding in a court of
11 appeals shall file a statement identifying any
12 parent corporation and listing stockholders that
13 are publicly held companies owning 10% or
14 more of the party's stock.
15 (b) *Time for Filing.* A party shall file the statement
16 with the principal brief or upon filing a motion,

17 response, petition, or answer in the court of
18 appeals, whichever ~~first~~ occurs first, unless a
19 local rule requires earlier filing. Even if the
20 statement has already been filed, the party's
21 principal brief must include the statement
22 before the table of contents.
23 (c) *Number of Copies.* ~~Whenever~~ If the statement
24 is filed before ~~a party's~~ the principal brief, the
25 party shall file an original and three copies, ~~of~~
26 ~~the statement must be filed~~ unless the court
27 requires the filing of a different number by
28 local rule or by order in a particular case. ~~The~~
29 ~~statement must be included in front of the table~~
30 ~~of contents in a party's principal brief even if~~
31 ~~the statement was previously filed.~~

Committee Note

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

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

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

Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. Conversely, disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation.

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

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

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

Rule 28. Briefs.

(a) *Appellant's Brief.* The appellant's brief ~~of the appellant~~ must contain, under appropriate headings and in the order here indicated:

* * * * *

(8) The certificate of compliance required by Rule 32(a)(5).

(b) *Appellee's Brief.* The appellee's brief ~~of the appellee~~ must conform to the requirements of ~~paragraphs~~ Rule 28(a)(1)-(6) and (8), except that none of the following need appear unless the appellee is dissatisfied with the appellant's 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.

* * * * *

(g) [reserved]

~~*Length of briefs.* Except by permission of the court, or as specified by local rule of the court~~

21 ~~of appeals, principal briefs must not exceed 50~~
22 ~~pages, and reply briefs must not exceed 25~~
23 ~~pages, exclusive of pages containing the~~
24 ~~corporate disclosure statement, table of~~
25 ~~contents, tables of citations, proof of service,~~
26 ~~and any addendum containing statutes, rules,~~
27 ~~regulations, etc.~~
28 (h) *Briefs in a Case~~s~~ Involving a Cross-Appeal~~s~~*. If a
29 cross-appeal is filed, the party who ~~first~~ files a
30 notice of appeal first, or ~~in the event that~~ if the
31 notices are filed on the same day, the plaintiff
32 in the proceeding below ~~shall be~~ is deemed the
33 appellant for the purposes of this rule and
34 Rules 30~~, and~~ 31, and 34, unless the parties
35 agree otherwise ~~agree~~ or the court orders
36 otherwise ~~orders~~. The appellee's brief ~~of the~~
37 ~~appellee~~ ~~shall~~ must conform to the
38 requirements of ~~subdivision~~ Rule 28(a)(1)- ~~(6)~~
39 (8) ~~of this rule~~ with respect to the appellee's
40 cross-appeal as well as respond to the
41 appellant's brief ~~of the appellant~~ except that a

42 statement of the case need not be made unless

43 the appellee is dissatisfied with the ~~appellant's~~

44 statement ~~of the appellant~~.

Committee Note

Subdivision (a). The amendment conforms this rule with an amendment being made to Rule 32. Rule 32 is amended to require that a brief include a certificate of compliance with format, typeface, and length requirements established by that rule. Rule 28(a) is amended to include that certificate in the list of items that must be included in a brief.

Subdivision (b). This is also a conforming amendment accompanying the amendment requiring a certificate of compliance with Rule 32. An appellee's brief must include such a certificate, so the cross-reference to subdivision (a) now includes paragraph (8).

Subdivision (g). The amendment deletes former subdivision (g) that limited a principal brief to 50 pages and a reply brief to 25 pages. The length limitations have been moved to Rule 32. Rule 32 deals generally with the format for a brief or appendix.

Subdivision (h). The amendment requires an appellee's brief to comply with (a)(1) through (8) with regard to a cross-appeal. The addition of separate paragraphs requiring a summary of argument and a certificate of compliance with Rule 32 increased the relevant paragraphs of subdivision (a) from (6) to (8). The rest of the changes are stylistic; no substantive changes are intended.

Rule 29. Brief of an Amicus Curiae

1 ~~A brief of an amicus curiae may be filed only if~~
2 ~~accompanied by written consent of all parties, or by~~
3 ~~leave of court granted on motion or at the request of~~
4 ~~the court, except that consent or leave shall not be~~
5 ~~required when the brief is presented by the United~~
6 ~~States or an officer or agency thereof, or by a State,~~
7 ~~Territory or Commonwealth. The brief may be~~
8 ~~conditionally filed with the motion for leave. A~~
9 ~~motion for leave shall identify the interest of the~~
10 ~~applicant and shall state the reasons why a brief of an~~
11 ~~amicus curiae is desirable. Save as all parties~~
12 ~~otherwise consent, any amicus curiae shall file its brief~~
13 ~~within the time allowed the party whose position as to~~
14 ~~affirmance or reversal the amicus brief will support~~
15 ~~unless the court for cause shown shall grant leave for~~
16 ~~later filing, in which event it shall specify within what~~
17 ~~period an opposing party may answer. A motion of an~~
18 ~~amicus curiae to participate in the oral argument will~~
19 ~~be granted only for extraordinary reasons.~~
20 (a) *When Permitted.* The United States or its

21 officer or agency, or a State, Territory or
22 Commonwealth may file an amicus-curiae brief
23 without consent of the parties or leave of court.
24 Any other amicus curiae may file a brief only if:
25 (1) it is accompanied by written consent of
26 all parties;
27 (2) the court grants leave on motion; or
28 (3) the court so requests.
29 (b) *Motion for Leave to File.* The motion must be
30 accompanied by the proposed brief, and must
31 state:
32 (1) the movant's interest;
33 (2) the reason why an amicus brief is
34 desirable and why the matters asserted
35 are relevant to the disposition of the
36 case.
37 (c) *Contents and Form.* An amicus brief must
38 comply with Rule 32. In addition to the
39 requirements of Rule 32(a), the cover must
40 identify the party or parties supported or
41 indicate whether the brief supports affirmance

42 or reversal. If an amicus curiae is a
43 corporation, the brief must include a disclosure
44 statement like that required of parties by Rule
45 26.1. With respect to Rule 28, an amicus brief
46 must include the following:
47 (1) a table of contents, with page references,
48 and a table of cases (alphabetically
49 arranged), statutes and other authorities
50 cited, with references to the pages of the
51 brief where they are cited;
52 (2) a concise statement of the identity of the
53 amicus and its interest in the case;
54 (3) an argument, which may be preceded by
55 a summary and which need not include a
56 statement of the applicable standard of
57 review; and
58 (4) the certificate of compliance required by
59 Rule 32(a)(5), modified to take into
60 account the length limitation in Rule
61 29(d).
62 (d) *Length.* An amicus brief may be no more than

63 one-half the length of a principal brief as
64 specified in Rule 32.
65 (e) *Time for Filing.* An amicus curiae shall file its
66 brief, accompanied by a motion for filing when
67 necessary, within the time allowed to the party
68 being supported. If an amicus does not support
69 either party, the amicus shall file its brief within
70 the time allowed to the appellant or petitioner.
71 A court may grant leave for later filing,
72 specifying the time within which an opposing
73 party may answer.
74 (f) *Reply Brief.* An amicus curiae is not entitled to
75 file a reply brief.
76 (g) *Oral Argument.* An amicus curiae's motion to
77 participate in oral argument will be granted
78 only for extraordinary reasons.

Committee Note

Rule 29 is entirely rewritten

Subdivision (a). The only changes in this material are stylistic.

Subdivision (b). The provision in the former rule,

granting permission to conditionally file the brief with the motion, is changed to one requiring that the brief accompany the motion. Sup. Ct. R. 37.4 requires that the proposed brief be presented with the motion.

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

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

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

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

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

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

not adequately addressed by a party.

Subdivision (e). The time limit for filing is unchanged; an amicus brief must be filed within the time allowed the party the amicus supports. Ordinarily this means that the amicus brief must be filed within the time allowed for filing the party's principal brief. That, however, is not always the case. For example, if an amicus is filing a brief in support of a party's petition for rehearing, the amicus brief is due within the time for filing that petition. Occasionally, an amicus supports neither party; in such instances, the amendment provides that the amicus brief must be filed within the time allowed the appellant or petitioner.

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

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

Subdivision (g). This provision is taken unchanged from the existing rule.

Rule 32. Form of a ~~Briefs~~ Brief, ~~the~~ an Appendix, and Other Papers

1 (a) *Form of a ~~Briefs~~ Brief and ~~the~~ an Appendix.*

2 (1) *In General.* ~~Briefs and appendices~~ A

3 brief may be produced by ~~standard~~

4 ~~typographic printing or by any~~

5 ~~duplicating or copying process which~~

6 ~~produces~~ any process that results in a

7 clear black image on white paper,

8 including by typing, printing or

9 photocopying. The paper must be

10 opaque and unglazed, and only one side

11 may be used. ~~Carbon copies of briefs~~

12 ~~and appendices may not be submitted~~

13 ~~without permission of the court, except~~

14 ~~in behalf of parties allowed to proceed~~

15 ~~in forma pauperis. All printed matter~~

16 ~~must appear in at least 11 point type on~~

17 ~~opaque, unglazed paper. Briefs and~~

18 ~~appendices produced by the standard~~

19 ~~typographic process shall be bound in~~

20 ~~volumes having pages 6-1/8 by 9-1/4~~
21 ~~inches and type matter 4-1/6 by 7-1/6~~
22 ~~inches. Those produced by any other~~
23 ~~process shall be bound in volumes~~
24 ~~having pages 8-1/2 by 11 inches and type~~
25 ~~matter not exceeding 6-1/2 by 9-1/2~~
26 ~~inches with double spacing between each~~
27 ~~line of text. In patent cases the pages of~~
28 ~~briefs and appendices may be of such~~
29 ~~size as is necessary to utilize copies of~~
30 ~~patent documents.~~
31 (2) *Typeface.* Either a proportionately
32 spaced typeface of 14 points or more, or
33 a monospaced typeface of no more than
34 10-1/2 characters per inch may be used
35 in a brief. A proportionately spaced
36 typeface has characters with different
37 advance widths. The design must be in
38 roman, non-script type. A monospaced
39 typeface has characters with the same
40 advance width.

41 (3) *Paper Size, Line Spacing, and Margins.* A
42 brief must be on 8-1/2 by 11 inch paper.
43 The text must be double-spaced, but
44 quotations more than two lines long may
45 be indented and single-spaced.
46 Headings and footnotes may be single-
47 spaced. The side margins must be at
48 least 1 inch, and the top and bottom
49 margins must be at least 1-1/4 inch.
50 (4) *Length.*
51 (A) Proportionately spaced briefs. A
52 principal brief must not exceed
53 14,000 words and a reply brief
54 must not exceed 7,000 words. No
55 brief may have an average of
56 more than 280 words per page,
57 including headings, footnotes, and
58 quotations.
59 (B) Monospaced or typewritten briefs.
60 A brief prepared in a monospaced
61 typeface must either:

62 (i) comply with the word
63 counts, both total and
64 average per page, for a
65 proportionately spaced
66 brief; or
67 (ii) not exceed 40 pages for a
68 principal brief and 20
69 pages for a reply brief.
70 (C) Exclusions. Word and page
71 counts do not include any of the
72 following: corporate disclosure
73 statement, table of contents, table
74 of citations, certificate of service,
75 certificate of compliance with
76 Rule 32, or any addendum
77 containing statutes, rules,
78 regulations, etc.
79 (5) *Certificate of Compliance.* The attorney,
80 or party proceeding pro se, shall include
81 a certificate of compliance with Rule
82 32(a)(1)-(4). The person preparing the

83 certificate may rely on the word count of
84 the word-processing system used to
85 prepare the brief. The certificate must
86 state the brief's line spacing, and either:
87 (i) that the brief is proportionately
88 spaced, together with the
89 typeface, point size, and word
90 count; or
91 (ii) that the brief uses a monospaced
92 typeface, together with the
93 number of characters per inch,
94 and word count or number of
95 counted pages.
96 (6) *Appendix.* An appendix must be in the
97 same form as a brief but may include a
98 legible photocopy of any document in
99 the record.
100 ~~Copies of the reporter's transcript and~~
101 ~~other papers reproduced in a manner~~
102 ~~authorized by this rule may be inserted~~
103 ~~in the appendix; such pages may be~~

104 ~~informally renumbered if necessary.~~

105 (7) *Cover.* ~~If briefs are produced by~~

106 ~~commercial printing or duplicating firms,~~

107 ~~or, if produced otherwise and the covers~~

108 ~~to be described are available,~~ Except for

109 filings of pro se parties, the cover of the

110 appellant's brief ~~of the appellant should~~

111 must be blue; ~~that of the appellee~~ the

112 appellee's, red; ~~that of~~ an intervenor's or

113 amicus curiae's, green; ~~that of~~ and any

114 reply brief, gray. The cover of ~~the~~

115 ~~appendix, if separately printed, should~~ a

116 separately printed appendix must be

117 white. The front ~~covers of the briefs and~~

118 ~~of appendices, if separately printed, shall~~

119 cover of a brief and of a separately

120 printed appendix must contain:

121 (A) the number of the case centered

122 at the top;

123 ~~(1)~~ (B) the name of the court ~~and the~~

124 ~~number of the case~~;

125 ~~(2)~~ (C) the title of the case (see Rule
126 12(a));
127 ~~(3)~~ (D) the nature of the proceeding in
128 the court (e.g., Appeal, Petition
129 for Review) and the name of the
130 court, agency, or board below;
131 ~~(4)~~ (E) the title of the document,
132 identifying the party or parties for
133 whom the document is filed ~~(e.g.,~~
134 ~~Brief for Appellant, Appendix)~~;
135 and
136 ~~(5)~~ (F) the ~~names~~ name, ~~and~~ office
137 address~~es~~, and telephone number
138 of counsel representing the party
139 ~~on whose behalf~~ for whom the
140 document is filed.
141 (8) *Binding.* A brief or appendix must be
142 bound in any manner that is secure, does
143 not obscure the text, and permits the
144 document to lie reasonably flat when
145 open.

146 (b) *Form of Other Papers.* ~~Petitions for rehearing~~
147 ~~shall be produced in a manner prescribed by~~
148 ~~subdivision (a). Motions and other papers may~~
149 ~~be produced in like manner, or they may be~~
150 ~~typewritten upon opaque, unglazed paper 8-1/2~~
151 ~~by 11 inches in size. Lines of typewritten text~~
152 ~~shall be double spaced. Consecutive sheets shall~~
153 ~~be attached at the left margin. Carbon copies~~
154 ~~may be used for filing and service if they are~~
155 ~~legible.~~
156 ~~A motion or other paper addressed to~~
157 ~~the court shall contain a caption setting forth~~
158 ~~the name of the court, the title of the case, the~~
159 ~~file number, and a brief descriptive title~~
160 ~~indicating the purpose of the paper.~~
161 (1) *Motion.* The form of a motion is
162 governed by Rule 27(d).
163 (2) *Other Papers.* Any other paper, including
164 a petition for rehearing and a petition
165 for rehearing en banc, and any response
166 to such a petition, must be produced in a

167 manner prescribed by Rule 32(a), with
168 the following exceptions:
169 (A) Rule 32(a)(4) does not apply;
170 (B) a cover is not necessary if the
171 paper has a caption that includes
172 the case number, the name of the
173 court, the title of the case, and a
174 brief descriptive title indicating
175 the purpose of the paper and
176 identifying the party or parties for
177 whom it is filed.

Committee Note

Subdivision (a). A number of stylistic and substantive changes have been made in subdivision (a). The rule permits printing on only one side of the paper. Although some argue that paper could be saved by allowing double-sided printing, others argue that in order to preserve legibility a heavier weight paper would be needed, resulting in little, if any, paper saving. In addition, the blank sides of a brief are commonly used by judges and their clerks for making notes about the case.

Because photocopying is inexpensive and widely available and because use of carbon paper is now very rare, all references to the use of carbon copies have been deleted.

The rule requires that a brief be produced by a process "that produces a clear black image on white paper."

It is strongly preferred that the method used to produce the brief have a print resolution of 300 dots per inch or more. This will ensure the legibility of the brief. A brief produced by a typewriter, laser printer, or daisy wheel printer has a print resolution of 300 dots per inch (dpi) or more. But a brief produced by a dot-matrix printer, fax machine, or portable printer that uses heat or dye transfer methods do not. Some ink jet printers are 300 dpi or more, but some are 216 dpi and would not be sufficient.

New paragraphs have been added governing the printing of a brief or appendix. The old rule simply stated that a brief or appendix produced by the standard typographic process must be printed in at least 11 point type or, if produced in any other manner, the lines of text must be double spaced. Today few briefs are produced by commercial printers or by typewriters; most are produced on and printed by computer. The availability of computer fonts in a variety of sizes and styles has given rise to local rules limiting type styles. The Advisory Committee believes that some standards are needed both to ensure that all litigants have an equal opportunity to present their material and to ensure that the documents are easily legible.

The rule provides two options. The text can be prepared using a proportionately spaced typeface of 14 points or more or a monospaced typeface of no more than 10-1/2 characters per inch.

A monospaced typeface is defined as one in which all characters have "the same advance width." That means that each character is given the same horizontal space on the line. A wide letter such as a capital "m" and a narrow letter such as a lower case "i" are given the same space. The rule requires use of a monospaced typeface that produces no more than 10-1/2 characters per inch. A standard typewriter with pica type produces a monospaced typeface with 10 characters per inch (cpi). That is the ideal monospaced typeface. The rule permits up to 10-1/2 cpi because some computer software programs contain monospaced fonts that purport to produce 10 cpi but that in fact produce slightly

more than 10 cpi. In order to avoid the need to reprint a brief produced in good faith reliance upon such a program, the rule permits a bit of leeway. A monospaced typeface with no more than 10 cpi is preferred.

A proportionately spaced typeface gives a different amount of horizontal space to characters depending upon the width of the character. A capital "m" would be given more horizontal space than a lower case "i." Books and newspapers are ordinarily printed in proportionately spaced typefaces. The rule requires a minimum size of 14 points so that the type is easily legible. A proportional typeface must be roman, that is non-italic. That does not mean, however, that italics cannot be used for case names or for occasional emphasis. In addition, the typeface may not be a script typeface.

Because pamphlet sized briefs are rarely used in the courts of appeal, the rule makes no provision for them. The rule requires that all briefs be prepared on 8-1/2 by 11 inch paper. A brief generally must be double-spaced.

Length limitations are defined separately for proportionately spaced briefs and monospaced briefs. The length limitation for a proportionately spaced brief is based on the number of words per brief rather than the number of pages. This gives every party the same opportunity to present an argument without regard to the typeface used and eliminates any incentive to use footnotes or typographical "tricks" to squeeze more material onto a page. The rule imposes not only an overall word limit, but also limits the average number of words per page. The reason for the limit on the average number of words per page as well as the limit on the total number of words is to ensure legibility. The limitation on the average number of words per page is an important element in guaranteeing that any proportionately spaced typeface used is of sufficient size to be easily legible. Although the rule specifies a minimum point size of 14, the various 14 point fonts can produce wide variations in the amount of material per page.

The length of a monospaced brief may be measured by the same word limits, both overall and per page, applicable to a proportionately spaced brief, or by the total number of pages. The Committee believes that the overall word limit of 14,000 words is the equivalent of a 50 page brief written with reasonable use of footnotes and single-spaced quotations. If the person preparing the brief does not want to certify the number of words in the brief, he or she may use the safe-harbor provision allowing 40 pages for a principal brief and 20 pages for a reply brief. The safe-harbor provision limits a monospaced principal brief to 40 pages rather 50 to prevent the use of the safe-harbor provision to produce a 50 page heavily footnoted brief or one containing extensive single-spaced quotations. No safe-harbor is provided for proportionately spaced briefs because they are ordinarily prepared on a computer and an exact word count is readily available.

Until adoption of these amendments, Rule 28(g) governed the length of briefs. Rule 28(g) began with the words "[e]xcept by permission of the court," signalling that a party could file a motion to exceed the limits established in the rule. The absence of similar language in Rule 32 does not mean that the Committee intends to prohibit motions to deviate from the requirements of the rule. The Committee did not believe that any such language was needed to authorize such a motion.

The rule requires a certification of compliance with the requirements of Rule 32(a)(1) through (4). The rule permits the person preparing the certification to rely upon the word count of the word processing system used to prepare the brief.

The rule recognizes that an appendix is virtually always produced by photocopying existing documents. The rule, however, requires that the photocopies be legible. Photocopies of the original documents are most legible; photocopying of copies, and especially of faxes should be avoided. If a decision that is included in the appendix has been published, a copy of the published decision should be

provided.

The rule requires a brief or appendix to be bound in any manner that is secure, does not obscure the text, and that permits the document to lie reasonably flat when open. Many judges and most court employees do much of their work at computer keyboards and a brief that lies flat when open is significantly more convenient. The Federal Circuit already has such a requirement, and the Fifth Circuit rules state a preference for it. While a spiral binding would comply with this requirement, it is not intended to be the exclusive method of binding. Stapling the brief at the upper left-hand corner also satisfies this requirement as long as it is sufficiently secure.

The rule requires that the number of the case be centered at the top of the front cover of a brief or appendix. This will aid in identification of the document and again the idea was drawn from a local rule. The rule also requires that the title of the document identify the party or parties on whose behalf the document is filed. When there are multiple appellants or appellees, this information is necessary to the court. If, however, the document is filed on behalf of all appellants or all appellees, it may so indicate. Further, it may be possible to identify the class of parties on whose behalf the document is filed. Otherwise, it may be necessary to name each party. The rule also requires that attorneys' telephone numbers appear on the front cover of a brief or appendix.

Having amended the national rule to provide additional detail, the Committee foresees little need for local variation and suggests that the existing local rules be repealed. It is the Committee's further suggestion that before a circuit adopts a local rule governing the form or style of papers, the circuit will carefully weigh the value of the proposed local rule against the difficulties and inefficiencies local variations create for national practitioners.

Subdivision (b). The old rule required a petition for rehearing to be produced in the same manner as a brief or

appendix. The new rule also requires that a petition for rehearing en banc and a response to either a petition for panel rehearing or a petition for rehearing en banc be prepared in the same manner. But the length limitations of paragraph (a)(4) do not apply and a cover is not required if a caption is used that provides all the information needed by the court to properly identify the document and the parties for whom it is filed.

Former subdivision (b) stated that other papers "may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8-1/2 by 11 inches in size." That language has been deleted but that method of preparing documents is not eliminated because (a)(2) permits use of standard pica type. The only change is that the rule now specifies margins for these typewritten documents.

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

1 (a) *When Hearing or Rehearing ~~in~~ En Banc ~~Will~~ May*
2 *Be Ordered.* -- A majority of the circuit judges
3 who are in regular active service may order that
4 an appeal or other proceeding be heard or
5 reheard by the court of appeals ~~in~~ en banc.
6 ~~Such a~~ An en banc hearing or rehearing is not
7 favored and ordinarily will not be ordered
8 ~~except when~~ unless:
9 (1) consideration by the full court is
10 necessary to secure or maintain
11 uniformity of its decisions; or
12 (2) the proceeding involves a question of
13 exceptional importance.
14 (b) *~~Suggestion of a party~~ Petition for Hearing or*
15 *Rehearing ~~in~~ En Banc.* - A party may ~~suggest~~
16 ~~the appropriateness of~~ petition for a hearing or
17 rehearing ~~in~~ en banc.
18 (1) The petition must begin with a statement
19 that either:

20 (A) the panel decision conflicts with a
21 decision of the United States
22 Supreme Court or of the court to
23 which the petition is addressed
24 (with citation to the conflicting
25 case or cases) and consideration
26 by the full court is therefore
27 necessary to secure and maintain
28 uniformity of the court's
29 decisions; or
30 (B) the proceeding involves one or
31 more questions of exceptional
32 importance, each of which must
33 be concisely stated; a proceeding
34 may present a question of
35 exceptional importance if it
36 involves an issue as to which the
37 panel decision conflicts with the
38 authoritative decisions of every
39 other federal court of appeals that
40 has addressed the issue (citation

41 to the conflicting case or cases

42 being required).

43 (2) Except by the court's permission, a

44 petition for en banc hearing or rehearing

45 must not exceed 15 pages, excluding

46 material not counted under Rule

47 32(a)(4)(C).

48 (3) Except by the court's permission, if a

49 petition for panel rehearing and a

50 petition for rehearing en banc are both

51 filed-- whether or not they are combined

52 in a single document--the combined

53 documents must not exceed 15 pages,

54 excluding material not counted under

55 Rule 32(a)(4)(C).

56 ~~No response shall be filed unless the court shall~~

57 ~~so order. The clerk shall transmit any such~~

58 ~~suggestion to the members of the panel and the~~

59 ~~judges of the court who are in regular active~~

60 ~~service but a vote need not be taken to~~

61 ~~determine whether the cause shall be heard or~~

62 ~~reheard in banc unless a judge in regular active~~
63 ~~service or a judge who was a member of the~~
64 ~~panel that rendered a decision sought to be~~
65 ~~reheard requests a vote on such a suggestion~~
66 ~~made by a party.~~
67 (c) *Time for ~~Suggestion of a party~~ Petition for*
68 *Hearing or Rehearing ~~in~~ En Banc.* ~~; Suggestion~~
69 ~~Does Not Stay Mandate. If a party desires to~~
70 ~~suggest that~~ A petition that an appeal be heard
71 initially ~~in~~ en banc~~, the suggestion~~ must be
72 ~~made~~ filed by the date ~~on which~~ when the
73 appellee's brief is ~~filed~~ due. A ~~suggestion~~
74 petition for a rehearing ~~in~~ en banc must be
75 ~~made~~ filed within the time prescribed by Rule
76 40 for filing a petition for rehearing. ~~, whether~~
77 ~~the suggestion is made in such petition or~~
78 ~~otherwise. The pendency of such a suggestion~~
79 ~~whether or not included in a petition for~~
80 ~~rehearing shall not affect the finality of the~~
81 ~~judgment of the court of appeals or stay the~~
82 ~~issuance of the mandate.~~

83 (d) *Number of Copies.* -- The number of copies
84 that must be filed may be prescribed by local
85 rule and may be altered by order in a particular
86 case.
87 (e) *Response.*-- No response may be filed to a
88 petition for en banc consideration unless the
89 court orders a response.
90 (f) *Voting on a Petition.* -- The clerk must forward
91 any such petition to the judges of the court who
92 are in regular active service and, with respect to
93 a petition for rehearing, to any other members
94 of the panel that rendered the decision sought
95 to be reheard. But a vote need not be taken to
96 determine whether the cause will be heard or
97 reheard en banc unless one of those judges
98 requests a vote.

Committee Note

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

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

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

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

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

Four circuits have rules or internal operating procedures that recognize a conflict with another circuit as a legitimate basis for granting a rehearing en banc. D.C. Cir. R. 35(c); 7th Cir. R. 40(c); 9th Cir. R. 35-1; and 4th Cir. I.O.P. 40.5. An intercircuit conflict may present a question of "exceptional importance" because of the costs that intercircuit conflicts impose on the system as a whole, in addition to the significance of the issues involved. It is not, however, the Committee's intent to make the granting of a hearing or rehearing en banc mandatory whenever there is an intercircuit conflict.

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

Counsel are reminded that their duty is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of subdivision (a) of this Rule.

Paragraph (2) of this subdivision establishes a maximum length for a petition. Fifteen pages is the length currently used in five circuits; D.C. Cir. R. 35(b), 5th Cir. R.

35.5, 10th Cir. R. 35.5, 11th Cir. R. 35-8, and Fed. Cir. R. 35(d). Each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. The extraordinary nature of the issue or the threat to uniformity of the court's decision can be established in most cases in less than fifteen pages. A court may shorten the maximum length on a case by case basis but the rule does not permit a circuit to shorten the length by local rule. The Committee has retained page limits rather than using a word count similar to that in Rule 32 because there has not been a serious enough problem to justify importing the word count and typeface requirements applicable to briefs into other contexts.

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

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

Subdivision (c). Two changes are made in this subdivision. First, the sentence stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate is deleted. The deletion of that sentence does not affirmatively accomplish the goal of extending the period for filing a petition for writ of certiorari; it simply sets the stage for such an amendment. In order to affirmatively accomplish that objective, Sup. Ct. R. 13.3 must be amended.

Second, the language permitting a party to include a request for rehearing en banc in a petition for panel rehearing is deleted. The Committee believes that those circuits that want to require two separate documents should have the option to do so.

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

former subdivision (b). The only changes are stylistic; no substantive changes are intended.

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

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

Rule 41. Issuance of Mandate; Stay of Mandate

1 (a) *The Mandate; Date of Issuance, Effective Date.*
2 (1) Unless the court directs that a formal
3 mandate issue, the mandate consists of a
4 certified copy of the judgment, a copy of
5 the court's opinion, if any, and any
6 direction about costs.
7 (2) ~~The mandate of the court must issue 7~~
8 ~~days after the expiration of the time for~~
9 ~~filing a petition for rehearing unless such~~
10 ~~a petition is filed or the time is~~
11 ~~shortened or enlarged by order. A~~
12 ~~certified copy of the judgment and a~~
13 ~~copy of the opinion of the court, if any,~~
14 ~~and any direction as to costs shall~~
15 ~~constitute the mandate, unless the court~~
16 ~~directs that a formal mandate issue.~~ The
17 court's mandate must issue 7 days after
18 the time for filing a petition for
19 rehearing expires, unless an order
20 shortens or extends the time, or a party

21 files a petition for rehearing, a petition
22 for rehearing en banc, or a motion for a
23 stay of mandate pending petition to the
24 Supreme Court for a writ of certiorari.
25 Unless the court orders otherwise, the
26 ~~The~~ timely filing of a petition for
27 rehearing, a petition for rehearing en
28 banc, or the filing of a motion for a stay
29 of mandate pending petition to the
30 Supreme Court for a writ of certiorari,
31 ~~will~~ stays the mandate until ~~disposition~~
32 the court disposes of the petition or
33 motion. ~~unless otherwise ordered by the~~
34 ~~court.~~ If the ~~petition is denied~~ court
35 denies the petition for rehearing or
36 rehearing en banc, or the motion for stay
37 of mandate, the ~~mandate must~~ court
38 must issue the mandate 7 days after
39 entry of the order denying the last such
40 petition or motion, ~~unless the time is~~
41 ~~shortened or enlarged by order~~ but an

42 order may shorten or extend the time.

43 (3) The mandate is effective when issued.

44 (b) *Stay of Mandate Pending Petition for Certiorari.*

45 ~~A party who files a motion requesting a stay of~~

46 ~~mandate pending petition to the Supreme Court~~

47 ~~for a writ of certiorari must file, at the same~~

48 ~~time, proof of service on all other parties. The~~

49 ~~motion~~ A party may move to stay the mandate

50 pending the filing of a petition for a writ of

51 certiorari in the Supreme Court. The motion

52 must be served on all parties and must show

53 that ~~a petition for certiorari~~ the certiorari

54 petition would present a substantial question

55 and that there is good cause for a stay. The

56 stay ~~must not~~ cannot exceed ~~30~~ 90 days, unless

57 the period is extended for good cause ~~shown~~,

58 and it cannot, in either case, exceed the time

59 that the party who obtained the stay has to file

60 a petition for a writ of certiorari in the

61 Supreme Court. ~~or unless during the period of~~

62 ~~the stay, a notice from~~ But if the clerk of the

63 Supreme Court ~~is filed showing~~ files a notice
64 during the stay indicating that the party who
65 ~~has~~ obtained the stay ~~has~~ filed a petition for the
66 writ. ~~in which case~~ the stay ~~will~~ continues until
67 ~~final disposition by~~ the Supreme Court's final
68 disposition. The court of appeals must issue
69 the mandate immediately when a copy of a
70 Supreme Court order denying the petition for
71 writ of certiorari is filed. The court may
72 require a bond or other security before ~~the~~
73 granting or ~~continuance of~~ continuing a stay of
74 ~~the~~ mandate.

Committee Note

Subdivision (a). The amendment to paragraph (2) provides that the filing of a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari delays the issuance of the mandate until the court disposes of the petition or motion. The provision that a petition for rehearing en banc delays the issuance of the mandate is a companion to the amendment of Rule 35 that deletes the language stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate. The Committee's objective is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of

appeals' judgment and extend the period for filing a petition for writ of certiorari. The change made in this rule advances the Committee's objective of tolling the time for filing a petition for writ of certiorari only indirectly. Amendment of Sup. Ct. R. 13.3 is also necessary. Because the filing of a petition for rehearing en banc will stay the mandate, a court of appeals will need to take final action on the petition but the procedure for doing so is left to local practice.

The amendment to paragraph (2) also provides that the filing of a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari delays the issuance of the mandate until the court disposes of the motion. If the court denies the motion, the court must issue the mandate 7 days after entering the order denying the motion. If the court grants the motion, the mandate is stayed according to the terms of the order granting the stay. Delaying issuance of the mandate eliminates the need to recall the mandate if the motion for a stay is granted. If, however, the court believes that it would be inappropriate to delay issuance of the mandate until disposition of the motion for a stay, the court may order that the mandate issue immediately.

Paragraph (3) has been added to subdivision (a). Paragraph (3) provides that the mandate is effective when the court issues it. A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed. This amendment is intended to make it clear that the mandate is effective upon issuance and that its effectiveness is not delayed until receipt of the mandate by the trial court or agency, or until the trial court or agency acts upon it. This amendment is consistent with the current understanding. See, *e.g.*, 4th Cir. I.O.P. 41.1; 10th Cir. I.O.P. VIII.B.1. Unless the court orders that the mandate issue earlier than provided in the rule, the parties can easily calculate the anticipated date of issuance and verify issuance with the clerk's office. In those instances in which the court orders earlier issuance of the mandate, the entry of the order on the docket alerts the parties to that fact.

Subdivision (b). The amendment changes the maximum period for a stay of mandate, absent the court of appeals granting an extension for cause, to 90 days and in any event to no longer than the period the party who obtained the stay has to file a petition for a writ of certiorari to the Supreme Court. The presumptive 30-day period was adopted when a party had to file a petition for a writ of certiorari in criminal cases within 30 days after entry of judgment. Supreme Court Rule 13.1 now provides that a party has 90 days after entry of judgment by a court of appeals to file a petition for a writ of certiorari whether the case is civil or criminal.

The amendment does not require a court of appeals to grant a stay of mandate that is coextensive with the period granted for filing a petition for a writ of certiorari. The granting of a stay and the length of the stay remain within the discretion of the court of appeals. The amendment means only that a 90-day stay may be granted without a need to show cause for a stay longer than 30 days.

GAP REPORT
CHANGES MADE IN RULES 28 AND 32 AFTER PUBLICATION

Rule 28 and 32 were previously published. The Advisory Committee is not requesting that these rules be forwarded to the Judicial Conference. A Gap Report may not be technically required. This segment of the report, however, will summarize the changes made since publication. The summary should facilitate the discussion of the changes.

Because the proposed amendments to Rules 26.1, 29, 35, and 41 have not been previously published, they are not treated in this portion of the report or the succeeding portions.

1. RULE 28 - Briefs

The post-publication changes in Rule 28 are not, by themselves, significant. Republication is requested, however, because these changes are companions to those in Rule 32. The Advisory Committee believes that the changes in Rule 32 are significant and requests republication of that rule.

The following changes have been made in Rule 28:

a. Subdivisions (a) and (b) are amended to provide that a party's brief must include the certificate of compliance required by amended Rule 32(a)(5).

b. Former subdivision (g) is noted as "reserved" and the remaining subdivisions retain their current labels.

c. The cross-reference in subdivision (h) to subdivision (a) now includes new paragraph (8), dealing with the certificate of compliance required by Rule 32.

d. Numerous stylistic changes were made.

2. RULE 32 - Form of a Brief or Appendix

Numerous changes have been made in Rule 32.

a. At line 10, double-sided printing is prohibited. Thirty-one commentators opposed double-sided printing of a brief or appendix.

b. The language previously located at line 7, requiring a print resolution of 300 dots per inch (dpi) has been deleted from the text of the rule, but the Committee Note expresses a strong preference for a printing method that produces 300 dpi or more. Six commentators objected to the requirement as being too technical.

c. At lines 11 through 15, the provisions dealing with carbon copies have been deleted. The use of carbon paper has become so rare that the Committee did not believe that the rule should address the use of carbon copies.

d. At line 35, the preference for proportional type has been omitted. Nine commentators opposed the use of proportional type and another 15 commentators would delete the preference for proportional type. At line 32, the rule is amended to require that proportional type be at least 14 point type. Twenty-seven commentators said that if proportional type is permitted it should be larger than 12 point.

e. Lines 33 and 34 provide that the monospaced type permitted under the rule cannot have more than 10-1/2 characters per inch. The published rule said no more than 11 characters per inch.

f. Line 42 requires that a brief must be on 8-1/2 by 11 inch paper. That precludes a pamphlet brief. Given the infrequent use of pamphlet briefs in the courts of appeals, the rule was simplified by dropping all treatment of them. The Committee believes that this change is significant.

g. The margins specified in lines 47 through 49 apply to all briefs whether proportionately spaced or monospaced. Five commentators opposed having different margins depending upon the style of type.

h. At lines 50 through 78, length limitations are defined separately for

proportionately spaced briefs and monospaced briefs.

i. The length of a proportionately spaced brief is based upon the number of words per brief, not the number of pages. A proportionately spaced principal brief must not exceed 14,000 words, and a reply brief must not exceed 7,000 words. (The previously published rule set the limit at 12,500 and 6,250 words.) In addition, the brief must not have an average of more than 280 words per page. The safe-harbor provision was deleted for proportionately spaced briefs.

ii. The length of a monospaced brief may be measured by the same word limits, both overall and per page, applicable to a proportionately spaced brief, or by the total number of pages. If a page count is used rather than a word count, the counted pages may not exceed 40 for a principal brief and 20 for a reply brief.

i. At lines 79 through 95, a more detailed certificate of compliance is required than that required by the published rule. The certificate is also required to be included in all briefs, even those using the page count method for determining the length of a monospaced brief. The Advisory Committee believes that these changes are significant.

j. At line 144, a brief or appendix is required to lie "reasonably" flat, rather than simply "flat."

k. The prohibitions against use of sans-serif type and boldface were deleted. The language requiring case names to be underlined unless a distinct italic typeface is used was also omitted.

l. Numerous style revisions were made.

SUMMARY OF COMMENTS RECEIVED ON PROPOSED AMENDMENTS TO RULES 28 AND 32

1. Rule 28

Only two comments were specifically aimed at Rule 28. Because of the interrelationship of the changes in Rule 28 and 32, most commentators combined their discussion of the two rules. Because the "substance" of the change is contained in Rule 32, all issues except those specifically addressing Rule 28 are treated with Rule 32.

One commentator suggests that subdivision (g) should be shown as "reserved" in order to preserve the current labels for the remaining subdivisions.

Public Citizen suggests amendment of subdivision (h) to make it clear that when there is more than one appellant or appellee, a court of appeals cannot require the filing of a joint brief. At its September 1993 meeting the Advisory Committee rejected a proposal that each side file a single brief in a consolidated or multi-party appeal, but the Committee had not considered the wisdom of prohibiting a court from requiring a joint brief. No change was made.

2. Rule 32

The Committee received a total of sixty-nine comments on the proposed amendments to Rule 32. Most of them deal with discreet provisions without expressing either general support for or opposition to the amendments as a whole. Six of the comments, however, expressed support for the amendments and the general approach taken by them and 11 comments stated general opposition. The commentators who oppose the rule amendments typically criticize the complexity of the proposed rule and its technical nature.

The vast majority of comments were directed at specific provisions. The most commonly addressed issues are outlined below.

a. Proportional type

Nine commentators expressed opposition to the use of proportional type. Another 15 commentators would delete the preference for proportional type. Most of these commentators state that proportional type is too difficult to read.

Twenty-seven commentators say that if proportional type is permitted, it should be required to be larger than 12 point. Most of the commentators say that it should be at least 14 or 15 point.

One commentator specifically supports the preference for proportional typeface because use of a proportional typeface makes it possible to fit more material on a single page and there will be a resulting environmental savings.

b. Monospaced type

The commentators who oppose use of proportional type, as well as those who would delete the preference for proportional type, prefer monospaced type. 19 commentators say that the monospaced type permitted under the rule should have no more than 10 characters per inch, the equivalent of pica type on a standard typewriter.

c. Double-sided printing

Thirty-one commentators oppose double-sided printing. A major concern is legibility even though the rule permits double-sided printing only when the brief is legible. Several commentators point out, however, that even if a brief is legible when submitted by the party, once the user of the brief highlights portions and takes notes on the brief there may be bleed through that destroys legibility. Another concern is that the back-side is currently used by many judges and law clerks for notetaking. Several of the opponents point out that any environmental saving that might result from use of fewer sheets of paper is likely to be offset by the use of heavier weight paper needed to meet the legibility requirement.

One commentator supports double-sided printing specifically because of the environmental savings.

d. Length limitations

Twelve commentators specifically oppose use of word limitations (both total words per brief and average number of words per page); one other opposes

applying word limits to *pro se* litigants proceeding *in forma pauperis*. Another five commentators implicitly reject the word limitations by saying that the rule should use page limits. Various reasons are given for the opposition. Some oppose word counts because not all lawyers have computers or office machinery that will perform the counting function. Others oppose the counts because of the time and effort that will be used to comply with a rule that they think is unnecessarily technical. Still others worry about the fact that different word-processing systems count words differently.

Eight commentators support the use of word limits as the most straightforward way to address the "cheating" that is currently a problem. Three of these commentators, however, recommend that the rule define a "word" in an effort to minimize the variation in word counting as performed by various computer programs. One commentator favors a character count rather than a word count because it eliminates the variations resulting from the different counting methods used by software programs.

Seven commentators object to what they believe is a shortening of brief length. They state that the word limitations in the published rule shorten briefs. The Ninth Circuit Advisory Committee on Rules and the Los Angeles County Bar Association Appellate Courts Committee, both recommend that the total number of words be raised to 14,000 for a principal brief and 7,000 for a reply brief, but that the average number of words per page remain at no more than 280. Judge Easterbrook recommends that the total number of words be increased to 14,500 per brief and that the average number of words per page be no more than 320. The National Association of Criminal Defense Lawyers recommends increasing both the word limits and the safe harbors by 10%.

Several commentators also state that the safe harbors are too restrictive.

Three commentators object to the requirement that a brief include a certification that it does not exceed either the total word count or the limit on average number of words per page. They find the requirement demeaning.

e. Use of decisions retrieved electronically

Seven commentators object to that portion of the Committee Note stating that decisions retrieved electronically from Lexis or Westlaw may not be included in an appendix. The commentators note that if citation to an opinion that is either unpublished or not yet published is permitted, inclusion of the opinion as retrieved from Lexis or Westlaw may be the only pragmatic way to provide the

court with a copy of the opinion. Because of the delay in publication of advance sheets and the slow response time to requests for copies of slip opinions, the electronically retrieved opinion may be all that the party can obtain. The restriction could deprive the litigants and the court of the opportunity to use the most current precedent. Moreover, the ability to "download" opinions and print them on high quality laser printers can eliminate legibility problems.

f. Miscellaneous "technical" matters.

Five commentators oppose requiring different margins depending upon whether a brief is prepared with monospaced or proportional type.

Four oppose the requirement that a brief lie flat when open. One approves the requirement but requests further guidance as to the type of binding that is acceptable. One commentator suggests that the rule should require spiral binding for all 8-1/2 by 11 inch briefs.

Six commentators recommend deleting the requirement that the print have a resolution of 300 dots per inch or more. The commentators believe that the requirement is too technical and that requiring "legibility" is sufficient.

LIST OF COMMENTATORS
SUMMARY OF THEIR INDIVIDUAL COMMENTS

1. Rule 28

Rule 28 is amended to delete the page limitations for a brief. The length limitations have been moved to Rule 32. Rule 32 deals generally with the form and format for a brief.

Because of the interrelationship of the changes to Rules 28 and 32 most commentators combined their discussion of the two rules. Because the "substance" of the changes is found in Rule 32, this list includes only those comments aimed specifically at Rule 28. The rest of the comments are summarized under Rule 32.

1. P. Michael Jung, Esquire
   Strasburger & Price, L.L.P.
   901 Main Street, Suite 4300
   Dallas, Texas 73202

   Mr. Jung suggests that 28(g) should be shown as "[reserved]" rather than relettering Fed. R. App. P. 28(h)-(j).

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

   Public Citizen suggests that subdivision (h) should be amended to make it clear that when there is more than one appellant or appellee they cannot be required to file joint briefs. This can result in parties who opposed each other below, and whose rights are still at odds although they are on the same side of the appellate caption, being forced to join in one brief.

2. Rule 32

The published amendments changed Rule 32 in several significant ways. The published rule would permit a brief to be produced using either a monospaced typeface or a proportionately spaced typeface, although the rule expressed a preference for the latter. Monospaced and proportionately spaced typefaces were defined in the rule. Margins were specified for different paper sizes and different typefaces.

The proposed rule established new length limitations for briefs. A principal brief would be limited to a total of 12,500 words and a reply brief could not exceed 6,250 words. In addition, the average number of words per page could not exceed 280 words. The latter limitation was included to ensure that the typeface used would be sufficiently large to be easily legible.

1. Honorable Ruggero J. Aldisert
United States Circuit Judge
6144 Calle Real
Santa Barbara, California 93117-2053

Given the caseload crises in the United States Courts of Appeals, Judge Aldisert states that any rule amendment should be designed to assist the judges. He believes that certain portions of the proposed amendments do not pass that test. He states that the rule should prohibit the use of proportionately spaced typeface because it is too difficult to read, but that if proportional type is used, the point size should be greater than 12. He objects to brief length being measured by number of words because it will be more difficult for court personnel to monitor. His strongest objection is to authorizing double-sided printing of briefs. Judge Aldisert uses the reverse side of the pages for his notes.

Specifically Judge Aldisert suggests that a monospaced typeface be not more than 10 characters per inch. He also suggests that brief lengths be expressed in number of pages and that a principal brief should be no more than 35 pages.

2. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611

The section disagrees with and proposed changes to (a)(1)-(6), (a)(7), and (b)(2).

With regard to (a)(1)-(6) the section disagrees with the substance and mechanics used to curtail the ability of lawyers to circumvent the current page limits.

a. The section opposes (a)(6) stating that it effectively shorten the maximum length of a brief from 50 to 44 pages. The sections emphasizes that a party appearing before a court of appeals has a right to present all of his or her non-frivolous arguments to the court.

b. The section believes that the paragraphs (a)(1)-(6) are unduly confusing, hard to follow, and will be even more difficult to administer. The section cites the differing margin requirements depending upon the typeface used as illustrative. The section further notes that many word processors do not have word counting capabilities and that many pro se litigants and small firms still use typewriters. The section recommends a simpler solution such as keeping the current margin and page length requirements and requiring that all briefs not commercially printed be produced in 11-point, 10 character per inch Courier. As an alternative, it suggests the Fifth Circuit Rules 28.1 and 32.1, which allows proportional fonts but is relatively easy to follow and administer.

With regard to (a)(7), the section opposes the restrictive language in the Committee note regarding legibility of documents to be included in an appendix. The section believes that simply requiring "legibility" is sufficient and that the additional requirements of the note should not be added to the rule and that the language of the note should be stricken. The section points out that in many cases, the "original" document in the record is a copy. Sometimes the record document is a copy of a fax. Similarly, Westlaw and Lexis opinions can be retrieved on printers that produce a 300 dot per inch resolution in double column format.

With regard to (b)(2), the section notes that neither the text nor the note indicate whether the length limitations apply to "other papers." The section

recommends that, at a minimum, the rule should refer to Rule 40(b), which prescribes a 15-page limit for a petition for rehearing.

3. State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, Arizona 85003-1742

The State Bar of Arizona has no objections to and foresees no particular difficulties with the proposed amendments.

4. Stewart A. Baker, Esquire
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795

Notes that it is difficult to read long lines of proportionally spaced type. He suggests that if the words per page limit is a subtle way of requiring the use of larger margins, the rule should be more direct.

5. Honorable Bobby R. Baldock
United States Circuit Judge
Post Office Box 2388
Roswell, New Mexico 88202

Judge Baldock prefers 14 point proportional type to either 12 point proportional type (which he characterizes as the least desirable) or monospaced type with at least 10 characters per inch. Judge Baldock also objects to double-sided printing.

6. Honorable Stanley F. Birch, JR.
United States Circuit Judge
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Judge Birch joins in the remarks of Judge Edmondson (see summary below).

7. Honorable Michael Boudin
United States Circuit Judge
J.W. McCormack Post Office and Courthouse
Boston, Massachusetts 02109

Judge Boudin questions the replacement of the 50/25-page length limitations for principal and reply briefs by the new provisions governing typeface, words per page, and total number of words. He believes the new provisions are unduly complicated and will be especially burdensome for solo and small firm practitioners. He recognizes that there probably should be different page limits for printed and typewritten briefs but would otherwise simply include in the rule an admonishment that "any devices that appear unreasonably designed to crowd more than an ordinary number of words into the page limits may subject the brief to rejection, or requirement of refiling in proper form, or (in egregious cases) other sanctions. He also suggests that it is unnecessary to require an appendix to lie flat when open.

8. Honorable Pasco M. Bowman
United States Circuit Judge
819 U.S. Courthouse
Kansas City, Missouri 64106

Judge Bowman prefers monospaced type and suggests deleting the preference for either monospaced type or proportional type. He also suggests that the rule require 14 or 15 point proportional type rather than 12. He notes that the use of 12 point proportional type can result in considerably more words per page than the 280 word maximum in the proposed rule. With regard to monospaced type he questions why a maximum of 11 characters per inch is specified when the most common monospaced typefaces have only 10 characters per inch. He questions whether double-sided printing is a good idea.

9. Honorable James R. Browning
United States Circuit Judge
121 Spear Street
Post Office Box 193939
San Francisco, California 94119-3939

Judge Browning prefers single-sided briefs. He prefers monospaced

typeface; if the rule permits proportionately spaced typeface, he believes that it should be larger than 12 point. With regard to monospaced typeface, he suggests that 10 characters per inch should be the minimum.

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

The committee opposes using a word count to limit the length of a brief and reducing the length of a brief from 50 pages to 44.6 (12,500 words per brief divided by 280 words per page). The committee says that many law firms do not have the capability of counting words using their word processing equipment and the safe harbors cause too significant loss in length. The committee also opposes the prohibition on using Lexis and Westlaw printouts in an appendix. The committee further notes that two-sided briefs are difficult to read and that common brief bindings generally do not lie flat.

11. The State Bar of California
The Committee on Federal Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee states that the word limits are "a very bad idea." They believe that the cost exacted by the change is too great. Time will be wasted simply on compliance with a format requirement. Many attorney's offices do not have equipment that will count words and even automated counting will be unduly time consuming. The committee prefers the current page limits but would find a total word limit, without per-page limits, more palatable. The safe-harbor alternatives are not palatable.

The committee opposes the prohibition on use of Lexis and Westlaw printouts in an appendix. If necessary, the rule simply should require that the printouts be legible.

12. Honorable William C. Canby, Jr.
United States Circuit Judge
6445 United States Courthouse
230 N. First Avenue
Phoenix, Arizona 85025

Judge Canby states that double-spaced pica type is far easier to read than proportionately spaced type in 12, 14, or even 15 point type. Judge Canby urges the committee to require monospaced type with 10 characters per inch. If, however, the rule continues to allow proportionately spaced type, it should be 14 point type. He would not, however, say "at least 14 points" because footnotes are difficult to read at 14 points and even more difficult at 15 points. Judge Canby also urges reconsideration of the two-sided brief.

13. Aaron H. Caplan, Esquire
on behalf of the Law Firm Waste Reduction Network
Perkins Coie
1201 Third Avenue, 40th Floor
Seattle, Washington 98101-3099

Mr. Caplan writes on behalf of the Law Firm Waste Reduction Network, an affiliation of attorneys and staff from among Seattle's larger law firms. The group writes in support of those portions of the proposed rule permitting the use of both sides of the page and encouraging the use of proportionately spaced typefaces. The group also proposes that the committee consider encouraging the use of recycled content paper for submissions to the courts of appeals.

The group calls double-sided printing both environmentally beneficial and cost-effective. They note that legibility is not an objection because the rule already takes legibility into account. Note taking, they say, is not a problem because commercially printed briefs are double-sided and there should not be a different standard when briefs are produced in-house.

With regard to recycled content paper, the group says that the states of Florida, New York and Colorado permit papers submitted to their courts on recycled-content paper and that Michigan and Washington have similar proposals under consideration. The group also notes that Executive Order 12873 requires the use of recycled paper by the administration. The group states that recycled-content paper is comparable to most types of

nonrecycled paper in terms of quality, function, availability, and price and requires no changes in office machinery. They argue that mandating recycled-content paper for important appellate documents would have a ripple effect making the use of such paper acceptable generally in the practice of law, a profession that uses a great deal of paper products.

14. Chicago Council of Lawyers
Federal Courts Committee
One Quincy Court Building, Suite 800
220 South State Street
Chicago, Illinois 60604

The Federal Courts Committee of the Chicago Council of Lawyers supports the goal of setting a national standard for typeface and other requirements, "to clear the tangle of contradictory local rules."

The committee, however, opposes replacing the current page limits with the proposed word count. The committee believes that overlong briefs are usually the product of either poor writing style or the courts' insistence that all issues be fully briefed, on pain of waiver.

The committee also opposes the requirement that only "printed court or agency decision[s]" be included in an appendix. The committee points out that very often district court opinions are not printed at all. Even as to those that are "printed" there is a lag time of two to three weeks before incoming slip opinions are available in the federal court library and that West advance sheets run a full month to two months behind decision dates. The restriction would deprive the reviewing court of the benefit of the most recent, on-point authority.

15. Clerks of the United States Courts of Appeals for
D.C. Circuit and the First through Eleventh Circuits

The primary concern of the clerks is that the rule be one that can realistically be enforced by deputy clerks and easily understood and abided by litigants. Specifically, the clerks state:

a. Legibility is crucial, but they question the need to require a "resolution of 300 dots per inch." How would a deputy clerk clearly identify a possible violation?
b. They suggest deletion of the preference for proportional type.

c. They are concerned about the requirement that a typeface design be serifed, Roman, text style. Given the large variety of type styles, they are concerned about enforceability and about fairness to those who have invested in alternatives.
d. They prefer a single margin requirement rather than varying the margins depending upon whether monospaced or proportional type is used.
e. Paragraphs (a)(4) and (5), dealing with boldface and underlining or italicizing case names, unnecessarily limit formatting discretion and provide more detail than is necessary in a national rule.
f. They support the use of word counts for defining the length of a brief provided the certification by the litigant can be relied upon for purposes of filing. They suggest that it might be helpful to create a form certification as an appendix to the rules.

16. Competitive Enterprise Institute
1001 Connecticut Avenue, N.W., Suite 1250
Washington, D.C. 20036

The institute opposes double-sided printing and, anticipating that the Advisory Committee will receive suggestions that it mandate the use of recycled paper, mandating the use of recycled paper. The institute does not believe that such measures will have any significant environmental benefits. Among other factors the institute provides statistics about the pollutants generated in recycling paper.

17. Peter W. Davis, Esquire, Chair
Ninth Circuit Advisory Committee on
Rules of Practice
Crosby, Hearey, Roach & May
1999 Harrison Street
Oakland, California 94612

The Ninth Circuit committee generally favors the approach taken in the proposed revisions and supports the basic concepts: that there be distinct provisions for proportionately spaced type in contrast to monospaced type, and that the length of proportionately spaced briefs be calculated by a "word-count" method.

The committee favors the word-count method because it removes the incentive to cram words on a page or otherwise "cheat" on a page limit.

The one objection to word counting that troubled the committee is that various word processing systems count differently so that the total will vary depending on the system used. They believe that the difference can be more than 200 words for a 35 page brief (or the equivalent of a three-quarters of a page). Even so, the committee believes that the benefits of the rule outweigh its drawbacks and that it should be adopted.

The committee made a number of suggestions for "fine-tuning" the rule.

a. In paragraph (a)(1) the committee believes that the 300 dots per inch requirement is too technical and that requiring "a clear black image" is sufficient.

b. The committee also suggests that only single-sided printing be permitted.

c. In paragraph (a)(2) the committee questions whether there is a uniform preference for proportional typefaces.

d. In subsections (a)(2)(A) and (B), the committee recommends that the rule require proportional fonts to be 14 points rather than 12. The committee also believes that defining proportional and monospaced type in terms of "advance widths" may not be understood by many practitioners and suggests more reader-friendly definitions. The committee suggests that proportionately spaced type could be defined as that having "characters of different widths" and that monospaced type could be defined as that having "characters of the same width." The committee also suggests deleting the reference in the rule to particular type style examples. The committee does not believe that it is necessary to require serifed styles to ensure readability. Finally, the committee believes that monospaced type should be 10 characters per inch rather than 11.

e. In subsection (a)(3)(A), the committee would use a single margin requirement for all briefs.

f. In subsection (a)(3)(B), the committee would eliminate the option of using 6-1/8 by 9-1/4 inch paper.

g. The committee believes that paragraphs (a)(4) and (5) impinge unnecessarily on formatting discretion.

h. With regard to paragraph (a)(6), the committee recommends that the permissible number of words be increased from 12,500 (6,250 for a reply brief) to 14,000 (7,000). A brief containing 14,000 words

would be 50 pages in length if the average number of words per page is 280. The committee would eliminate the "safe harbor" exception from the certificate of compliance because it is overly complicated and burdensome to enforce. The committee believes that a word count is the better approach for all proportionately spaced briefs.

With regard to monospaced briefs, the committee believes that litigants may use excessive single-spaced footnotes to circumvent the limitation on length. The committee recommends, therefore, that any monospaced principal brief exceeding 40 pages (or reply brief exceeding 20 pages) should be subject to the average words per page and maximum words per brief rule as well as the certificate of compliance requirement.

i. In paragraph (a)(7), the committee suggests that the volumes of an appendix be limited to 300 pages each.

j. The committee suggests that paragraph (a)(8) prohibit plastic covers on briefs.

k. In paragraph (a)(9), the committee suggests that requiring a brief to "lie flat" may be too restrictive and suggests that it might be better to require that it "stay open" or "lie reasonably flat when open."

18. The Bar Association of the District of Columbia
Litigation Committee and its Subcommittee on Court Rules
1819 H. Street, N.W., 12th Floor
Washington, D.C. 20006

Although the Litigation Committee agrees that there should be a uniform national standard for appellate briefs, one that will preempt local rules on the subject, the committee believes that the existing provisions in Rules 28 and 32 dealing with the length and form of a brief are sufficient to accomplish the Advisory Committee's goals of ensuring that all litigants have an equal opportunity to present their material and that the documents are easily legible. The Litigation Committee opposes the proposed revisions for several reasons. The committee objects in general to the complexity of the proposed revisions. The committee objects to the complexity not only because of the burdens ordinarily accompanying any complex rule, but also because, in this case, the complexity "suggests that lawyers have an improper attitude and simply cannot be trusted." The Litigation Committee urges the courts of appeals "simply to respect the integrity of the bar to comply with present requirements." If the Standing Committee, however, believes that a word count is necessary to curtail

"cheating," the Litigation Committee suggests that a word count alone is a sufficient limitation.

Specifically, the Litigation Committee notes that some long-time practitioners on the committee did not understand the requirement that a font be "serifed, roman, text style" and that even the distinction between "monospaced" and "proportionately" spaced typeface eluded some members of the committee. The committee questions the propriety of including examples of acceptable typefaces in the rule, calling them "a virtual advertisement for a product sold by those who drafted and testified in favor of the rule." The committee questions the need to vary the margin sizes depending upon whether a typeface is monospaced or proportionately spaced.

The committee states that the complexity of the rule will make court evaluation of compliance difficult. The committee notes the need for the litigants to certify the total and average word counts. The committee states that the rule's reliance upon the party's representation as to compliance demonstrates the superfluousness of the rule. The committee objects to reliance upon the word count derived from the word processing system used to prepare the brief because different systems count differently.

The committee believes that the 300 dots per inch minimum is unnecessary (in light of the requirement that text be a "clear black image") and that court determination of compliance will be difficult. If the judgment is that it is important to keep the 300 dpi standard, the Litigation Committee believes that it should be moved from the text of the rule to the note so that the rule will not become outdated by technological changes.

The Litigation Committee also objects to the requirement that a brief lie flat when open.

Finally, the committee objects to the requirement that only "printed court or agency decisions" may be included in an appendix. The committee states that if an unpublished decision may be cited, a party should be permitted to use the decisions in the form normally obtained from Lexis, Westlaw, or the courthouse database through the Internet. The committee argues that "[s]ometimes, an electronically retrieved version of a decision is far more legible than an nth-generation photocopy that is the only 'original' available to a party."

19. District of Columbia Bar
Section on Courts, Lawyers and the Administration of Justice
Anthony C. Epstein, Co-chair
Jenner & Block
601 Thirteenth Street, N.W., Suite 1200
Washington, D. C. 20005

The section agrees that the length of a brief and other papers should be primarily governed by limits on the number of words and by general rules concerning the layout of pages. The section states that the proposed amendments are, however, too detailed and will be confusing to those not versed in typographic issues. Specifically, the section states:

a. The requirement of "a clear black image on white paper" is sufficient; there is no need for the "300 dots per inch" standard.
b. The rule should not require a certification of compliance. The rule could provide that by filing a brief, an attorney certifies that the brief complies with the rule. The certification requirement is "implicitly demeaning to the integrity and professionalism of lawyers." The rules do not otherwise require certification of compliance even when a violation may not be obvious from the face of a document.

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

Judge Easterbrook states that the proposed amendments are a substantial step forward but he suggests a number of additional amendments.

a. He suggests that the copies of faxes and Lexis printouts should not be includible in an appendix. He believes that the appropriate step would be to permit inclusion of a document in an appendix only if the original has 300 dots per inch or better.
b. To aid a judge with vision difficulties, the rule should require lawyers to retain electronic copies of any brief composed on a computer so that the courts by local rule, or order in particular cases, may call for the briefs and other papers in electronic form. This would permit a judge to enlarge the text on a computer screen, print it in a larger size on a local printer, or even have it read aloud by a computer equipped to do so. He does not suggest that the rule require routine filing of disks.

c. He continues to believe that the rule should adopt character rather than word limits.

d. He is concerned that the conversion from pages to words has substantially curtailed the maximum length of a brief from the old 50-page rule. The proposed rule establishes a maximum of 12,500 words per brief and an average of 280 words per page. Using five briefs submitted to the Supreme Court (printed, of course) he found that the number of words in a 50 page printed brief would ordinarily be at least 14,000 and may be almost as high as 16,900. He also found that a 50 page typewritten brief produced in 12 point Courier also has significantly more than 12,500 words. Using one inch margins all around his document had 13,875 words (counted by Microsoft Word) and using the smallest margins allowed by the current rule 14,543 words. Setting the same brief in an easily read proportional typeface and using the margins in the proposed rule, his document had 16,333 words in 50 pages. The average words per page in the printed briefs varied from a low of 283 to a high of 338. The typewritten brief in 12 point Courier had 277.5 words per page with the one inch margins and 290.1 words per page with the smaller margins. The brief with proportional typeface had 326.7 words per page.

As previously stated, Judge Easterbrook prefers a character count to a word count. His examples show that there is less variation in character count from one word-processing package to another than there is using a word count.

In a later comment, Judge Easterbrook responds to the comments of the Ninth Circuit Advisory Committee on Rules. He agrees with many aspects of the comment and differs with others. Specifically he responds as follows:

a. He rejects the suggestion that the rule define how to count a word as not feasible. He prefers a character count because it eliminates the disparity in word count approaches across software packages, but if a character count is rejected he believes we simply must live with the variation from package to package as to word count.

b. The 300 dot per inch may be too technical, but rather than delete it he would offer more explanation in the committee note.

c. Double-sided printing is fine but he agrees that the rule should require 20 pound paper (or heavier) to prevent bleed through.

d. The preference for proportional type should be retained. "The current prejudice against it by some judges may be traced to its use

as a cheating device. From here on, only legibility counts."

e. The minimum point size may stay at 12. "Once typographical tricks have been eliminated as a means to squeeze more words into a brief, lawyers will begin to appreciate how type can be used for persuasion. A brief set in Adobe Garamond ought to be 13-point; a brief set in Berthold Baskerville ought to be 12-point; if we try to give a table of these things we'll end up in a swamp."

f. The term "advance widths" can be abandoned in favor of the proposed definitions of "characters of different widths" and "characters of the same width" for proportional and monospaced type.

g. Examples of typefaces do not belong in the text of the rule but would be helpful in the committee note.

h. It is essential to limit proportionally spaced fonts to those with serifs. A sans serif font is tiring to read in longer passages.

i. The reason the rule requires a monospaced font to have no more than 11 characters per inch (cpi) rather than 10 cpi is that some of the monospaced fonts built into printers yield about 10-1/4 or 10-1/2 cpi when printed at 12 point but when printed at 13 point, they look too large. Perhaps the rule could say that 10 cpi is strongly preferred and that no more than 10-1/2 cpi are allowed.

j. The reason for wider side margins for proportionally spaced type is that it is less readable in lines that reach 6-1/2 inches.

k. It would not be a big loss to abandon the pamphlet brief.

l. Boldface generally should be prohibited and case names should be in italic unless that is impossible.

m. The word limits should be increased to 14,500 per principal brief and no more than 320 word per page. The safe-harbors are designed for simplicity and should be retained. Judge Easterbrook agrees that the rule might limit the safe harbor for monospaced briefs to 40 pages to ward off the excessive use of footnotes.

n. Appendix volumes exceeding 300 pages are not troublesome.

o. Plastic covers are not problematic but Judge Easterbrook dislikes plastic backs, but is not convinced that either should be the subject of rulemaking.

p. Requiring a brief to "stay open" or "lie reasonably flat when open" would do the trick without compelling everyone to use spiral binders.

21. Honorable J.L. Edmondson
United States Circuit Judge
Room 416, 56 Forsyth Street
Atlanta, Georgia 30303

Judge Edmondson strongly objects to typeface as small as 12 point. If proportionately-spaced typeface is allowed, he believes that 15 point type should be required. If monospaced typeface is used, he believes that at least ten characters per inch should be the standard but he prefers even fewer than 10 characters per inch. Judge Edmondson also objects to double-sided briefs. He further objects to single spacing footnotes that contain more than simple citations to authority.

22. Honorable Jerome Farris
United States Circuit Judge
United States Courthouse
1010 5th Avenue
Seattle, Washington 98104

Judge Farris objects to printing text on both sides of the page. He also objects to use of proportionately spaced type. He further objects to the word counts; they will be difficult for a person using a typewriter. He suggests that the 11 characters per inch be changed to 10 characters per inch which is standard for typewriters.

23. Honorable Wilfred Feinberg
United States Circuit Judge
United States Courthouse
Foley Square
New York, New York 10007

Judge Feinberg opposes double-sided briefs. He suggests that the rule should specify that a monospaced typeface may have no more than 10 characters per inch. He further suggests that proportional typeface should be prohibited rather than preferred but if it is permitted it should be at least 14 point type.

24. Honorable Floyd R. Gibson
United States Circuit Judge
837 United States Courthouse
811 Grand Avenue
Kansas City, Missouri 64106-1991

Judge Gibson objects to the use of 12 point proportional type; he finds monospaced, pica (10 characters per inch) much easier to read. He also questions permitting double-sided printing unless it can be done without the imprint on one side of the page interfering with the characters on the other side of the page.

25. Joseph A. Halpern, Elizabeth A. Phelan, & Heather R. Hanneman, Esquires
Holland & Hart
555 Seventeenth Street, Suite 2900
Denver, Colorado 80202-3979

Mr. Halpern, et al, oppose the substitution of a word limitation for a page limitation even though they recognize the desirability of minimizing creative evasions of page limitations and the need for uniformity and legibility of briefs. They point out that gamesmanship will continue with a word limitation. They note that different word processing systems, and even different versions of the same system, count "words" differently. They performed a word-count on the same 50 page brief and found that Word Perfect 5.1 counted 12,436 words, MicroSoft Word 6.0 counted 12,850, and WordPerfect Windows 6.1 counted 13,011 words. Given the difference in word counting functions, Mr. Halpern concludes that a certificate concerning word count will be meaningless. Other gamesmanship opportunities exist; lawyers may eliminate parallel citations, shorten case names in citations, or use typographical characters that do not count as words, such as "7" instead of "seven." Finally they note that a word limitation is onerous for parties that do not have access to word processing systems.

Mr. Halpern, Ms. Phelan, and Ms. Hanneman recommend that Rule 32 limit the length of a brief by (1) using a page limitation; (2) specifying a minimum point size; and (3) specifying acceptable typefaces for briefs.

26. Honorable Shirley M. Hufstedler
Hufstedler & Kaus
Thirty-Ninth Floor
355 South Grand Avenue
Los Angeles, California 90071-3101

Judge Hufstedler objects to the revisions for a variety of reasons including that they will require conscientious lawyers to spend unjustifiable amounts of time trying to comply. She does not believe that the benefits to the judges are significant enough to justify the increased cost to litigants.

Judge Hufstedler also object to shortening the length of appellate briefs; she believes that shortening the length will actually increase the work for courts of appeals because there will be more motions to file oversized brief and difficult factual situations and hard questions of law will not be effectively explained if the length in inappropriately shortened. She does not believe that shorter briefs are more efficient or conducive to quality decision making.

Judge Hufstedler also challenges the apparent assumption that every lawyer who files a brief in a federal appellate court is computer literate and has available to him or her the kind of equipment that permits ready compliance with the revised rule.

27. Honorable Procter Hug, Jr.
United States Circuit Judge
50 W. Liberty Street, Suite 800
Reno, Nevada 89501

Judge Hug objects to permitting the use of 12 point proportional type to prepare a brief. He believes that it is too difficult to read. He thinks that the use of monospaced pica, 10 character per inch, should be encouraged, if not mandated. If proportional type is permitted it should not be smaller than 15 point type.

28. Sandra S. Ikuta, Esquire
O'Melveny & Myers
400 South Hope Street
Los Angeles, California 90071-2899

Ms. Ikuta believes that 12 point type is too small to be easily read. She

also believes that proportional type is less readable than monospaced type, especially in footnotes.
She recommends monospaced typeface of 10 characters per inch on single-sided pages. The preferred typeface should be 15 point type.

29. Lawrence A. G. Johnson
Johnson & Swenson
2535 East 21st Street
Tulsa, Oklahoma 74114

Mr. Johnson suggests that Rule 32 should permit a brief writer to petition a court for permission to scan pertinent photographs and documentary evidence into the body of brief and that such items should be exempt from the page limits.

30. P. Michael Jung, Esquire
Strasburger & Price, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 73202

Mr. Jung suggests that 32(a)(7) should permit inclusion in an appendix of any court or agency decision, whether printed or not. Unprinted decisions, available only in electronic or manuscript form, may well be those whose inclusion is most helpful to the court.

31. Brett M. Kavanaugh, Esquire
2727 29th Street, N.W. #134
Washington, D.C. 20008

Mr. Kavanaugh believes that the rule should require, or at least encourage, monospaced typeface. At a minimum, he states, the rule should not state a preference for proportionately spaced typeface.

Mr. Kavanaugh further suggests that if proportionately spaced typeface is to be allowed, the rule should require a 14 or 15 point type.

Mr. Kavanaugh suggests that the rule should prohibit double-sided briefs except for "printed" briefs.

With regard to the requirement that a brief be bound so that it lies flat when open, Mr. Kavanaugh suggests that the rule require spiral binding for

all 8-1/2 by 11-inch briefs.

32. Mr. Kevin M. Kelly
1800 Avenue of the Stars
Suite 500
Los Angeles, California 90067

Mr. Kelly objects to double-sided printing of briefs. He also objects to the use of 12 point proportional type. He finds 12 point type difficult to read especially if certain small fonts (such as CG Times) are used. He recommends use of 14 or 15 point proportional typeface but would favor stating a preference for monospaced type.

33. Kelly M. Klaus, Esquire
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, California 94304-1050

As a general matter Mr. Klaus questions the need to amend Rule 32. She believes that the existing rule has the virtues of brevity and flexibility and that the proposed rule is unduly complex and will result in an increase in motions to strike portions of brief that allegedly fail to comply with the rule. Specifically, with regard to double-sided briefs, Ms. Klaus notes that even though the rule required that counsel's finished product be legible, that highlighting and notetaking on the brief by judges and law clerks will likely bleed through the paper causing legibility problems. Ms. Klaus also objects to the preference for proportionately spaced typeface. She suggests that monospaced type be preferred or even required and that the rule specify a maximum of 10 characters per inch rather than 11.

34. Associate Professor Michael S. Knoll
The Law Center
University of Southern California
University Park
Los Angeles, California 90089-0071

Professor Knoll suggests that the rule should omit the preference for proportional type and encourage the use of monospaced type because it is easier to read. He also believes that lawyers could abuse the 12 point proportional font option and attempt to press more words into their documents using the safe harbor provisions in (a)(6)(A). If proportional

type is permitted, he believes the rule should require 14 or 15 point type. He also objects to double-sided briefs.

35. Stephen A. Kroft, Esquire
McDermott, Will & Emery
2049 Century Park East
Los Angeles, California 90067-3208

Mr. Kroft does not believe that the proposed amendments will materially improve the legibility of appellate briefs but that the amendments may create unnecessary difficulties. He favors monospaced type, specifically courier pica (10 characters per inch) because he finds it easier to read. He states that 12 point proportional type is not only more difficult to read, but it results in many more than 280 words per page. He would prefer 40 page briefs in courier pica type rather than 35 page briefs in 12 point proportional type. If proportional type is to be encouraged, he suggests that it be no smaller than 15 point type. He does not favor double-sided printing.

36. Honorable Pierre N. Leval
United States Circuit Judge
United States Courthouse
Foley Square
New York, New York 10007

Judge Leval notes that word counts may be impractical for pro se litigants proceeding in forma pauperis. He believes that pro se litigants proceeding in forma pauperis should be exempted from the word count and be subject, instead, to page limits.

37. Los Angeles Chapter of the Federal Bar Association
Section on Appellate Practice

The section endorses the work and comments of the Ninth Circuit Advisory Committee on Rules of Practice. The section also urges that the rule provide guidance as to the criteria by which "words" will be defined for purposes of applying the word count limitation. The section suggests that citations (including parallel citations and citations to the record) be counted as a single word.

38. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee of the Los Angeles County Bar Association agrees that the word count approach will greatly further the purposes of the rule. The committee states that use of a word count will level the playing field and eliminate the "cheating" now possible by playing font and spacing games. The committee is concerned, however, about the number of words and the ways a word is counted. The committee recommends that the count be raised to 14,000 and 7,000 (from 12,500 and 6,250). The committee also recommends that the rule define a "word" so that practitioners will know how to count a "word." The committee also suggests that all requirements pertaining to one format category of brief should be contained under a single heading rather than requiring the reader to jump from subsection to subsection to find all applicable requirements.

The committee offers the following suggestions:

a. Double-sided reproduction should be encouraged but heavier weight paper should be required to avoid bleed-through.
b. The rule might have an appendix that provides samples of approved typefaces, samples of approved type sizes, and a chart summarizing all of the various requirements.
c. The rule might specify a standardized format for brief covers, including a list of all required information and the order in which it is to be displayed. The methods, manner and style of page numbering should be specified. It might be helpful to prescribe a standardized set of titles for various briefs.
d. The margins should be the same regardless of style of typeface.
e. Pamphlet-sized briefs can be eliminated.
f. Additional format and style parameters might be set forth as "preferred."
g. A single rule should be used to define the format of all papers rather than having separate rules for briefs, motions, etc.
h. Type size and line spacing of footnotes should be the same as the text.

39. Honorable J. Michael Luttig
United States Circuit Judge
United States Court of Appeals for
the Fourth Circuit

Judge Luttig opposes the use of proportional typeface in briefs; he also opposes double-sided briefs. If the rule allows proportional type, he recommends that it require either 14 or 15 point type. He also states that for monospaced type, the standard should be 10 characters per inch.

40. Gordon MacDougall, Esquire
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. MacDougall states that Rule 32 should stay "as is." He states that the proposal eliminates the use of a typewriter. He suggests that a resolution of 300 dots is not needed in a national rule. He states that a national rule in inappropriate on the matter of two-sided briefs. He opposes the preference for proportionately spaced typeface. He would not change the margins. He states that the elimination of the 50 page rule would work a hardship on those required to count words or else be confined to 40 pages. He opposes the requirements that the case number be positioned at the top of the cover and that counsel's telephone numbers appear on the cover. He also opposes the "lie flat" requirement for binding briefs and appendices.

41. Honorable J. Daniel Mahoney
United States Circuit Judge
55 Red Bush Lane
Milford, Connecticut 06460

Judge Mahoney finds monospaced type easier to read than proportionately spaced typeface. He suggested that proportional typeface should be 14 or 15 point and that monospaced type should be no more than 10 characters per inch. Judge Mahoney opposes double-sided printing of briefs.

42. Honorable H. Robert Mayer
United States Circuit Judge
United States Court of Appeals for
the Federal Circuit
Washington, D.C. 20439

Judge Mayer opposes double-sided printing. He also objects to the preference for proportionately spaced typefaces and would change the definition of monospaced typeface to specify no more than 10 characters per inch. Judge Mayer also suggests that proportionately spaced typeface should be at least 14 point.

43. State Bar of Michigan
United States Courts Committee
Richard Bisio
Honigman Miller Schwartz and Cohn
2290 First National Building
Detroit, Michigan 48226-3583

The United States Courts Committee of the State Bar of Michigan opposes the detailed regulation of brief format in the proposed amendments. The committee proposes that the first paragraph of present Rule 32(a) be retained with a modification specifying a minimum type size and that the current page limits of Rule 28(g) be retained (a redraft is provided). The committee believes that the increased time and expense of compliance with and enforcement of the detailed provisions in the proposed amendments will outweigh the marginal increase in readability or any other advantages. The committee also suggests that paragraph 32(a)(7) of the proposed rule be modified to permit use in an appendix of copies of electronically retrieved opinions when they are not readily available from other sources.

44. Kathleen L. Millian, Esquire
Terris, Pravlik & Wagner
1121 12th Street, N.W.
Washington, D.C. 20005-4632

Ms. Millian requests that the Committee consider allowing submissions on non-white recycled paper. Rule 32(a) states that all briefs must be submitted on white paper. Ms. Millian notes that recycled paper with a high content of post-consumer waste is usually gray-tone or off-white and requests that the rule be amended to allow non-white recycled paper. She

states that the fact that the paper is not white does not affect its durability or readability.

45. John S. Moore, Esquire
Valikanje, Moore & Shore, Inc., P.S.
405 East Lincoln Avenue
P.O. Box C2550
Yakima, Washington 98907

Mr. Moore disapproves of the changes in Rule 28 and 32. He states that it "[w]ill take a specialist to spend time to make certain that compliance has been achieved."

46. Jesse A. Moorman, Esquire
Wood & Moorman
808 North Spring Street, Suite 614
Los Angeles, California 90012

Mr. Moorman says that the definition of "proportionately spaced typeface" is not clear and that using the term "advance width" may not even follow the conventions of the typesetting community. He also comments that the omission of "Times Roman" or "Times New Roman" from the examples may be confusing because they are widely available in Windows.

Mr. Moorman likes the idea of a brief "lying flat" but wants more guidance as to what is acceptable.

47. National Association of Criminal Defense Lawyers
1627 K Street, N.W.
Washington, D. C. 20006

The association makes a number of comments.

a. It appreciates the simple yet flexible manner in which the rule would accommodate both proportional and monospaced typefaces, by adjusting margin width. It also appreciates the receding on the question of single-spaced footnotes and headings.
b. The association supports the abolition of Rule 28(g) and in particular its local option provision but notes that the committee note should make it clear that local options would be invalid under the revised rule.
c. The association supports the change to a word count but opposes

the reduction in brief length that results from the 12,500 word limitation (at 280 words per page, 45 pages) and the 40 page safe harbor length. The association opposes the reduction. The association "emphatically" urges the committee to add 10% to each of the proposed word counts and safe harbor page counts.

d. The association finds the certification of compliance "demeaning overkill."

e. The association supports the provision permitting a petition for rehearing or suggestion for rehearing in banc to be produced with simple binding and without a cover.

48. Honorable David A. Nelson
United States Circuit Judge
Potter Stewart U.S. Courthouse
100 E. 5th Street
Cincinnati, Ohio 45202-3988

Judge Nelson opposes double-sided briefs and suggests that if the issue is addressed at all that the rule state that the use of both sides is not encouraged. He thinks that 12 point proportionately spaced typeface is too small for the safe harbor. He also opposes the word-count provisions because not all lawyers have equipment capable of performing automatic word counts.

49. Honorable Dorothy W. Nelson
United States Circuit Judge
125 South Grand Avenue, Suite 303
Pasadena, California 91105

Judge Nelson objects to the use of proportionately spaced typeface and suggests that its use be prohibited. If it is permitted, she suggests that at least 14, and preferable 15, point type be required. She notes that 12 point type typically produces between 400 and 450 words per page, far more than the 280 words per page permitted under the rule. Judge Nelson also objects to double-sided briefs.

50. Honorable Thomas G. Nelson
United States Circuit Judge
Post Office Box 1339
304 North Eighth Street
Boise, Idaho 83701-1339

Judge Nelson suggests that Rule 32 should require monospaced typeface and since 10 characters per inch is most commonly used, the rules should use 10 rather than 11. If monospaced typeface is not required, Judge Nelson suggests that the rule should express a preference for monospaced typeface.

Judge Nelson does not believe that the word limit will protect the readability of a brief. He suggests discarding the word limit and tightening the safe harbor provisions and using them as the standards for brief preparation. He suggests limiting the allowable line per page on an 8-1/2 by 11-inch page, having no footnotes, to 28 lines. Footnotes should be double-spaced and in the same typeface as the body of the brief. He believes that, if footnotes cannot be used as a length extender, their use will decline. If double-spaced footnotes are unacceptable, he suggests that footnotes be limited to an average of three lines per page, or 105 lines in a 35-page brief. If proportionately spaced typeface is permitted, the minimum size should be 15 point.

In additional, Judge Nelson suggests that the Committee limit a principal brief to no more than 35 pages regardless of the typeface used and a reply brief to 15 pages.

He objects to double-sided printing.

51. New Jersey State Bar Association
One Constitution Square
New Brunswick, New Jersey 08901-1500

The association opposes the word-count approach because it may be more difficult for practitioners to follow and particularly difficult for pro se litigants and others without sophisticated word processing programs. In light of typeface and margin requirements, the association believes that page limits can be used.

52. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board opposes the proposed amendments for several reasons. The board does not believe that the amendment will help the courts or save them time. The board suggests that the proposed amendments violate the following general principles about rulemaking: appellate rules should provide general guidance and direction to assist the lawyers and the courts and should not be rigid or tied to a particular state of technology; rules should not prohibit accommodation to local needs and conditions, nor should national rules attempt to micromanage regional court operations. Specifically, the board states that specifying computer printer resolution, limiting the length of a brief to a specified number of words, and specifying typeface and spacing are too rigid for a national rule. The board believes that the rule makes an arbitrary 40% reduction in the maximum brief length (from 50 to 30 pages) and questions whether the committee had adequate information upon which to base the change. If 30 pages is inadequate to provide the judges with sufficient information, the board believes that the limitation may delay the decisionmaking process.

53. Honorable John T. Noonan, Jr.
United States Circuit Judge
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939

Judge Noonan objects to double-sided printing of briefs.

54. Associate Professor Julie Rose O'Sullivan
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001-2075

She believes that the rule should prohibit the use of proportional type but that if it is permitted, the rule should require 14 or 15 point type. She also objects to double-sided briefs.

55. Mr. Patrick D. Otto
Mohave Community College
1971 Jagerson Avenue
Kingman, Arizona 86401

Mr. Otto agrees with the proposed amendments.

56. Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036

Public Citizen has a number of comments on the proposed amendments.

a. As to 32(a)(2)(A), the terms "roman style" or "text" style should be explained either in the rule or the note.
b. As to 32(a)(4), the rule should not forbid use of bold type for emphasis.
c. As to 32(a)(6), Public Citizen in not averse to the use of a word limit rather than a page limit if the committee is determined to "fix" this "problem" although they state that lawyers will find ways to stretch a word limit. Public Citizen "object[s] strenuously," however, to the "substantial cut in the permissible length of briefs." With 280 words per page, the maximum size of a principal brief would be 44-1/2 pages. Examining several briefs containing fewer than 90% of the applicable page limits (on the assumption that none of such briefs would have been manipulated to comply with length limitations), Public Citizen found that no brief averaged as few as 250 words per page. The average ranged from a low of 254 words per page to a high of 278 words per page. Public Citizen also contended that their briefs tend to use fewer footnotes and fewer blocked quotations than seems to be the norm. Others of their briefs had an average number of word per page as high as 305 or 311.

In light of recent amendments to FRAP requiring a statement of subject matter and appellate jurisdiction and a statement of standard of review, and in light of the growth in the complexity of federal law and the quantity of federal precedent. Public Citizen states that "it seems unfair to the litigants to require their counsel to write shorter briefs." Public Citizen suggests that the number of words per brief and the average number of words per page should be more realistic and should not effectively reduce the existing length limitation. Public Citizen supports the concept of a safe harbor but says the 30 page limit is too low. Public citizen suggests that 37 pages should suffice for a principal brief and 18 pages for a reply.

57. Honorable Stephen Reinhardt
United States Circuit Judge
312 North Spring Street
Los Angeles, California 90012

He objects to double-sided printing and the proposal concerning typeface. He urges the committee to make the rule comprehensible to those without a great deal of technical expertise and to avoid excessive detail and a hypertechnical rule.

58. Robert H. Rotstein, Esquire
McDermott, Will & Emery
2049 Century Park East
Los Angeles, California 90067-3208

Mr. Rotstein believes that the use of proportionately spaced typeface is "detrimental to effective appellate advocacy and decision making because the briefs are too difficult to read, especially in 12 point type. He urges the committee to require "ten pitch pica monospaced typeface" in appellate briefs. In the alternative he suggests proportionately spaced typeface in at least 14 point type. Mr. Rotstein also opposes double-sided printing.

59. K. John Shaffer, Esquire
Stutman, Treister & Glatt
3699 Wilshire Boulevard
Suite 900
Los Angeles, California 90010-2739

His principal objection is to the complexity of the proposed rule. He

suggests that the rule should simply require monospaced type with 10 characters per inch. He also objects to permitting double-sided briefs.

60. Lawrence J. Siskind, Esquire
Cooper, White & Cooper
201 California Street
Seventeenth Floor
San Francisco, California 94111

Mr. Siskind objects to double-sided briefs. He also dislikes the preference for proportionately spaced typeface because he believes it is harder to read. He would prefer that the rule state a preference for monospaced typeface but would be satisfied if the rule omitted a preference for either. He believes that the minimum acceptable size for proportional type should be 14 point.

61. Diane M. Stahle, Esquire
Davis, Hockenberg, Wine, Brown, Koehn & Shors, P.C.
The Financial Center
666 Walnut Street, Suite 2500
Des Moines, Iowa 50309-3993

Ms. Stahle favors limiting brief by number of words rather than the number of pages but states that it is unclear whether headings are included in the word count. If headings are to be counted, she suggests changing the language in paragraph (a)(6) -- lines 104-107 -- to read: "and in either case there must be on average no more than 280 words per page including headings, footnotes and quotations."

62. Honorable Walter K. Stapleton
United States Circuit Judge
Federal Building, 844 King Street
Wilmington, Delaware 19801

Judge Stapleton opposes the provision permitting text on both sides of each page. He believes that any environmental savings would be offset by the use of heavier paper made necessary to render the brief legible.

63. Marc D. Stern & Denise Simmonds
American Jewish Congress
Stephen Wise Congress House
15 East 84th Street
New York, New York 10028-0458

Mr. Stern and Ms. Simmonds approve of the proposed revision believing "that it accurately reflects the current technology widely used in the preparation of appellate briefs. They suggest that the rule should be a "mandatory and inflexible national requirement" and that local departures should be forbidden.

64. Honorable Richard R. Suhrheinrich
United States Circuit Judge
United States Post Office and
Federal Building
315 West Allegan, Room 241
Lansing, Michigan 48933

Judge Suhrheinrich objects to printing briefs on both sides of the page and use of proportionately spaced type at less than 14 point. He also believes that the rule makes life difficult for a person using a typewriter. Word counts are difficult for a typewriter user. He suggests, at a minimum, that the rule allow monospaced type of 10 characters per inch, rather than 11, because 10 is standard on typewriters.

65. Honorable Stephen S. Trott
United States Circuit Judge
Room 666
United States Court Building
Boise, Idaho 83724

Judge Trott urges to the committee to be concerned about ease of reading and suggests that proportionately spaced typeface be 14 or 15 point type. Judge Trott also believes that most of the proposed rule is too technical to be readily understood.

66. Professor Eugene Volokh
School of Law
University of California, Los Angeles
405 Hilgard Avenue
Los Angeles, California 90024-1476

Professor Volokh objects to double-sided printing of briefs. The bleed-through from two-sided printing will make briefs much harder to read but the even greater problem will be the bleed-through from highlighting and notes made by the reader of the briefs. Because heavier paper will be used to avoid the foregoing problems, there will be little, if any, environmental savings.

67. Honorable J. Clifford Wallace
Chief Judge, United States Court of Appeals
United States Courthouse
San Diego, California 92101-8918

Chief Judge Wallace states that the Ninth Circuit Court of Appeals' Executive Committee endorses, in principle, the comments submitted by the Ninth Circuit Advisory Committee on Rules of Practice and Procedure.

68. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport & Toole
422 West Riverside, Suite 1100
Spokane, Washington 99201-0390

Ms. Weatherhead opposes use of a word count to limit the length of a brief. She suggests that a better solution would be to sanction those lawyers who chisel on brief length limits by fudging the margins, typefaces, etc.

Ms. Weatherhead suggests that the rule should direct parties to attempt to produce a joint appendix "subject to the right of any party to supplement the joint appendix with whatever materials were overlooked or become necessary as the case develops in the briefing."

69. Honorable Charles E. Wiggins
United States Circuit Judge
50 West Liberty Street, Suite 950
Reno, Nevada 89501

Judge Wiggins has diabetes related vision problems. He requests that: the total pages be limited; margins be reasonable; the number of lines of text per page be limited; that all type (including that used for footnotes) be of a size and type style that is reasonable (he needs 14 or 15 point type to be able to read). He also encourages the committee to print, in the rule, an example of the required size and style of type. He further encourages requiring counsel to submit at least one "floppy disc" so that any judge who needs to do so may project the brief on a computer screen in a much larger version than the authorized type size.