Agenda G-7
Rules of Practice
and Procedure
September 1985

SUMMARY

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

This report contains the following recommendations for the consideration of the Conference:

1. That the Conference approve the proposed amendments to the Federal Rules of Appellate Procedure set out in Appendix A and transmit them to the Supreme Court for its consideration with a recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

2. That the Conference endorse the views expressed by the Committee chairman in his statement on H.R. 2633, 99th Congress, the bill to amend the Rules Enabling Acts, which are set out in Appendix D.

Agenda G-7
Rules of Practice
and Procedure
September, 1985

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

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

Your Committee on Practice and Procedure met in Washington, D.C. on June 10, 1985. All members of the Committee attended the meeeting, except Judge Walter E. Hoffman who was unavoidably absent. The Secretary of the Committee, Mr. Joseph F. Spaniol, Jr., was also present. Judges Pierce Lively and Kenneth Ripple, (formerly Professor) chairman and reporter, respectively, of the Advisory Committee on the Appellate Rules; and Professor Stephen Saltzburg, reporter to the Advisory Committee on the Criminal Rules, were also in attendance.

I. Federal Rules of Appellate Procedure

The Advisory Committee on the Federal Rules of Appellate Procedure has submitted to your Committee proposed new Appellate Rules 3.1, 5.1, and 15.1 and proposed amendments to Appellate Rules 19, 28(c), 30(a) and (b), 39(c), and 45(b). These proposed new rules and amendments to existing rules were circulated to the bench and bar and the public generally for comment in September, 1984, and public hearings were held in Washington, D. C., on February 1, 1985 and in San Francisco, California, on February 21, 1985. Your Committee has reviewed each proposal presented and has made certain technical and clarifying changes which in the Committee's view do not alter the substance of the proposals.

In accordance with a request from the Supreme Court your Committee also asked the Advisory Committee to eliminate all gender-specific language from the Appellate Rules. Subsequently, the Advisory Committee submitted additional proposed amendments to Appellate Rules 3(d), 8(b), 10(b) and (c), 11(b), 12(a), 23(b) and (c), 24(a), 25(a) and (b), 26(a) and (c), 28(j), 31(a) and (c), 34(a) and (e), 43(a) and (c), 45(a) and (d), and 46(a) and (b). These proposed amendments were not circulated for public comment since they are merely stylistic and no substantive change is intended.

The above proposed amendments to the Federal Rules of Appellate Procedure are set out in Appendix A and are accompanied by Committee Notes explaining their purpose and intent. A separate report from the Chairman of the Advisory Committee summarizes the Advisory Committee's work. (See also Report of the Advisory Committee on the Federal Appellate Rules on the Operation of Rule 30, Appendix B).

Your Committee recommends that these proposed amendments be approved by the Conference and transmitted to the Supreme Court for its consideration with a recommendation that they be approved by the Court and transmitted to the Congress pursuant to law.

II. Federal Rules of Civil Procedure

The Advisory Committee on the Federal Rules of Civil Procedure met in Washington, D.C. on June 4, 1985. It was the first meeting to be presided over by the new Advisory Committee Chairman, Judge Frank M. Johnson. The Advisory Committee reviewed the public comments received on the proposals to amend Civil Rules 4, 28, 44, 51, 63, and 68, and Supplemental Admiralty Rules C and E which were publicly circulated in September, 1984. No final action was taken and

the Advisory Committee will continue its review at its next meeting tentatively scheduled to be held in November, 1985.

III. Federal Rules of Criminal Procedure

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on June 6, 1985 to review the public comments on the proposals to amend Criminal Rule 31 (to permit a less than unanimous verdict in a criminal jury trial if the defendant waives any right to a unanimous verdict) and the proposals to amend Rules 9(a) of the Section 2254 and 2255 rules (to permit dismissal if the government has been prejudiced by delay in filing.) The Advisory Committee decided not to proceed with these proposals.

The Advisory Committee, however, is considering other proposed amendments to the Criminal Rules and has tentatively agreed to proceed with an amendment to Criminal Rule 6(a) to permit empanelment of alternate grand jurors as recommended by the Conference Committee on Jury Administration. The Advisory Committee had previously decided to take no action on this proposal which was submitted for public comment about two years ago believing at that time there was no need for it. The proposed amendment will be included in a future submission to the Conference.

IV. Bankruptcy Rules

The Advisory Committee on Bankruptcy Rules is currently considering proposals to revise the Bankruptcy Rules to conform them to the substantive and procedural changes to the Bankruptcy Code, Title 11, United States Code, brought about by the Bankruptcy Amendments and Federal Judgeship Act of 1984. The Advisory Committee has already held several meetings and is planning to proceed on an expedited basis.

V. Gender-Specific Language

The Supreme Court has requested that gender-specific language be removed from all rules of practice and procedure prescribed by the Court under the Rules Enabling Acts. As noted above, appropriate proposed amendments to the Federal Rules of Appellate Procedure accompany this report. The chairmen of the Advisory Committees on the Civil, Criminal and Bankruptcy Rules have been asked to consider the Supreme Court request on an expedited basis. The Standing Committee will undertake to gender neutralize the Evidence Rules.

VI. Rules of Evidence

Your Committee previously recommended to the Conference that the Chief Justice be requested to reactivate an Advisory Committee on the Federal Rules of Evidence and the Conference approved. (Conf. Rept., Sept. 1981, p. 104) Upon further consideration the Committee believes that the reactivation of the Committee at this time may not be desirable. Instead, the Committee proposes to form an ad hoc group consisting of members of the Civil and Criminal Rules Advisory Committees, with Professor Stephen A. Saltzburg, who is the reporter to the Criminal Rules Advisory Committee, to act as reporter. The ad hoc group will be requested to review the Evidence Rules and make proposals to the Standing Committee for any needed changes.

VII. Legislation

H.R. 2633, 99th Congress, introduced by Congressman Kastenmeier, is a bill to amend the Rules Enabling Acts. It is the successor to H.R. 4144, 98th Congress, on which the Conference in September, 1983 (Conf. Rept., p. 63) expressed its views. The new bill, H.R. 2633, incorporates some of the Conference's previous recommendations, but contains new provisions which are a matter of concern. A copy of H.R. 2633 is set out in Appendix C.

H. R. 2633 provides, in part, that a rule prescribed by the Supreme Court shall not "supersede any provision of a law of the United States." It also provides that "The Supreme Court shall also transmit with such proposed rule proposed amendments to any law, to the extent such amendments are necessary to implement such proposed rule..." The bill would also require that all rules Committee meetings be open to the public.

At Mr. Kastenmeier's request, your chairman filed a statement with the subcommittee on July 15th setting forth his view that these proposals are unnecessary and would do mischief to the existing rules program. A copy of the statement is set forth in Appendix D.

Your Committee recommends that the Conference endorse the views of the Committee Chairman expressed in his statement filed with the Congress.

Respectfully submitted,

Hon. Edward T. Gignoux, Chairman
Hon. Amalya L. Kearse
Hon. Walter R. Mansfield
Hon. Walter E. Hoffman
Prof. Wade H. McCree
Prof. Wayne LaFave
Edward H. Hickey, Esquire
Gael Mahony, Esquire

August 1, 1985

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

TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE:

On April 23, 1985, the Advisory Committee on the Federal Appellate Rules met in Washington, D. C. to consider the comments of the bench and bar on the preliminary drafts of amendments to the Federal Rules of Appellate Procedure which had been submitted for public comment on September 6, 1984.

The Advisory Committee considered the statements made at the public hearings conducted in Washington, D. C. on February 1, 1985 and in San Francisco, California on February 21, 1985 as well as the written statements submitted by interested individuals and groups. The following paragraphs present a summary of those statements and the Advisory Committee's recommendation with respect to each preliminary draft.

Rule 3.1

A. Summary of Public Comment

The Association of the Bar of the City of New York, Committee on Federal Courts, suggests that the word "consent" be used in place of "stipulate" (line 1) and "agree" (line 5) in order to conform the language of the rule to 28 U.S.C. § 636(c) (1) and (c)(3). The Association also suggests a comma after "district court" (line 6) and to change "and thereafter" in line 6 to "which is thereafter reviewable."

The Board of Trustees of the Los Angeles County Bar Association and the Philadelphia Bar Association note their agreement with the preliminary draft.

B. Advisory Committee Recommendations

The Advisory Committee, after reviewing the comments of the bench and bar, recommends the following changes in the language of the preliminary draft:

line 1 - Change "stipulate" to "consent."

line 5 - Change "agree" to "consent."

This change conforms the language of the rule to the precise language of the statute.

Rule 5.1

A. Summary of Public Comment

While several bar associations approved of the preliminary draft, the majority of the commentators suggested that the seven day period for the filing of an answer in opposition was too short. One commentator also suggested that specific allowance for cross petitions be made.

B. Advisory Committee Recommendations

The Advisory Committee, after reviewing the comments of the bench and bar, recommends the following changes in the language of the preliminary draft:

line 1 - Change "The" to "An" and add two commas in lines 2 and 4.

These changes are purely stylistic.

line 11 - Change "seven" to "14."

This change is prompted by the concern of several who submitted statements that seven days was too short a period. The change to arabic numbers is purely stylistic.

line 12 - Add: "or a cross-petition."

This change, also suggested by a comment from the bar, will ensure that, once a petition is filed, other parties may suggest other reasons for further review of the case by the court of appeals.

line 26 - Change "ten" to "10."

This change is purely stylistic.

Rule 15.1

A. Summary of Public Comment

Only one comment was received on this proposed rule. The Philadelphia Bar Association recommends against adoption unless the rule is expanded to include enforcement proceedings other than those brought by the NLRB.

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the language of the preliminary draft.

Rule 19

A. Summary of Public Comment

The Association of the Bar of the City of New York suggests the elimination of the language "or denied completely such enforcement" in the Committee Note. It suggests the following language be added:

> "The simpler procedures permitted by this change already are applicable when the court's opinion denies completely the enforcement of an agency's order."

Several other bar associations and the Ninth Circuit Advisory Commmittee indicated their agreement with the preliminary draft or stated that they had no objection.

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the language of the preliminary draft or of the Committee Note except stylistic changes in lines 6 and 8.

Rule 28

A. Summary of Public Comment

Several commentaries expressed approval of the preliminary draft. The Ninth Circuit Advisory Committee suggested that the new rule be limited to briefs over 3-4 pages. The Los Angeles Chapter of the Federal Bar Association suggests that the draft read:

"The reply briefs shall conform to the requirements of subdivision (a)(1)."

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the language of the preliminary draft. The matters raised by the comments of the bench and bar were considered prior to the circulation of the preliminary draft. The Advisory Committee believes that this rule should provide the practitioner with guidance without reference to another subsection. It also believes that the requirement should extend to all reply briefs regardless of their length.

Rule 30(a)

A. Summary of Public Comment

Several commentators expressed agreement with the preliminary draft. The Joint Federal Courts Committee of the Bar Association of San Francisco suggested that the rule, and not just the Committee Note, should state that only pertinent sections of memoranda should be included.

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the language of the preliminary draft except a stylistic change in line 15.

Rule 30(b)

A. Summary of Public Comment

This preliminary draft has been opposed by all those who did comment on it. The objections can be summarized as follows:

1. Present mechanisms for the allocation of costs provide adequate sanctions.

2. Courts already have the power to sanction attorneys acting in bad faith.

3. The preliminary draft fails to specify criteria for bad faith and fails to require use of procedural safeguards before imposition of sanctions.

4. Imposition of sanctions would be expensive and time consuming.

5. The preliminary draft amendment deals with only a small portion of the frivolous appeal problem.

6. Education of the bar would be the more appropriate approach.

B. Advisory Committee Recommendations

The Advisory Committee recomends only stylistic changes to the preliminary draft. On the basis of its study of the practice under Rule 30, as set forth in the report submitted to this Committee in July 1984, the Advisory Committee believes that the preliminary draft is an appropriate response. It recommends the following addition to the Committee Note:

> "The local rule shall provide for notice and opportunity to respond before imposition of any sanction."

Rule 39(c)

A. Summary of Public Comment

The Board of Trustees of the Los Angeles County Bar Association expressed "no major opposition" to the preliminary draft. The Association of the Bar of the City of New York expessed doubt as to the proposed rule's efficacy. The Philadelphia Bar Association recommends against adoption on the ground that the rule will not reduce the overall costs of litigation. John L. Warden, Esquire of the New York Bar suggests that the rule specifically permit standard typographic printing.

B. Advisory Committee Recommendations

The Advisory Committee recommends no change in the preliminary draft.

Rule 45

A. Summary of Public Comment

Several commentators expressed approval of or no opposition to the preliminary draft. The Joint Federal Courts Committee of the Bar Association of San Francisco recommends clarification to assure that the clerk of court enter a record of all papers filed in the clerk's office and that these papers remain available to the public.

B. Advisory Committee Recommendations

The Advisory Committee recommends no changes in the preliminary draft except a stylistic change in line 24. The suggestion set forth above is not within the scope of the rule, and, in the opinion of the Advisory Committee, unnecessary.

Stylistic Changes

The Advisory Commiteee was requested to remove gender-specific language from all appellate rules. Amendments to many rules were required and the changes requested are included.

Respectfully submitted.

Pierce Lively
Chairman, Advisory Committee on the Federal Appellate Rules

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 3. Appeal as of Right - How Taken

* * * * *

(d) Service of the Notice of Appeal. The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the ~~party at his~~ last known address of that party; and the clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon ~~him~~ the defendant, either by personal service or by mail addressed to ~~him~~ the defendant. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or ~~his~~ the party's counsel. The

---

*New matter is underlined; matter to be omitted is lined through.

clerk shall note in the docket the names of the parties to whom he the clerk mails copies, with the date of mailing.

* * * * *

COMMITTEE NOTE

The amendments to Rule 3(d) are technical. No substantive change is intended.

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

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

COMMITTEE NOTE

Under the governing statute, 28 U.S.C. § 636(c) (3), the judgment of a magistrate becomes a judgment of the district court and is appealable to the court of appeals "as an appeal from any other judgment of a district court." This provision is designed to make this point explicit for the convenience of practitioners.

Rule 5.1. Appeals by Permission Under 28 U.S.C. . 636(c) (5)

(a) Petition for Leave to Appeal; Answer or Cross Petition. An appeal from a district court judgment, entered after an appeal pursuant to 28 U.S.C. . 636(c) (4) to a judge of the district court from a judgment entered upon direction of a magistrate in a civil case, may be sought by filing a petition for leave to appeal. An appeal on petition for leave to appeal is not a matter of right, but its allowance is a matter of sound judicial discretion. The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed. Within 14 days after service of the petition, a party may file an answer in opposition or a cross petition.

(b) Content of Petition; Answer. The petition for leave to appeal shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in the opinion of the petitioner the appeal should be allowed; and a copy of the order, decree or judgment complained of and any opinion or memorandum relating thereto. The petition and answer shall be submitted to a panel of judges of the court of appeals without oral argument unless otherwise ordered.

(c) Form of Papers; Number of Copies. All papers may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

(d) Allowance of the Appeal; Fees; Cost Bond; Filing of Record. Within 10 days after the entry of an order granting the appeal, the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice, the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b).

COMMITTEE NOTE

When the initial appeal of a magistrate's decision is taken to the district court, the statute provides for a second discretionary appeal to the court of appeals. This rule provides the procedure for taking such an appeal.

Rule 8. Stay or Injunction Pending Appeal

* * * * *

(b) Stay May Be Conditioned Upon Giving of Bond; Proceedings Against Sureties. Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond

or other appropriate security in the district court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits ~~himself~~ to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as ~~his~~ the surety's agent upon whom any papers affecting ~~his~~ the surety's liability on the bond or undertaking may be served. ~~His~~ A surety's liability may be enforced on motion in the district court without the necessity of an independent action. The motion and such notice of the motion as the district court prescribes may be served on the clerk of the district court, who shall forthwith mail copies to the sureties if their addresses are known.

* * * * *

COMMITTEE NOTE

The amendments to Rule 8(b) are technical. No substantive change is intended.

Rule 10. The Record on Appeal

* * * * *

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered.

(1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as ~~he~~ the appellant deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, ~~he~~ the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues ~~he~~ the appellant intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript or other parts of the proceedings to be necessary, ~~he~~ the appellee shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has

ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(c) Statement on the Evidence or Proceedings When no Report Was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including ~~his~~ the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto with 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

* * * * *

COMMITTEE NOTE

The amendments to Rules 10(b) and (c) are technical. No substantive change is intended.

Rule 11. Transmission of the Record

* * * * *

(b) Duty of Reporter to Prepare and File Transcript; Notice to Court of Appeals; Duty of Clerk to Transmit the Record. Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that ~~he~~ the reporter has received it and the date on which ~~he~~ the reporter expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the clerk of the court of appeals and the action of the clerk of the court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file it with the clerk of the district court and shall notify the clerk of the court of appeals that ~~he~~ the reporter has done so.

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the

record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless ~~he~~ the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

* * * * *

COMMITTEE NOTE

The amendments to Rule 11(b) are technical. No substantive change is intended.

Rule 12. Docketing the Appeal; Filing of the Record

(a) Docketing the Appeal. Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, ~~his~~ the appellant's name, identified as appellant, shall be added to the title.

* * * * *

COMMITTEE NOTE

The amendment to Rule 12(a) is technical. No substantive change is intended.

Rule 15.1. Briefs and Oral Argument in National Labor Relations Board Proceedings

Each party adverse to the National Labor Relations Board in an enforcement or a review proceeding shall proceed first on briefing and at oral argument unless the court orders otherwise.

COMMITTEE NOTE

This rule simply confirms the existing practice in most circuits.

Rule 19. Settlement of Judgments Enforcing Orders

When an opinion of the court is filed directing the entry of a judgment enforcing ~~in whole or~~ in part the order of an agency, the agency shall within 14 days thereafter serve upon the respondent and file with the clerk a proposed judgment in conformity with the opinion. If the respondent objects to the proposed judgment as not in conformity with the opinion, ~~he~~ the respondent shall within 7 days thereafter serve upon the agency and file with the clerk a proposed judgment which ~~he~~ the respondent deems to be in conformity with the opinion. The court will thereupon settle the judgment and direct its entry without further hearing or argument.

COMMITTEE NOTE

The deletion of the words "in whole or" is designed to eliminate delay in the issuance of a judgment when the court of appeals has either enforced completely the order of an agency or denied completely such enforcement. In such a clear-cut situation, it serves no useful purpose to delay the issuance of the judgment until a proposed judgment is submitted by the agency and reviewed by the respondent. This change conforms the Rule to the existing practice in most circuits. Other amendments are technical and no substantive change is intended.

Rule 23. Custody of Prisoners in Habeas Corpus Proceedings

* * * * *

(b) Detention or Release of Prisoner Pending Review of Decision Failing to Release. Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon ~~his~~ the prisoner's recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

(c) Release of Prisoner Pending Review of Decision Ordering Release. Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon ~~his~~ the prisoner's recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

* * * * *

COMMITTEE NOTE

The amendments to Rules 23(b) and (c) are technical. No substantive change is intended.

Rule 24. Proceedings in Forma Pauperis

(a) Leave to Proceed on Appeal in Forma Pauperis from District Court to Court of Appeals. A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, ~~his~~ the party's inability to pay fees and costs or to give security therefor, ~~his~~ the party's belief that ~~he~~ that party is entitled to redress, and a statement of the issues which ~~he~~ that party intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in

good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.

If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by a copy of the affidavit filed in the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of reasons given by the district court for its action.

* * * * *

COMMITTEE NOTE

The amendments to Rule 24(a) are technical. No substantive change is intended.

Rule 25. Filing and Service

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

(b) Service of all Papers Required. Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for ~~him~~ that party on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

* * * * *

COMMITTEE NOTE

The amendments to Rules 25(a) and (b) are technical. No substantive change is intended.

Rule 26. Computation and Extension of Time

(a) Computation of Time. In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.

* * * * *

(c) Additional Time after Service by Mail. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon ~~him~~ that party and the paper is served by mail, 3 days shall be added to the prescribed period.

COMMITTEE NOTE

The Birthday of Martin Luther King, Jr. is added to the list of national holidays in Rule 26(a). The amendment to Rule 26(c) is technical. No substantive change is intended.

Rule 28. Briefs

* * * * *

(c) Reply Brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court. All reply briefs shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the reply brief where they are cited.

* * * * *

(j) Citation of Supplemental Authorities. When pertinent and significant authorities come to the attention of a party after ~~his~~ the

party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

COMMITTEE NOTE

While Rule 28(g) can be read as requiring that tables of authorities be included in a reply brief, such tables are often not included. Their absence impedes efficient use of the reply brief to ascertain the appellant's reponse to a particular argument of the appellee or to the appellee's use of a particular authority. The amendment to Rule 28(c) is intended to make it clear that such tables are required in reply briefs.

The amendment to Rule 28(j) is technical. No substantive change is intended.

Rule 30. Appendix to the Briefs

(a) Duty of Appellant To Prepare and File; Content of Appendix; Time for Filing; Number of Copies. The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the district court should not be

included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with ~~his~~ the brief. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number.

(b) Determination of Contents of Appendix; Cost of Producing. The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which ~~he~~ the appellant intends to include in the appendix and a statement of the issues which ~~he~~ the appellant intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, ~~he~~ the appellee shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is

always available to the court for reference and examination and shall not engage in unnecessary designation.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented ~~he~~ the appellant may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party. Each circuit shall provide by local rule for the imposition of sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix.

(c) Alternative Method of Designating Contents of the Appendix; How References to the Record May be Made in the Briefs When Alternative Method is Used. If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply,

except that the designations referred to therein shall be made by each party at the time ~~his~~ each brief is served, and a statement of the issues presented shall be unnecessary.

If the deferred appendix authorized by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where that page begins. Or if a party desires to refer in ~~his~~ a brief directly to pages of the appendix, ~~he~~ that party may serve and file typewritten or page proof copies of ~~his~~ the brief within the time required by Rule 31(a), with appropriate references to the pages of the parts of the record involved. In that event, within 14 days after the appendix is filed ~~he~~ the party shall serve and file copies of the brief in the form prescribed by Rule 32(a) containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.

* * * * *

COMMITTEE NOTE

Subdivision (a). During its study of the separate appendix [see Report of the Advisory Committee on the Federal Appellate Rules on the Operation of Rule 30, _ FRD _ (1985)], the Advisory Committee found that this document was frequently encumbered with memoranda submitted to

the trial court. United States v. Noall, 587 F.2d 123, 125 n. 1 (2nd Cir. 1978). See generally Drewett v. Aetna Cas. & Sur. Co., 539 F.2d 496, 500 (5th Cir. 1976); Volkswagenwerk Aktiengesellschaft v. Church, 413 F.2d 1126, 1128 (9th Cir. 1969). Inclusion of such material makes the appendix more bulky and therefore less useful to the appellate panel. It also can increase significantly the costs of litigation.

There are occasions when such trial court memoranda have independent relevance in the appellate litigation. For instance, there may be a dispute as to whether a particular point was raised or whether a concession was made in the district court. In such circumstances, it is appropriate to include pertinent sections of such memoranda in the appendix.

Subdivision (b). The amendment to subdivision (b) is designed to require the circuits, by local rule, to establish a procedural mechanism for the imposition of sanctions against those attorneys who conduct appellate litigation in bad faith. Both 28 U.S.C. § 1927 and the inherent power of the court authorize such sanctions. See Brennan v. Local 357, International Brotherhood of Teamsters, 709 F.2d 611 (9th Cir. 1983). See generally Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). While considerations of uniformity are important and doubtless will be taken into account by the judges of the respective circuits, the Advisory Committee believes that, at this time, the circuits need the flexibility to tailor their approach to the conditions of local practice. The local rule shall provide for notice and opportunity to respond before the imposition of any sanction.

Technical amendments also are made to subdivisions (a), (b) and (c) which are not intended to be substantive changes.

Rule 31. Filing and Service of Briefs

(a) Time for Serving and Filing Briefs. The appellant shall serve and file ~~his~~ a brief within 40 days after the date on which the record is filed. The appellee shall serve and file ~~his~~ a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are

filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

* * * * *

(c) Consequence of Failure to File Briefs. If an appellant fails to file ~~his~~ a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file ~~his~~ a brief, ~~he~~ the appellee will not be heard at oral argument except by permission of the court.

COMMITTEE NOTE

The amendments to Rules 31(a) and (c) are technical. No substantive change is intended.

Rule 34. Oral Argument

(a) In General; Local Rule. Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why~~, in his opinion,~~ oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the

rule and such criteria shall conform substantially to the following minimum standard:

Oral Argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

* * * * *

(e) Non-Appearance of Parties. If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if ~~his counsel is~~ present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.

* * * * *

COMMITTEE NOTE

The amendments to Rules 34(a) and (e) are technical. No substantive change is intended.

Rule 39. Costs

* * * * *

(c) Costs of Briefs, Appendices, and Copies of Records. ~~Unless otherwise provided by local rule, the cost of printing, or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located.~~ By local rule the court of appeals shall fix the maximum rate at which the cost of printing or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable. Such rate shall not be higher than that generally charged for such work in the area where the clerk's office is located and shall encourage the use of economical methods of printing and copying.

(d) Bill of Costs; Objections; Costs to be Inserted in Mandate or Added Later. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which ~~he~~ the party shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall

prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

* * * * *

COMMITTEE NOTE

The amendment to subdivison (c) is intended to increase the degree of control exercised by the courts of appeals over rates for printing and copying recoverable as costs. It further requires the courts of appeals to encourage cost-consciousness by requiring that, in fixing the rate, the court consider the most economical methods of printing and copying.

The amendment to subdivision (d) is technical. No substantive change is intended.

Rule 43. Substitution of Parties

(a) Death of a Party. If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative,

any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by ~~his~~ that party's personal representative, or, if ~~he has~~ there is no personal representative by ~~his~~ that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.

* * * * *

(c) Public Officers; Death or Separation from Office.

(1) When a public officer is a party to an appeal or other proceeding in the court of appeals in ~~his~~ an official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and ~~his~~ the public officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer is a party to an appeal or other proceeding in ~~his~~ an official capacity ~~he~~ that public officer may be described as a party by ~~his~~ the public officer's official title rather than by name; but the court may require ~~his~~ the public officer's name to be added.

COMMITTEE NOTE

The amendments to Rules 43(a) and (c) are technical. No substantive change is intended.

Rule 45. Duties of Clerks

(a) General Provisions. The clerk of a court of appeals shall take the oath and give the bond required by law. Neither the clerk nor any deputy clerk shall practice as an attorney or counselor in any court while ~~he continues~~ continuing in office. The court of appeals shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The office of the clerk with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that the office of its clerk shall be open for specified hours on Saturdays or on particular legal holidays other than New Years Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor

Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

(b) The Docket; Calendar; Other Records Required. ~~The clerk shall keep a book, known as the docket, in such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each case. Cases shall be assigned consecutive file numbers. The file number of each case shall be noted on the folio of the docket whereon the first entry is made. All papers filed with the clerk and all process, orders and judgment shall be entered chronologically in the docket on the folio assigned to the case. Entries shall be brief but shall show the nature of each paper filed or judgment or order entered. The entry of an order or judgment shall show the date the entry is made. The clerk shall keep a suitable index of cases contained in the docket.~~

The clerk shall maintain a docket in such form as may be prescribed by the Director of the Administrative Office of the United States Courts. The clerk shall enter a record of all papers filed with the clerk and all process, orders and judgments. An index of cases contained in the docket shall be maintained as prescribed by the Director of the Administrative Office of the United States Courts.

The clerk shall prepare, under the direction of the court, a calendar *of cases awaiting argument. In placing cases on the* calendar for argument, ~~he~~ the clerk shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law.

The clerk shall keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts *with the approval of the Judicial* Conference of the United States, or as may be required by the court.

* * * * *

(d) Custody of Records and Papers. The clerk shall have custody of the records and papers of the court. ~~He~~ The clerk shall not permit any original record or paper to be taken from ~~his~~ the clerk's custody except as authorized by the orders or instructions of the court. *Original papers transmitted as the record on appeal or* review shall upon disposition of the case be returned to the court or agency from which they were received. The clerk shall preserve copies of briefs and appendices and other printed papers filed.

COMMITTEE NOTE

The amendment to Rule 45(b) permits the courts of appeals to maintain computerized dockets. The Committee believes that the

Administrative Office of the United States Courts ought to have maximum flexibility in prescribing the format of this docket in order to ensure a smooth transition from manual to automated systems and subsequent adaptation to technological improvements.

The amendments to Rules 45(a) and (d) are technical. No substantive change is intended. The Birthday of Martin Luther King, Jr. has been added to the list of national holidays.

Rule 46. Attorneys

(a) Admission to the Bar of a Court of Appeals; Eligibility; Procedure for Admission. An attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district courts for the Canal Zone, Guam and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals.

An applicant shall file with the clerk of the court of appeals, on a form approved by the court and furnished by the clerk, an application for admission containing ~~his~~ the applicant's personal statement showing ~~his~~ eligibility for membership. At the foot of the application the applicant shall take and subscribe to the following oath or affirmation:

I,_____, do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. An applicant may be admitted by oral motion in open court, but it is not necessary that ~~he~~ the applicant appear before the court for the purpose of being admitted, unless the court shall otherwise order. An applicant shall upon admission pay to the clerk the fee prescribed by rule or order of the court.

(b) Suspension or disbarment. When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, ~~he~~ the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why ~~he~~ the member should not be suspended or disbarred. Upon ~~his~~ the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

* * * * *

COMMITTEE NOTE

The amendments to Rules 46(a) and (b) are technical. No substantive change is intended.

Report of the Advisory Committee on the Federal Appellate Rules on the Operation of Rule 30

Report of the Advisory Committee on the Federal Appellate Rules on the Operation of Rule 30

I. Background

At the first meeting of the newly-reconstituted Advisory Committee on the Federal Appellate Rules, the Chief Justice invited the Committee's attention to the problem of ever-spiraling costs of litigation. He noted in particular the growing amount of unnecessary documentation which was becoming accepted as standard practice in appellate litigation. More specifically, he asked the Committee to investigate whether the present requirements of Rule 30[1] contribute to the unnecessary expense and, if so, to recommend a solution to the problem.[2]

In general terms, Rule 30 requires that counsel prepare and file a separate appendix to the brief that contains: (1) the relevant docket entries in the proceeding below; (2) those portions of the pleadings, charge, findings, or opinion of the Court below that are relevant to the appeal; (3) the judgment, order or decision of the lower court; and (4) "any other parts of the record to which the parties wish to direct the particular attention of the Court."[3] It is this last requirement which has the potential for inflating litigation costs. Although the record on appeal is already before the Court,[4] segments of it are included in multiple copies of this separate appendix.[5] Overdesignation[6] of those segments can considerably increase overall litigation costs.

II. The Committee's Investigation

In fulfilling the mandate of the Chief Justice,[7] the Committee undertook the following inquiries:

1) In order to understand the rationale of the present rule, it undertook an investigation of its history. The present rule was a deliberate choice from among several options considered by the original Advisory Committee. Therefore, respect for the work of its predecessors required that the present Committee, in reevaluating the rule, begin by understanding the reasons for that conscious choice. A summary of that investigation is set forth in Part III.

2) The Committee undertook an extensive survey of local circuit practice with respect to the separate appendix. In his dissenting opinion in New State Ice Company v. Liebmann, 285 U.S. 262, 311 (1932), Justice Brandeis described how a state may play the role of a laboratory in the development of a solution to a social or economic problem. Within the federal judiciary, the circuits often perform the same function as they try new approaches to judicial administration problems. Rule 30 affords a particularly good opportunity for such experimentation. Under subsection (f) of Rule 30, a circuit may "by rule applicable to all cases, to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be

heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require." Most circuits have exercised this option and the Committee believed that their experimentation could contribute significantly to its understanding of the role of the appendix in federal appellate litigation and to possible solutions. The value of this experimentation was enhanced by the fact that some of the most radical departures from the separate appendix system had taken place in circuits with heavy caseloads, complex litigation, and wide geographic dispersion of judges. The results of this study of local rules are set forth in Part IV.

3) Since cost savings measures must be evaluated in light of their impact on the appellate process, the Committee next solicited the views of all active United States Circuit Judges. The judges were asked to evaluate their present system and the principal alternative approaches used in other circuits. This survey is described in Part V.

4) With the assistance of the Clerks of the Courts of Appeals, the Committee, through its Reporter, surveyed the costs and administrative burdens associated with each circuit's approach to the separate appendix. The results of this study were discussed with the Clerks by the Chairman and the Reporter and then discussed at a subsequent meeting of

the Committee. The results of this inquiry are contained in Part VI.

III. A Brief History of the Development of Federal Rule of Appellate Procedure 30

A. Introduction

In undertaking its review of FRAP 30, the Committee believed that respect for the long and careful work of its predecessor committees required that the origin of the Rule be identified and the reasons for its present form appreciated. This approach was especially important in the case of FRAP 30. Its present form is the product of a conscious choice after long and thoughtful consideration of several options.

B. Practice Before the Adoption of FRAP

Before the adoption of the Federal Rules of Appellate Procedure, most circuits (7) used an appendix. In six of these circuits, the appellant filed this document at the time of the filing of his brief. It contained those parts of the record which he deemed essential to an understanding of the questions presented in the brief. The appellee, if he believed that additional parts of the record were necessary for a fair consideration of the case, had to include those additional parts in a separate appendix to his brief.

A printed record was required in three circuits (5, 8, 10), although the Advisory Committee found that practice in those circuits made the difference between a printed record and the appendix "largely nominal."[8] The Ninth Circuit permitted litigants, if they wished, to proceed on the original record and two copies.[9]

C. The Advisory Committee's First Draft

The Preliminary Draft of the Advisory Committee, issued in March 1964, called for a "deferred appendix" to be constructed after the submission of both briefs.[10] In the opinion of the Committee, this system was preferable to the fragmentation which resulted when each party submitted its own appendix. Appellants had a tendency, noted the Committee, to underestimate what was necessary for a determination of the issues presented. The "no appendix" approach of the Ninth Circuit was rejected since the Committee decided against "any general dispensation from the requirement of submitting an appendix."[11] The Draft Rule did permit, however, an individual court to dispense with the requirement of submitting an appendix.[12]

D. Subsequent Drafts by the Advisory Committee

The Advisory Committee's initial draft met a good deal of opposition. Consequently, in December 1966, the Standing Committee on Rules of Practice and Procedure circulated three other drafts for comment:

1. Draft A [13] called for the use of a single appendix which would contain all the record material "which it is deemed by the parties essential for the judges to read."[14] Normally, this document was to be filed with the appellant's brief. By stipulation or order, it could be filed by the appellant within 21 days of service of the appellee's brief. Any circuit could opt to proceed on the original record.

   The Advisory Committee, in a "special note," expressed its clear preference for this option:

   > "[O]f all the methods suggested for the presentation to the several members of a court of material in a record, the one thus devised would best serve the purposes of accurate and expeditious disposition of cases."[15]

   It also stressed that the deferred appendix option would produce "economy and clarity" because "the necessary parts of a record can be designated more certainly and easily after the legal points at issue have been defined."[16]

2. Draft B[17]- This option was the separate appendix system then employed in most circuits. The draft gave the circuits the option of requiring a joint appendix or of

dispensing with the appendix altogether by rule, order, or stipulation.

In an accompanying comment, the Advisory Committee noted that this "individual appendix" approach, while permitting each attorney to concern himself only with his own selection of the record, required the appellate judge to work with a fragmented presentation of the record.[18]

3. Draft C[19]- This approach was modeled on the Ninth Circuit approach of proceeding on the original record and two copies. Each circuit could dispense with the requirement for filing copies and "direct that the appeal be heard on the original record alone."[20]

The Advisory Committee gave the following reasons against adopting this procedure as a national rule:[21]

1) a busy court is entitled to the help of lawyers in finding those parts of the record essential to the disposition of the case;
2) selecting parts of the record will help lawyers in their own presentation;
3) the size of the original record will create problems in its transmittal;
4) insufficient copies will be available for simultaneous use by judges, law clerks and for deposit in law libraries.

The Committee did note, however, that this approach might

be appropriate "in certain types of appeals, particularly those with voluminous transcripts of which large portions require appellate consideration as when convictions are attacked as being without sufficient evidence or in appeals in forma pauperis."[22]

E. Final Adoption and Subsequent Amendments

The present FRAP 30 was based principally on "Draft A," although subsection (f) gave the circuits the option of adopting "Draft C" and proceeding on the original record.

In 1970, FRAP 30(a) was amended to shorten the time for filing the appendix when the Court of Appeals shortens the time for the filing of briefs under FRAP 31(a). FRAP 30(c) was also amended to permit deferral of the appendix only if the Court should provide by order or local rule. The litigants could no longer choose this option themselves. The purpose of the amendment was to prevent the practice of electing to defer filing of the appendix simply to obtain a 21 day delay. However, the Advisory Committee notes state specifically that this amendment "should not cause use of the deferred appendix to be viewed with disfavor."[23]

IV. Current Circuit Practice

The promulgation of Rule 30 hardly put an end to the diversity of views on the separate appendix issue. Over the years, the circuits have employed a variety of techniques to

formulate the appellate record and to deal with the problem of costs. The following subsections describe briefly the current practice.

A. The Local Rules Dealing Directly With The Separate Appendix

In examining current circuit practice under Rule 30, the local rules provide a logical and helpful starting point. The approaches of the circuits can roughly be divided as follows:

1. The "Separate Appendix" Circuit

The Fourth Circuit is the only circuit without a local rule on the matter of the separate appendix.

2. The "Specific Exception" Circuits

The First,[24] Second,[25] Third,[26] Sixth,[27] District of Columbia[28] and Federal Circuits,[29] while generally adhering to the requirement for a separate appendix, have eliminated the requirement in certain types of cases or have provided by local rule that the requirement may be waived in a given case. In many of these circuits, in forma pauperis cases are heard on the original record. In some, social security cases are treated in similar fashion.

3. The "Record Excerpt" Circuits

The Fifth,[30] Seventh,[31] Ninth[32] and Eleventh[33] Circuits have adopted a "record excerpt" method. The "record excerpt" is an abbreviated appendix.

There are significant variations in each circuit's rule.However, the basic approach is the same. The appeal is heard on the original appellate record as defined in FRAP 10. However, an additional document is prepared for the judges. It contains those parts of the appellate record which, by consensus, the judges of that circuit deem essential. The most abbreviated version appears to be that of the Fifth Circuit which contains: 1) the docket sheet; 2) the judgment or interlocutory order appealed from; 3) any other orders or rulings sought to be reviewed; 4) any supporting opinion, findings of fact or conclusions of law filed or delivered orally by the district court.[34] The Circuit's internal operating procedures permit the appellant to add "the pleadings, charge, transcript, or exhibits if they are essential to an understanding of the issues raised."[35] The Seventh Circuit rule, by comparison, requires that the document also contain "any other short excerpts from the record . . . important to a consideration of the issues raised on appeal."[36]

4. The "Original Record" Circuit

The Tenth Circuit hears most cases on the original record. Local Rules 10 and 11 provide that, with the exception of civil cases containing a transcript of 300 pages or more, the appeal will

proceed on the original record. All criminal appeals proceed on the original record.

5. The Eighth Circuit Approach

The Eighth Circuit has adopted another and somewhat unique approach.[37] Unless the parties agree to proceed on agreed statement of facts under FRAP 10(d), the appeal is on the appellate record (referred to as the "designated record"). The parties may choose between two methods of preparing the "designated record:"

a. the parties may prepare the "designated record" in accordance with FRAP 30(b). This form is called "the appendix."

b. the parties may request the district court clerk to compile and transmit to the Court of Appeals those portions of the original record on appeal which they designate.

Thus, the Eighth Circuit has combined the "appendix" and "original record" approach.

B. Other Rule Provisions Relating to the Appendix

In addition to describing the basic form of the separate appendix, other local rules further shape practice in this area.

1. Material for Inclusion in the Appendix

A few local rules contain additional guidance for counsel aimed at reducing the material contained in the appendix.

Two local rules set forth explicitly the material which ought not be included in the appendix.[38] The Second Circuit has admonished counsel not to include in the appendix extraneous material such as memoranda of counsel to the trial court.[39] One rule assures counsel that, if reference to such material is necessary in the decision of the case, the original record will be consulted.[40] By contrast, a First Circuit rule warns counsel that "notwithstanding the provisions of FRAP Rule 30 the court may decline to refer to portions of the record omitted from the Appendix, except by inadvertence, unless leave is granted prior to argument."[41]

Two other circuits affirmatively urge counsel to enter into stipulations which will reduce costs by reducing the size of the transcripts.[42]

2. Number of Copies

Several circuits have, by local rule, reduced the number of copies required.[43]

3. Method of Copying

Some circuits have explicit rules governing the method of copying the record and the amount recoverable for such copying.[44]

4. Sanctions for Over-Inclusion of Material

Some circuits have also reiterated and made more explicit the provision of FRAP 30(b) permitting the court to disallow

costs for the inclusion of unnecessary material in the record.[45] Two circuits now explicitly provide for the imposition of costs against counsel pursuant to 28 U.S.C. § 1927.[46] These rules also explicitly note that counsel can be subject to disciplinary proceedings for unreasonably and vexatiously increasing costs.

5. Leaving Record in District Court

Several circuits have also adopted the practice, either on a temporary or experimental basis, of leaving the appellate record in the District Court.[47] The Court of Appeals decides the appeal on the basis of the material in the appendix (or its equivalent) or by requesting that the appellate record, or parts of it, be forwarded to the Court of Appeals. While this procedure may well simplify the administrative burdens of the Court of Appeals, it would appear, at first glance, to have the potential of inducing counsel to include more material within the appendix. Knowing that the record is not immediately on hand during the consideration of the appeal, counsel could well decide not to rely on a busy court's taking the time to procure the necessary documentation. This supposition is not easy to verify. Moreover, the Committee's repeated inquiries have produced no evidence that overdesignation in appendices is attributable to this administrative practice.

V. Survey of the Judges of the Courts of Appeals

In Fall 1981, the Reporter, at the direction of the Committee, invited every active United States Circuit Judge to submit to the Committee a statement on the operation of Rule 30. Each judge was asked to comment on the practice currently in use in his or her circuit. Each was also afforded an opportunity to comment on the practices of the other circuits.

The responses received from the various judges demonstrated no clear nation-wide preference for any single approach to the separate appendix question. To the extent that any "trend" could be perceived, it was a tendency to preserve the status quo in each circuit. However, the responses - often quite long and thoughtful - were extremely helpful to the Committee because they revealed a good deal about the various roles which an appendix or its alternative plays in the methodology of appellate judges.

The most important message of the survey is that judges - like the judges at the time of the original formulation of Rule 30 - do not regard the question of the separate appendix as a simple "administrative" matter, but as quite central to the process of deciding cases. There are many styles of judging on the appellate bench and the question of what kind of appendix will be required is worked out among the judges, sometimes through trial and error. While most circuits have

achieved a fairly stable consensus on the matter, there is, beneath the surface, a significant disparity of views.

A. The "Pros and Cons"

1. - In Favor of the Separate Appendix

Those judges preferring the separate appendix tended to be more forceful in their answers to the survey. They stressed that the quality and quantity of judicial productivity were to be weighed against cost savings to the litigants. Their arguments may be summarized as follows:

a. A separate appendix is needed at oral argument to permit easy access to the record when questioning counsel.

b. Preparation of an appendix requires counsel to focus at an early stage on the essential points in the case.

c. The separate appendix permits earlier identification of those cases in which summary disposition is appropriate.

d. The separate appendix permits the judge to cast the tentative, but crucial, vote at conference immediately after argument on the basis of more of the record than would be available under a "record excerpt" approach.

e. A separate appendix permits more thorough preargument preparation. The non-resident judge or the judge who works at home can take a good deal of

the record along if he has an appendix. More than one judge must prepare for oral argument at the same time and often a judge and his law clerk must use the materials separately.

f. An appendix can also act as a check on attorney hyperbole in the brief and at oral argument since any member of the court can check the accuracy of a statement easily.

2. In Favor of the Record Excerpt

Judges in circuits using some variation of the "record excerpt" approach generally believe that their system also fulfills the objectives set forth by those who favor the appendix method. When the record excerpt does not suffice, the appendix will not suffice either is an oft-repeated claim.

Responses from these judges also exhibit a marked tendency to emphasize that the record excerpt must be flexible to the needs of the case and include material necessary for a resolution of the issues raised. Most frequently suggested additions are the inclusion of pertinent parts of the transcript and, when applicable, the jury charge.

Interestingly, most judges using the record excerpt method (and those where the case is heard on the original record) do not seem bothered by the necessity of transmitting

the record in the mail. On the other hand, judges in circuits which use the separate appendix often cite this problem as a major reason for not adopting the "record excerpt" method.

B. Common Ground

The survey also suggested some areas where there is a general consensus among the judges:

1. There is no disagreement on goals: 1) the quality and quantity of judicial productivity; 2) the reduction of litigant costs.
2. The difference of opinion between the "separate appendix" method and the "record excerpt" method centers on the pre-oral argument and oral argument stages of the appellate process. There is little dissent from the position that the entire record must be used in writing the opinion for the court.
3. There are certain cases which, because of their voluminous records or complex issues, need an appendix. (There is no unanimity, however, on how to describe this category.)

VI. Survey of the Clerks of the Courts of Appeals

In 1982, the Reporter, working with Mr. John Hehman, Clerk of the United States Court of Appeals for the Sixth Circuit, and Mr. Gilbert Gannucheau, Clerk of the United States Court of Appeals for the Fifth Circuit, formulated a

survey for the clerks of all the federal circuits designed to elicit information on the impact of the separate appendix requirement on their offices and upon counsel appearing before their courts. The Chairman and the Reporter later discussed the results of this survey with the Clerks at their annual meeting at the Federal Judicial Center. Mr. Leonard Green, Chief Deputy Clerk of the Sixth Circuit summarized the results for the Committee as follows:

> The survey suggests that the following conclusions can fairly be drawn:
>
> Each of the circuits has its own alternative to Rule 30. In that sense, the Rule plays an important role; it defines a document to serve as a supplement to the briefs, in which is to be distilled from the larger record on appeal only those items necessary to the adjudicative process. Rule 30, then, serves as a fixed point of reference for the circuits to use in fashioning for themselves that vehicle which will respond to their needs.
>
> There is a wide variation among the local alternatives, ranging from the "record excerpt" system in use in several circuits to the full-blown FRAP 30 appendix or something very closely akin to it, in use in other circuits.

Use of the deferred appendix procedure of 30(c) is negligible, even where use of that arrangement is given some encouragement.

There are several categories of cases, collectively comprising a significant portion of the docket, in which the appendix requirement is commonly waived. These categories include prisoner cases, especially without counsel, CJA cases, in forma pauperis cases, and social security cases.

The principal distinction among the courts as far as what parts of the record need to be included in the appendix is the transcript. The differences among the courts in this respect reflect differences and different judicial approaches to the adjudicative process.

Because of the nearly universal use of photocopy as the preferred method of reproduction, rather than costly printing, the actual cost of preparing the appendix is not high, certainly not when compared with other costs associated with litigation. The average

number of pages reported in an appendix range from seven to seven-hundred, but most commonly seems to be in the two-hundred to three-hundred page range; from four to ten copies of the appendix are required in the various courts.

The cost of the appendix requirement to the Clerks' offices is not great. Neither the investment of man hours required nor the storage requirements would seem to represent a significant burden to the offices.

All of the circuits except the Third and, in some cases, the Eighth, require that the district court proceedings be filed with the Court of Appeals.

There is a wide variation among the practices of the courts in circulating the record or parts of it to the court. Some will send the record automatically to the lead judge of the hearing panel or the writing judge while other courts will send the record only in response to a specific request from a judge.

VII. Conclusions and Recommendations

On the basis of the foregoing study, the Committee makes the following conclusions and recommendations:

1. Today, as at the time of the formulation of the Rules, most judges do not consider the form of the separate appendix a simple "administrative" matter. There are many styles of judging. On any Court, arriving at a decision as to the most appropriate form of appendix is a collegial decision aimed at accomodating the particular judging styles of the bench in question and, consequently, at maximizing the efficiency of the Court and the quality of its workproduct. While considerations of uniformity are important and doubtless will be taken into account by the judges of the respective circuits, the committee concludes that at this time the form of the separate appendix is not an appropriate subject for rigid national regulation.

2. Litigation costs remain, however, a significant concern. Each court has a responsibility to consider such costs in formulating its approach to the separate appendix issue. In this respect, current circuit practice evidences a general, although somewhat uneven, acknowledgment of this responsibility. Over recent years, there has been, even in many of those circuits which adhere to the "separate appendix approach," a "natural shrinkage" of the appendix or at least of its costs. Exceptions to the appendix requirement in many

cases and the replacement of "hot lead" printing by much less expensive copying methods have been the principal improvements. Other avenues must be explored more fully, however:

a. Local rules and internal operating procedures must articulate more precisely how the Court uses the separate appendix. It must be emphasized that the appendix is used principally in evaluating the briefs and in preparing for oral argument and that the entire record is normally used in writing an opinion. Furthermore, counsel must be assured that, throughout the appellate process, the Court will consult the entire record whenever it becomes necessary.

In addition to making such information available to the bar through local rules, the Court and its Clerk ought to communicate more informally and more regularly with the bar regarding the proper role of the appendix.

b. Through local rule and informal contact with the bar, the Court ought to communicate its continuing concern with litigation costs. Each circuit ought to have in its local rules a specific provisions fixing the maximum recoverable costs for copying of appendix material and noting the availability of sanctions for overdesignation of appendix material.

c. The application of sanctions against the litigant or counsel for abuse of the appendix process ought to be given sufficient dissemination to have a deterrent effect.

3. While the Committee believes that, at this time, no particular form of separate appendix ought to be mandated in a rule of national application, several changes to FRAP are desirable:

a. Rule 30(a) should be amended to specify that memoranda of law in the trial court are not to be included in the separate appendix. See United States v. Noall, 587 F.2d 123 (2d Cir. 1978).

b. Rule 38(b) ought to be amended to require that each circuit have a local rule specifically noting that, in addition to sanctions against the litigant, the court may, in an appropriate case, impose sanctions against counsel.

c. Rule 39(c) ought to be amended to require each circuit to fix by local rule the maximum allowable costs for copying appendix material.

4. Cost to the litigants must remain a matter for continuous and careful monitoring by the circuits. It is especially important that, in assessing innovations aimed at increasing administrative efficiency, the Court identify and weigh any resulting increase in costs to the litigants.

Advisory Committee on Federal Appellate Rules

Honorable Pierce Lively, Chairman
E. Milton Farley, III, Esquire
Honorable J. Smith Henley
Honorable Rex E. Lee
Honorable Edward D. Re
Ira C. Rothgerber, Esquire
Honorable Edward A. Tamm
Honorable Eugene A. Wright

Professor Kenneth F. Ripple, Reporter

Footnotes

[1]Fed. R. App. P. 30 provides in pertinent part

(a) DUTY OF APPELLANT TO PREPARE AND FILE; CONTENT OF APPENDIX; TIME FOR FILING; NUMBER OF COPIES. The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

. . . .

(b) DETERMINATION OF CONTENTS OF APPENDIX; COST OF PRODUCING. The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, he shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The

appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented he may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party.

. . . .

(f) HEARING OF APPEALS ON THE ORIGINAL RECORD WITHOUT THE NECESSITY OF AN APPENDIX. A court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

[2]See Burger, Annual Report on the State of the Judicary - 1980, Midyear Meeting of the American Bar Association (Feb. 3, 1980), 66 A.B.A.J. 295 (1980).

[3]Fed. R. App. P. 30(a)(4).

[4]Fed. R. App. P. 10, 11.

[5]Fed. R. App. P. 30 reads in pertinent part:

(a). . . Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with his brief. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number. . . .

(e) REPRODUCTION OF EXHIBITS. Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. Four copies thereof shall be filed with the appendix and one copy shall be served on counsel for each party separately represented. The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this subdivision.

[6]See, e.g., Drewett v. Aetna Cas. & Sur. Co., 539 F.2d 496, 498-501 (5th Cir. 1976) (reproduction of entire trial transcript); Bernard v. Omaha Hotel, Inc. 482 F.2d 1222, 1225-26 (8th Cir. 1973)(inclusion of complete medical testimony that was totally irrelevant to appeal).

[7]For a description of the Committee's early work see Ainsworth and Ripple, The Separate Appendix in Federal Appellate Practice - Necessary Tool or Costly Luxury?, 34 S.L.J. 1159 (1981).

[8]Prop. Fed. R. App. P. 30, advisory committee note, March 1964 Preliminary Draft [hereinafter cited as Preliminary Draft], reprinted in 9 J. Moore, B. Ward and J. Lucas, Moore's Federal Practice § 100.01, at 9-10 (2d ed. 1983).

[9]J. Moore, B. Ward and J. Lucas, supra note 8, at 10. The Eighth Circuit dispensed with its printed record in criminal, habeas corpus, and 28 U.S.C. § 2255 cases.

[10]Id. at 7.

[11]Preliminary Draft, supra note 8, at 10.

[12]Prop. Fed. R. App. P. 30(a)(March 1964 Draft).

[13]J. Moore, B. Ward and J. Lucas, supra note 8, at 12-16.

[14]Letter from Judge Maris, Chairman of the Standing Committee, to the bench and bar (Dec. 20, 1966), reprinted in J. Moore, B. Ward and J. Lucas, supra note 8, at 10.

[15]Special Note to the December 30, 1966, Proposed Draft A by the Advisory Committee on Appellate Rules, reprinted in J. Moore, B. Ward and J. Lucas, supra note 8, at 18-20 [hereinafter cited as Special Note].

[16]Id. at 19.

[17]J. Moore, B. Ward and J. Lucas, supra note 8, at 20-23.

[18]Special Note, supra note 15, at 19.

[19]J. Moore, B. Ward and J. Lucas, supra note 8, at 25-27.

[20]Id. at 27.

[21]Special Note, supra note 15, at 20.

[22]Id. at 19-20.

[23]Fed. R. App. P. 30, advisory committee note to 1970 amendment.

[24]The First Circuit generally uses a separate appendix. However, 1st Cir. R. 11(i) provides that, absent order of the court, all in forma pauperis cases shall be considered on the record on appeal as certified by the district court without the necessity of filing an appendix.

[25]In the Second Circuit, 2d Cir. R. 30.2 authorizes appeals on the original record without printed appendix in: (1) all appeals under CJA; (2) all other in forma pauperis proceedings; (3) all appeals involving a social security decision. In such cases, the appellant files three legible copies of those portions of the transcript that he wants the court to read. To avoid additional expense, application may be made to file less than three copies.

[26]In the Third Circuit, 3d Cir. R. 10 permits hearing on original papers in applications for writs of habeas corpus and for relief under 28 U.S.C.§ 2255 when permission has been granted to proceed in forma pauperis. The appeal is heard on the original record, three copies of the opinion (if any), and the order from which the appeal is taken. In any other case, the court may dispense with the requirement of a record and proceed on the original record.

[27]In the Sixth Circuit, 6th Cir. R. 11 requires that only five (5) copies of the appendix be filed. When the entire record is 100 pages or less, three copies of the record may be filed. In Social Security Law cases, the United States Attorney files four (4) copies of the administrative record provided that the appellant files with his brief copies of the opinion and order of the District Court and the recommendation of the magistrate if the District Court relied upon it.

[28]D.C. Cir. R. 17(c)(3) permits in forma pauperis appeals on the original record without the necessity of an appendix. The appellant furnishes two copies of the relevant parts of the transcript with a list of the page numbers of the transcript so furnished. The findings of fact and conclusions of law and the opinion, if any, of the district court must always be included. The appellee furnishes two copies of any pages of the transcript to which he wishes to

call the court's attention and that were not furnished by the appellant.

[29]Fed. Cir. R. 12(j) provides that the Court may dispense with the requirement of an appendix on motion or sua sponte.

[30]5th Cir. Rule 30.1 (described in text accompanying note 34 infra.).

[31]7th Cir. R. 12 states that a full appendix is not required. The appellant files, either bound with his brief or as a separate document, an appendix containing the judgment or order under review, and any opinion, memorandum, findings of fact, or conclusions of law of the trial court or the administrative agency. The local rule also states that the court prefers that the brief appendix contain "any other short excerpts from the record . . . important to a consideration of the issues raised on appeal." The rule declares that "costs for a lengthy appendix will not be awarded." It is apparently fairly rare for these "other short excerpts" to exceed 15 pages.

[32]9th Cir. R. 13 provides that the appellant file five (5) copies of the following documents:

(a) the complaint and answer(s) and, in criminal cases, the indictment;

(b) the pretrial order, if any;

(c) the judgment or interlocutory order from which the appeal is taken;

(d) other orders sought to be reviewed, if any;

(e) any supporting opinion, findings of fact or conclusions of law filed or delivered orally by the trial court (citations if opinion is published);

(f) the motion and response upon which the court rendered judgment, if any;

(g) the notice of appeal;

(h) the trial court docket sheet, and

(i) the parties' stipulation to a direct appeal to the U.S. Court of Appeals if the appeal is taken directly from a decision of the U.S. Bankruptcy Court.

With respect to administrative proceedings, the same rule requires the petitioner to file five copies of any order to be reviewed and of any supporting opinion, findings of fact or conclusions of law filed by the agency, board, commission, or officer.

[33] 11th Cir. Rule 22(a) requires that the following material be included in the "record excerpt:"

(1) the docket sheet;

(2) the indictment, information, or complaint as amended;

(3) the answer, counterclaim, cross-claim, and replies thereto;

(4) those parts of any pretrial order relative to the issues on appeal;

(5) the judgment or interlocutory order appealed from;

(6) any other order or orders sought to be reviewed;

(7) any supporting opinion, findings of fact and conclusions of law filed or delivered orally by the court, and

(8) if the correctness of a jury instruction is in issue, the instruction in question and any other relevant part of the jury charge.

[34]5th Cir. R. 30.1

[35]5th Cir. R. 30.1, internal operating procedures commentary.

[36]7th Cir. R. 12(a).

[37]8th Cir. R. 7.

[38]8th Cir. R. 7(c)(2); Fed. Cir. R. 12(a).

[39]United States v. Noall, 587 F.2d 123 (2d Cir. 1978).

[40]8th Cir. R. 7(c)(2).

[41]1st Cir. R. 11(c).

[42]1st Cir. R. 7; 10th Cir. R. 7(a).

[43]1st Cir. R. 11(f); 3d Cir. R. 10(1); 5th Cir. R. 13.1; 6th Cir. R. 11(c),(f); 8th Cir. R. 7(d)(3); 9th Cir. R. 13(a)(1); 11th Cir. R. 22(a); D.C. Cir. R. 9(a)(1); Fed. Cir. R. 12(f).

[44]4th Cir. R. 12; 5th Cir. R. 39; 6th Cir. R. 26(a); 8th Cir. R. 7 (f); 9th Cir. R. 14(b) & (d); 10th Cir. R. 18; 11th Cir. R. 28; D.C. Cir. R. 15(b).

[45]6th Cir. R. 11(h); 7th Cir. R. 12(a); 8th Cir. R. 7(c)(2); D.C. Cir. R. 9(a)(3).

[46]6th Cir. R. 11(h); 8th Cir. R. 7(c)(2).

[47]3d Cir. R. 14(1); 8th Cir. R. 6(a). Two circuits urge counsel to endeavor to enter into stipulations that will avoid or reduce transcripts. 1st Cir. R. 7; 10th Cir. R. 7(a).

99TH CONGRESS
1ST SESSION

H. R. 2633

To amend the provisions of titles 18 and 28 of the United States Code commonly called the "enabling Acts" to make modifications in the system for the promulgation of certain rules for certain Federal judicial proceedings, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 23, 1985

Mr. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend the provisions of titles 18 and 28 of the United States Code commonly called the "enabling Acts" to make modifications in the system for the promulgation of certain rules for certain Federal judicial proceedings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Rules Enabling Act of 1985".

SEC. 2. RULES ENABLING ACT AMENDMENTS.

(a) IN GENERAL.—Title 28 of the United States Code is amended by striking out section 2072 and all that follows through section 2076 and inserting in lieu thereof the following:

"§ 2072. Rules of procedure; power to prescribe

"(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure (including rules of evidence) for cases (including all bankruptcy matters) in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

"(b) Such rules shall not abridge, enlarge, or modify any substantive right or supersede any provision of a law of the United States.

"§ 2073. Rules of procedure; method of prescribing

"(a)(1) The Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules under this section.

"(2) The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under section 2072 of this title. Each such committee shall consist of a balanced cross section of bench and bar, and trial and appellate judges.

"(b) The Judicial Conference shall authorize the appointment of a standing committee on rules of practice and procedure under subsection (a) of this section. Such standing

committee shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice and procedure and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and otherwise promote the interest of justice.

"(c)(1) Each meeting for the transaction of business under this chapter by any committee appointed under this section shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public, and states the reason for so closing the meeting. Minutes of each meeting for the transaction of business under this chapter shall be maintained by the committee and made available to the public, except that any portion of such minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting.

"(2) Any meeting for the transaction of business under this chapter by a committee appointed under this section shall be preceded by sufficient notice to enable all interested persons to attend.

"(d) In making a recommendation under this section or under section 2072, the body making that recommendation

shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views.

"(e) Failure to comply with this section does not invalidate a rule prescribed under section 2072 of this title.

"§ 2074. Rules of procedure; submission to Congress; effective date

"(a) The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law. The Supreme Court may fix the extent such rule shall apply to proceedings then pending. The Supreme Court shall also transmit with such proposed rule proposed amendments to any law, to the extent such amendments are necessary to implement such proposed rule or would otherwise promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.

"(b) Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.".

(b) ADVISORY COMMITTEES FOR COURTS.—Section [illegible] of title 28, United States Code, is amended—

(1) by striking out "of appeals" the first place it appears and inserting ", except the Supreme Court, that is authorized to prescribe rules of the conduct of such court's business under section 2071 of this title" in lieu thereof; and

(2) by striking out "the court of appeals" the second place it appears and inserting "such court" in lieu thereof.

(c) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 131 of title 28 of the United States Code is amended by striking out the item relating to section 2072 and all that follows through the item relating to section 2076 and inserting in lieu thereof the following:

"2072. Rules of procedure, power to prescribe
"2073. Rules of procedure; method of prescribing.
"2074. Rules of procedure; submission to Congress; effective date.".

SEC. 3. COMPILATION AND REVIEW OF LOCAL RULES.

Section 331 of title 28 of the United States Code is amended—

(1) in the fourth paragraph, by inserting after "any agency thereof." the following: "The Conference shall periodically compile the rules which are prescribed under section 372(c)(11) of this title and the orders which are required to be publicly available under section 372(c)(15) of this title so as to provide a current record of such rules and orders."; and

(2) by adding after the fifth paragraph the following new paragraph:

"The Judicial Conference shall periodically compile the rules which are prescribed under section 2071 of this title by court other than the Supreme Court of the United States so as to provide a current record of such rules. The Judicial Conference shall periodically review such rules for consistency with rules prescribed under section 2072 of this title. The Judicial Conference may modify or abrogate any such rule found inconsistent in the course of such a review.".

SEC. 4. RULES BY DISTRICT COURTS AND ORDERS BY CIRCUIT JUDICIAL COUNCILS AND THE JUDICIAL CONFERENCE.

(a) RULES BY DISTRICT COURTS.—(1) Section 2071 of title 28 of the United States Code is amended—

(A) by striking out "by the Supreme Court" and inserting "under section 2072 of this title" in lieu thereof; and

(B) by adding at the end the following paragraphs:

"Any such rule of a district court shall be made or amended only after giving appropriate public notice and an opportunity for comment. Such rule so made or amended shall take effect upon the date specified by the district court and shall remain in effect unless modified or abrogated by the District Court or modified or abrogated by the judicial council

of the relevant circuit. Copies of such rules so made or amended shall be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.".

(2) Section 332(d) of title 28 of the United States Code is amended by adding at the end the following new paragraph:

"(4) Each judicial council shall periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title. Each council may modify or abrogate any such rule found inconsistent in the course of such a review.".

(b) ORDERS BY CIRCUIT JUDICIAL COUNCILS.—Section 332(d)(1) of title 28 of the United States Code is amended by inserting after the first sentence the following new sentence: "Any general order relating to practice and procedure shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any such order so relating shall take effect upon the date specified by such judicial council. Copies of such orders so relating shall be furnished to the Judicial Conference and the Administrative Office of the United States Courts and be made available to the public.".

(c) RULES BY JUDICIAL CONFERENCE AND CIRCUIT JUDICIAL COUNCILS.—Section 372(c)(11) of title 28 of the United States Code is amended by inserting before "Any rule promulgated" the following new sentence: "Any such rule shall be made or amended only after giving appropriate public notice and an opportunity for comment.".

SEC. 5. CONFORMING AND OTHER TECHNICAL AMENDMENTS.

(a) CONFORMING REPEAL OF CRIMINAL RULES ENABLING PROVISIONS.—(1) Title 18 of the United States Code is amended by striking out chapter 237.

(2) The table of chapters for part II of title 18 of the United States Code is amended by striking out the item relating to chapter 237.

(b) CONFORMING REPEALS RELATING TO MAGISTRATES.—(1) Section 3402 of title 18 of the United States Code is amended by striking out the second paragraph.

(2) Section 636(d) of title 28 of the United States Code is amended by striking out "section 3402 of title 18, United States Code" and inserting "section 2072 of this title" in lieu thereof.

(c) CROSS REFERENCE TECHNICAL AMENDMENT.—Section 9 of the Act entitled "An Act to provide an adequate basis for the administration of the Lake Mead National Recreation Area, Arizona and Nevada, and for other purposes" approved October 8, 1964 (Public Law 89-639) is

amended by striking out the sentence beginning "The provisions of title 18, section 3402".

(d) ORGANIC ACT TECHNICAL AMENDMENTS.—(1) Section 22(b) of the Organic Act of Guam is amended by striking out ", in civil cases" and all that follows through "bankruptcy cases".

(2) Section 25 of the Organic Act of the Virgin Islands is amended by striking out ", in civil cases" and all that follows through "bankruptcy cases".

SEC. 6. SAVINGS PROVISION.

The rules prescribed in accordance with law before the taking effect of this Act and in effect on the date of such taking effect shall remain in force until changed pursuant to the law as modified by this Act.

SEC. 7. EFFECTIVE DATE.

This Act shall take effect December 1, 1986.

○

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

EDWARD T GIGNOUX
CHAIRMAN

JOSEPH F SPANIOL, JR
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
PIERCE LIVELY
APPELLATE RULES
FRANK M JOHNSON, JR
CIVIL RULES
FREDERICK B LACEY
CRIMINAL RULES
MOREY L SEAR
BANKRUPTCY RULES

July 11, 1985

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil Liberties
and the Administration of Justice
Committee on the Judiciary
United States House of Representatives
2232 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I am pleased to submit a Prepared Statement setting forth my views, as Chairman of the Judicial Conference Standing Committee on the Rules of Practice and Procedure, on the provisions of H.R. 2633, the "Rules Enabling Act of 1985," the bill introduced by you on May 23, 1985, to amend the Rules Enabling Acts. I appreciate your courtesy in permitting me to submit these written comments, and regret that I was unable to appear and testify in person at the hearing conducted by the Subcommittee on June 6, 1985.

H.R. 2633 is the second revision of H.R. 4144, 98th Congress, 1st Session, the original bill introduced by you on October 18, 1983. At the hearing conducted by the Subcommittee on March 1, 1984, I was privileged to present the views of the Judicial Conference, which endorsed those of the Standing Committee, on H.R. 4144. To the extent that H.R. 2633 carries forward the provisions of H.R. 4144, the views of the Conference are already in the hearing record. Neither the Standing Committee nor the Judicial Conference has had an opportunity, however, to review the new bill and to formulate views concerning it. Accordingly, the enclosed Statement sets forth my own views, and not those of the Standing Committee or the Conference, on those provisions of the present bill which differ from the original bill.

At the outset, may I commend the Subcommittee on its continuing interest in perfecting the federal rulemaking process. In my view, H.R. 2633 is a substantial improvement over the earlier drafts, and I am pleased to note that it incorporates many of the suggestions made on behalf of the Conference at the previous hearing. As more fully set forth in my Statement, however, H.R. 2633 contains several provisions that I find disturbing:

(1) H.R. 2633 does not include the provision in the current Rules Enabling Acts permitting judicially promulgated rules to supersede conflicting procedural statutes. I am concerned

that the elimination of this supersession authority could lead to fruitless satellite litigation challenging the validity of a rule solely because it arguably may conflict with some obscure procedural statute.

(2) Proposed Section 2072(b) of Title 28 would provide that "Such rules shall not ... supersede any provision of a law of the United States." It seems to me that every rule of procedure, when effective, becomes "a law of the United States," whether promulgated by the Supreme Court or enacted by Congress. Thus, any proposed amendment to an existing rule would appear to be a change in "a law of the United States," and the Supreme Court would be powerless to act. This new provision could effectively destroy the rulemaking process as we know it today.

(3) Proposed Section 2074(a) of Title 28 would require that the Supreme Court transmit with a proposed rule proposed amendments to any law "to the extent such amendments are necessary to implement such proposed rule ...." This provision presumably would require the Court to render an advisory opinion as to whether a proposed rule conflicts with an existing statute. Under Article III of the Constitution, the Supreme Court cannot, of course, render advisory opinions.

(4) H.R. 2633 would require open committee meetings. As I previously testified, the Judicial Conference and the Standing Committee are of the view that this "sunshine" proposal is unnecessary and would seriously impair the efficient functioning of the rulemaking process, without any significant public benefit. We believe that our present procedures, as codified in the "Statement of Operating Procedures" adopted by the Standing Committee and approved by the Conference, adequately achieve the objective of full public awareness and participation in rulemaking.

My Statement contains a number of other comments and suggestions, which I hope may be helpful. Again, I appreciate the opportunity to submit my views on this important bill.

Sincerely,

Edward T. Gignoux

PREPARED STATEMENT

OF

HONORABLE EDWARD THAXTER GIGNOUX

UNITED STATES SENIOR DISTRICT JUDGE
FOR THE DISTRICT OF MAINE

and

CHAIRMAN OF THE STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

before the

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND
THE ADMINISTRATION OF JUSTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

on

H.R. 2633,
A BILL TO AMEND THE RULES ENABLING ACTS

July 10, 1985

Mr. Chairman, and Members of the Subcommittee, I submit this Prepared Statement in response to Chairman Rodino's request for my views, as chairman of the Judicial Conference Standing Committee on Rules of Practice and Procedure, on the provisions of H.R. 2633, the "Rules Enabling Act of 1985," a bill introduced by you, Mr. Chairman, on May 23, 1985, to amend the provisions of Titles 18 and 28 of the United States Code, commonly called the Rules Enabling Acts. I appreciate your courtesy in permitting me to submit these written comments, and regret that time constraints made it impossible for me to appear and testify in person at the hearing conducted by the Subcommittee on June 6, 1985.

INTRODUCTION

H.R. 2633 is substantially similar to the measure approved by the Subcommittee last Congress, H.R. 6344, 98th Congress, 2nd Session, and introduced by the Chairman on October 1, 1984. H.R. 6344, in turn, was a revision of H.R. 4144, 98th Congress, 1st Session, the original bill introduced by the Chairman on October 18, 1983. As stated by you, Mr. Chairman, in your remarks when introducing H.R. 2633, this bill is the product of two days of hearings at the last Congress and a substantial amount of work by the Subcommittee. See Rules Enabling Act, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 98th Congress, 1st and 2nd sessions (April 21, 1983, and March 1, 1984), Serial #96 (1985) (hereinafter "Hearings"). I commend the Subcommittee on its continuing interest in perfecting the Federal rulemaking process.

At the hearing conducted by the Subcommittee on March 1, 1984 I was privileged to submit the views of the Judicial Conference, which had

endorsed those of the Standing Committee, on H.R. 4144, 98th Congress. See Hearings at 88 (Testimony), at 93 (Statement). I am pleased to note that the present bill incorporates many of the views expressed on behalf of the Judicial Conference at the previous hearing.

To the extent that H.R. 2633 carries forward provisions of H.R. 4144, 98th Congress, the views of the Judicial Conference are already in the hearing record, and I shall attempt to avoid repeating them at this time. Neither the Judicial Conference nor the Standing Committee has had an opportunity, however, to formulate final views on the present bill. Since H.R. 2633 modifies H.R. 4144, 98th Congress, in several significant respects, in commenting thereon, I am necessarily presenting my own views and not those of the Judicial Conference or the Standing Committee.

COMMENTS

My comments with respect to the provisions of H.R. 2633 are as follows:

SECTION 1. SHORT TITLE

I have no comment.

SEC. 2. RULES ENABLING ACT AMENDMENTS

SEC. 2(a) IN GENERAL.

Section 2(a) of H.R. 2633 (with Section 5(a) and (b)) would repeal the present Rules Enabling Acts, 28 U.S.C., Sections 2072, 2075, 2076, 18 U.S.C. Sections 3771, 3772 (chapter 237) and 18 U.S.C. Section 3402 (second paragraph), and would consolidate all rules enabling provisions into new Sections 2072, 2073, and 2074 of Title 28.

Proposed Section 2072. Rules of procedure; power to prescribe

Proposed Section 2072 contains two subsections:

Section 2072(a) would vest the rulemaking authority in the Supreme Court, as at present. I support this provision. The original bill, H.R. 4144, 98th Congress, would have transferred the rulemaking authority from the Supreme Court to the Judicial Conference. I understand that the current provision responds to the concern expressed by the Conference of State Chief Justices that the prestige and authority of the Court are important to acceptance of the rules, not only within the Federal judicial system but by the many States which have adopted the Federal Rules of Procedure, either in whole or in part. See Letter to the Honorable Robert W. Kastenmeier from the Honorable John A. Speziale, Chairman, Committee on State-Federal Relations, Conference of Chief Justices, dated March 6, 1984, Hearings at 231. I further understand that the Justices have concluded that it would be better that the rulemaking process continue to be conducted under the aegis of the Supreme Court. See Letter to the Honorable Robert W. Kastenmeier from the Chief Justice, dated June 25, 1984, Hearings at 195. I agree that the prestige and authority of the Court are important to acceptance of the rules in both the Federal and State judicial systems.

Section 2072(b) would provide that the rules promulgated by the Supreme Court "shall not abridge, enlarge, or modify any substantive right or supersede any provision of a law of the United States." I support the first clause of the subsection, which carries forward the present limitation on judicial rulemaking in 28 U.S.C. §§ 2072 (Rules of Civil Procedure) and 2075 (Bankruptcy Rules). I am disturbed, however, by two features of proposed Section 2072(b) which could lead to

unnecessary satellite litigation and potentially destroy the rulemaking process as it exists today:

(1) I am concerned that H.R. 2633 does not incorporate the provision in the current Rules Enabling Acts permitting judicially promulgated rules to supersede conflicting procedural statutes. The Rules Enabling Act of 1934 (Act of June 19, 1934, c. 651, §§ 1, 2, 48 Stat. 1064, as amended, 28 U.S.C. § 2072) contained a provision that "all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." This supersession authority was necessary because of the numerous procedural statutes then contained in the United States Code. Although the Judicial Code of 1948 eliminated many of these obsolete procedural provisions, subsequently enacted Rules Enabling Acts have included a supersession provision, permitting judicially promulgated rules to supersede conflicting statutes, always subject to the limitation that the rules shall not "abridge, enlarge, or modify any substantive right." See 28 U.S.C. § 2076 (Rules of Evidence), 18 U.S.C. § 3771 (Rules of Criminal Procedure: Procedure to and including verdict), 18 U.S.C. § 3772 (Procedure after verdict). I am not aware that this supersession authority has caused any difficulty. And I am concerned that its elimination could open up the potential that any rule--whether an appellate, civil, criminal, bankruptcy or evidence rule--may be challenged as arguably conflicting with a procedural statute. Congress should not encourage this type of unnecessary

satellite litigation, which is expensive for the parties and time-consuming for the courts.

I am aware that some commentators have derived from Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983), a potential constitutional problem, based on Separation of Powers principles, in permitting judicially promulgated rules to supersede congressionally enacted statutes. While I do not purport to be a constitutional law scholar, I do not perceive any serious constitutional objection to Congress delegating the rulemaking power to the Judicial Branch, reserving the opportunity to review proposed rules changes before they become effective and to pass legislation suspending or modifying any rules found objectionable. I do not read in Chadha any implication that the "report and wait" provisions of the Rules Enabling Acts run afoul of the Separation of Powers doctrine, upon which Chief Justice Burger's opinion is bottomed. Chadha held that the one-house veto provision of Section 244 of the Immigration and Naturalization Act was unconstitutional because Congress is authorized to act in the legislative area only by approval of both the House and the Senate, and presentment to the President. Except for the Evidence Rules, the Federal rules are not presently promulgated under such a scheme. Nor would they be under the procedure proposed by H.R. 2633. Under proposed Section 2074(a), rules amendments would be transmitted to Congress and would become effective, without more, on a specified date unless Congress passes legislation

barring their effectiveness.* The Chief Justice in Chadha specifically recognized the validity of this "report and wait" process as having been approved by the Supreme Court in Sibbach v. Wilson & Co., 312 U.S. 1 (1941). See Chadha, 462 U.S. at 935 n.9. As he noted in Chadha, the "report and wait" process is not a legislative veto.

As Professor Charles A. Wright has observed, see Wright & Miller, Federal Practice and Procedure: Civil § 1001 (1969 & 1985 Supp.), there is no consensus of opinion among constitutional scholars on the question of whether the power to regulate judicial procedure in the United States lies exclusively with Congress or with the judiciary. Able commentators insist that the right to make rules of procedure is inherent in the judicial power vested in the courts by Article III of the Constitution. Dean Roscoe Pound and Professor John Wigmore, among others, espoused this view. Other commentators assert that the power to make procedural rules is a legislative, not a judicial, power. The merits of these competing legal arguments have been a fruitful subject for debate. I suggest, however, that the question really is of no practical importance. The fact is that for 50 years in the Federal courts we have been operating under a process which may be best described as judicial rulemaking pursuant to

---

*H.R. 2633 would eliminate the one-house veto provision, similar to that condemned in Chadha, that is contained in the present Evidence Rules Enabling Act, 28 U.S.C. § 2076.

congressional delegation and subject to review by the Congress. See Wright & Miller, supra § 1001 at 30. This accommodation has worked well and has avoided a confrontation on constitutional principles.

(2) I am particularly disturbed by the added provision in Section 2072(b) that "Such rules shall not . . . supersede any provision of a law of the United States." It seems to me that every procedural rule, when effective, becomes "a law of the United States," whether promulgated by the Supreme Court or enacted by Congress, as has been the case in recent years. See, e.g., P.L. 93-595, § 1, app. Jan. 2, 1975 (Federal Rules of Evidence); P.L. 97-462, app. Jan. 12, 1983 (Civil Rule 4); Comprehensive Crime Control Act of 1984, P.L. 98-473, app. Oct. 12, 1984 (Criminal Rules). Potential destruction of the entire rulemaking process could result from this provision because any proposed amendment to an existing rule would appear to be a change in "a law of the United States," and the Supreme Court would be powerless to act. Moreover, this new provision could lead to fruitless satellite litigation challenging the validity of a rule solely because it arguably superseded some obscure procedural statute. I suggest that the seven months "layover period" which would be provided by proposed Section 2074(a) should be sufficient to permit Congress to determine whether a proposed rule conflicts with an existing statute, and, if so, to make any appropriate modification.

Proposed Section 2073. Rules of procedure: method of prescribing

Proposed Section 2073 contains several subsections:

Section 2073(a)(1) would require the Judicial Conference to prescribe and publish the procedures for the consideration of proposed rules. I do not object to this provision, but question that it is necessary. The Standing Committee has already published such procedures, which have been approved by the Conference. See Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, Hearings at 112. This subsection merely continues that responsibility.

Section 2073(a)(2) would provide that the Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under Section 2072. I endorse this provision. At the present time there are four such advisory committees, one each for Appellate, Civil, Criminal and Bankruptcy Rules. I am pleased to observe that the discretionary language of the present bill responds to the Judicial Conference's criticism of H.R. 4144 as creating undesirable inflexibility. Section 2073(a)(2) also would provide that each rules committee shall consist of "a balanced cross section of bench and bar, and trial and appellate judges." I approve this provision, which is consistent with the requirement of the 1958 Judicial Conference resolution establishing the rules program. See Rules of Practice and Procedure for the United States Courts, Hearings at 109. It is my belief that the present rules committees are broadly representative. They include experienced district and circuit judges, members of the bar, and law professors, widely distributed geographically and chosen

from diverse professional backgrounds. A current list of rules committees members is attached to this Statement as Appendix A.

Section 2073(b) would require the Judicial Conference to authorize the appointment of a Standing Committee on Rules of Practice and Procedure. The Standing Committee is to review each recommendation of any other committee and recommend to the Conference such changes in rules proposed by a committee "as may be necessary to maintain consistency and otherwise promote the interest of justice." In addition, the Standing Committee would have independent authority to recommend rules. I support these provisions, which are in accord with present practice.

Section 2073(c)(1) and (c)(2) would require that all rules committee meetings be open to the public (except when a majority of the committee votes in open session to close a meeting, stating the reason therefor); would require that minutes of each meeting be prepared and made available to the public; and would require that sufficient notice of each meeting be given "to enable all interested persons to attend." For the reasons set forth in my Testimony and Prepared Statement at the previous hearing, see Hearings at 91 (Testimony); 100-02 (Statement), the Judicial Conference and the Standing Committee are of the view that this "sunshine" proposal is unnecessary and would seriously impair the efficient functioning of the rulemaking process without any significant benefit to the public or to the members of the bar. As there stated, we concur fully in the objective of full public awareness and participation in rulemaking, but we believe that our present procedures, as codified in the "Statement of Operating Procedures," adequately achieve this end. Opportunity for public participation in the rulemaking process is

assured by the wide circulation given to proposed rules changes and by the opportunity afforded any interested person either to submit written comments or to attend and present oral views at the public hearings that are held on the draft rules. In addition, the written comments received, the transcripts of public hearings, the minutes of Rules Committee meetings, and the Advisory Committee and Standing Committee reports are available to the public at the Administrative Office of the United States Courts.

Section 2073(d) would require that any recommended rule change set forth "a proposed rule, an explanatory note on the rule, and a written report explaining the [rulemaking] body's action, including any minority or other separate views." I approve this requirement, which is in accord with present practice.

As a drafting matter, it appears that at page 3, lines 24-25, the words "or under section 2072" should be deleted. Section 2072 authorizes the Supreme Court to "prescribe," not to "recommend," rules of practice and procedure.

Section 2073(e) would provide that failure to comply with Section 2073 does not invalidate a rule. I endorse this provision, which was suggested by the Judicial Conference, and others. It is essential to avoid satellite litigation challenging the validity of a rule solely because of alleged noncompliance with a minor procedural requirement of Section 2073.

Proposed Section 2074. Rules of procedure; submission to Congress; effective date

Proposed Section 2074 contains two subsections:

Section 2074(a) would require that rules amendments be transmitted to Congress by May 1, to become effective no earlier than December 1 of the year in which they are transmitted, the Court being authorized to fix the extent to which a rule shall apply to pending proceedings. The current Rules Enabling Acts require that rules changes be transmitted to Congress by May 1, to become effective after a waiting period of not less than 90 days (180 days for the Evidence Rules). As set forth in my previous Testimony and Prepared Statement, see Hearings at 91-92 (Testimony); 96-97 (Statement), the Judicial Conference is of the view that it is for Congress to determine the amount of time it needs to consider rules changes, but that a uniform waiting period should be provided for all rules. The proposal in the present bill appears reasonable, and I have no suggestions with respect to it.

Section 2074(a) also would require that the Supreme Court transmit with a proposed rule proposed amendments to any law, "to the extent such amendments are necessary to implement such proposed rule or would otherwise promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." I question this provision on both legal and practical grounds. It would appear to require the Court to render an advisory opinion as to whether a proposed rule conflicts with an existing statute. Under Article III of the Constitution, which limits the judicial power to the decision of "cases" and "controversies," the Supreme Court cannot, of course, render "advisory opinions." See Flast v. Cohen, 392 U.S. 83, 95 (1968); Wright, Law of Federal Courts at 57 (4th ed. 1983).

As a drafting matter, I cannot understand the purpose of the language at page 4, lines 17-20, which is confusing and appears to be unnecessary.

Section 2074(b) would provide that "any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." This provision incorporates the language of 28 U.S.C. § 2076 (Rules of Evidence). I have no comment on it.

SEC. 2(b). ADVISORY COMMITTEES FOR COURTS.

Section 2(b) of H.R. 2633 would amend 28 U.S.C. § 2077(b) by striking out "of appeals" in the first line and inserting ", except the Supreme Court, that is authorized to prescribe rules of the conduct of such court's business under section 2071 of this title," and also by striking out "the court of appeals" in the third and fourth lines and inserting "such court." Section 2077(b) of Title 28 presently requires each court of appeals to appoint an advisory committee to study and to make recommendations concerning the court's rules of practice and internal operating procedures. The proposed amendments would also require the district courts, and all other courts established by Act of Congress (but not the Supreme Court), to appoint such advisory committees. A number of district courts have appointed such committees; it is clearly a desirable practice; and I endorse this provision.

SEC. 2(c) CLERICAL AMENDMENT.

I have no comment on this subsection.

SEC. 3. COMPILATION AND REVIEW OF LOCAL RULES

Section 3 of H.R. 2633 would amend 28 U.S.C. § 331 in two respects:

(1) Section 3 would insert in the fourth paragraph of Section 331 a requirement that the Judicial Conference periodically compile the rules and orders prescribed under 28 U.S.C. §§ 372(c)(11) and 372(c)(15). Section 372(c) of Title 28, the Judicial Discipline Act, P.L. 96-458, § 3(a) (1980), is not within the jurisdiction of the Standing Committee, and I shall not comment thereon.

(2) Section 3 would add after the fifth paragraph of Section 331 a new paragraph requiring the Judicial Conference periodically to compile the rules prescribed under 28 U.S.C. § 2071 by courts other than the Supreme Court so as to provide a current record thereof. The new paragraph would also require the Conference periodically to review such rules for consistency with rules prescribed under proposed Section 2072 of Title 28 and would authorize the Conference to modify or abrogate any rule found inconsistent. I question the necessity of a requirement that the Judicial Conference maintain a current record of circuit and district court rules. The Administrative Office of the United States Courts is the appropriate body to maintain a compilation of such rules. I also question that the Judicial Conference should be required to review district court rules for consistency with the Federal Rules of Procedure. Section 4(a)(2) of H.R. 2633, post, would require such review of district court rules by the judicial councils. Review by the Judicial Conference would be unnecessarily duplicative and wasteful of judicial time and resources. Finally, if the suggested revision of Section 4(b) of H.R. 2633, post, is accepted, Section 3(2) can be deleted as unnecessary.

SEC. 4. RULES BY DISTRICT COURTS AND ORDERS BY CIRCUIT JUDICIAL COUNCILS AND THE JUDICIAL CONFERENCE

SEC. 4(a) RULES BY DISTRICT COURTS

Section 4(a) of H.R. 2633 contains two subsections:

Section 4(a)(1) would amend 28 U.S.C. § 2071 by striking out "by the Supreme Court" and inserting "under section 2072 of this title," and by adding the following new paragraph[s] (sic):

> "Any such rule of a district court shall be made or amended only after giving appropriate public notice and an opportunity for comment. Such rule so made or amended shall take effect upon the date specified by the district court and shall remain in effect unless modified or abrogated by the District Court or modified or abrogated by the judicial council of the relevant circuit. Copies of such rules so made or amended shall be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.".

The proposed new paragraph in all material respects tracks the language of proposed Civil Rule 83 (Rules by District Courts) and proposed Criminal Rule 57 (Rules by District Courts) now pending before the Congress. See Amendments to the Federal Rules of Civil Procedure, Communication from the Chief Justice of the United States, April 30, 1985, 99th Congress, 1st Session, House Document 99-63; Amendments to the Federal Rules of Criminal Procedure, Communication from the Chief Justice of the United States, April 30, 1985, 99th Congress, 1st Session, House Document 99-64. I suggest that incorporation of the same provisions in a statute is unnecessary.

Section 4(a)(2) of H.R. 2633 would amend 28 U.S.C. § 332(d) by adding the following new paragraph:

"(4) Each judicial council shall periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title. Each council may modify or abrogate any such rule found inconsistent in the course of such a review.".

The proposed new paragraph would require each judicial council periodically to review district court rules for consistency with rules prescribed under proposed Section 2072 of Title 28 and would authorize the council to modify or abrogate any such rule found inconsistent. It is a reasonable requirement, and I have no comment.

SEC. 4(b) ORDERS BY CIRCUIT JUDICIAL COUNCILS.

Section 4(b) of H.R. 2633 would amend 28 U.S.C. § 332(d)(1) by inserting after the first sentence the following new sentence:

"Any general order relating to practice and procedure shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any such order so relating shall take effect upon the date specified by such judicial council. Copies of such orders so relating shall be furnished to the Judicial Conference and the Administrative Office of the United States Courts and be made available to the public.".

I sense that the intent of the drafters of this subsection was to create a procedure for the promulgation of circuit court rules which would parallel that for the promulgation of district court rules. Since circuit court rules are promulgated by the courts of appeals and not by

the circuit councils, the proposed amendment to Section 332(d)(1) of Title 28 does not seem appropriate. If I am correct as to the Subcommittee's intent, I suggest that Section 4(b) of H.R. 2633 be revised to read substantially as follows:

"(b) RULES BY CIRCUIT COURTS.--(1) Section 2071 of title 28 of the United States Code is amended by adding at the end the following paragraph:

"'Any such rule of a court of appeals shall be made or amended only after giving appropriate public notice and an opportunity for comment Such rule so made or amended shall take effect upon the date specified by the court of appeals and shall remain in effect unless modified or abrogated by the court of appeals or modified or abrogated by the Judicial Conference. Copies of such rules so made or amended shall be furnished to the Administrative Office of the United States Courts and be made available to the public.'"

"(2) Section 331 of title 28 of the United States Code is amended by adding after the fifth paragraph the following new paragraph:

"'The Judicial Conference shall periodically review the rules which are prescribed under section 2071 of this title by courts of appeals for consistency with rules prescribed under section 2072 of this title. The Judicial Conference may modify or abrogate any such rule found inconsistent in the course of such a review.'"

SEC. 4(c). RULES BY JUDICIAL CONFERENCE AND CIRCUIT JUDICIAL COUNCILS.

Section 4(c) of H.R. 2633 would amend 28 U.S.C. § 372(c)(11), the Judicial Discipline Act. That Act is not within the jurisdiction of the Standing Committee, and I shall not comment thereon.

SEC. 5. CONFORMING AND OTHER TECHNICAL AMENDMENTS.

Section 5 of H.R. 2633 contains technical and conforming amendments. I have no comment thereon.

SEC. 6. SAVINGS PROVISION.

Section 6 of H.R. 2633 is the savings clause. It would provide that rules prescribed in accordance with law before the effective date of the Act and still in effect shall remain in force until changed pursuant to the law as modified by the Act. Similar savings clauses have been included in earlier Rules Enabling Acts. This provision is reasonable, and I have no comment.

SEC. 7. EFFECTIVE DATE.

Section 7 of H.R. 2633 would provide that the Act shall take effect December 1, 1986. This effective date appears reasonable, and I have no comment.

CONCLUSION

I thank you, Mr. Chairman and Members of the Subcommittee, for the privilege of submitting these views.

COMMITTEE ON
RULES OF PRACTICE AND PROCEDURE

Honorable Edward T. Gignoux

Honorable Amalya L. Kearse

Honorable Walter R. Mansfield

Honorable Walter E. Hoffman

Professor Wade H. McCree, Jr.

Professor Wayne R. LaFave

Edward H. Hickey, Esquire

Gael Mahony, Esquire

ADVISORY COMMITTEE
ON
APPELLATE RULES

Honorable Pierce Lively

Honorable Joseph W. Hatchett

Honorable Edward Allen Tamm

Honorable Eugene A. Wright

Honorable Vincent L. McKusick

Honorable Edward D. Re

Ira C. Rothgerber, Jr., Esquire

Honorable Rex E. Lee

ADVISORY COMMITTEE
ON
CIVIL RULES

Honorable Frank M. Johnson, Jr.

Honorable Joseph F. Weis, Jr.

Honorable Charles E. Wiggins

Honorable John F. Grady

Honorable Mariana R. Pfaelzer

Honorable Walter Jay Skinner

Professor Maurice Rosenberg

David J. Anderson, Esquire

W. Reece Bader, Esquire

Larrine S. Holbrooke, Esquire

William T. Kirby, Esquire

Arthur L. Liman, Esquire

Reporter:

Professor Arthur R. Miller

ADVISORY COMMITTEE
ON
CRIMINAL RULES

Honorable Frederick B. Lacey

Honorable Sherman G. Finesilver

Honorable William L. Hungate

Honorable Leland C. Neilsen

Honorable William C. O'Kelley

Honorable Stephen S. Trott

James F. Hewitt, Esquire

Richard A. Green, Esquire

Herbert J. Miller, Jr., Esquire

Leon Silverman, Esquire

Reporter:

Professor Stephen A. Saltzburg

ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Honorable Morey L. Sear

Honorable Norman W. Black

Honorable Franklin T. Dupree, Jr.

Honorable Joel M. Flaum

Professor Robert W. Foster

Honorable Lloyd D. George

Honorable Beryl E. McGuire

Honorable Thomas A. Wiseman

Professor Lawrence P. King

Norman H. Nachman, Esquire

Joseph Patchan, Esquire

Reporter:

Professor Walter J. Taggart