PROPOSED RULE AMENDMENTS
OF SIGNIFICANT INTEREST

The following summary outlines considerations underlying the recommendations of the advisory committees and the Standing Rules Committee on topics that raised significant interest. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent together with this report.

Federal Rules of Appellate Procedure

I. Appellate Rule 35

A. Brief Description

The proposed amendment to Rule 35 resolves an inter-circuit conflict regarding the make-up of a vote for a hearing or rehearing en banc. Present Rule 35(a) and 28 U.S.C. § 46(c) both require a vote of a "majority of the circuit judges who are in regular active service" to hear a case en banc. Courts of appeals have interpreted differently the meaning of "majority." They are nearly evenly split between those that have adopted an "absolute-majority" counting method, under which recused judges are included in the base in calculating whether a "majority" has voted to hear a case en banc, and those that have adopted a "case-majority" counting method, under which recused judges are excluded from the base.

The proposed amendment adopts the "case-majority" counting method. Consistent with the quorum requirement of 28 U.S.C. § 46(d), however, the total number of non-recused judges voting on the en banc petition must still represent a majority of all of the circuit's active judges.

B. Arguments in Favor

- The proposed amendment resolves an intercircuit conflict that has resulted in disparate treatment for similarly situated litigants depending on the forum circuit. Under the amendment, the rule governing the make-up of the vote for an en banc hearing will be interpreted and applied uniformly among the courts of appeals.

- The "case-majority" counting method represents the best interpretation of the phrase "a majority of the circuit judges" in Rule 35(a) and § 46(c). Section 46(c) not only prescribes that a "majority of the circuit judges who are in regular active service" may vote to hear a case en banc, but it also provides that when a case is heard en banc, the en banc court "shall consist of all circuit judges in regular active service." The latter reference to "all circuit judges in regular active service" cannot include recused judges, because recused judges obviously cannot participate in the rehearing. The two references to "circuit judges in active service" in § 46(c) should be read consistently to exclude recused judges.

- Under the "absolute-majority" counting method, a recused judge is treated for practical purposes as though he or she had voted against hearing the case en banc. In such circumstances, a recused judge's negative "vote" might prevent a rehearing, leaving the underlying judgment intact and eliminating the possibility that the judgment might be overturned by an en banc court. The result seems inconsistent with the purpose of the rule and underlying statute to prevent a recused judge from having any effect on the outcome of a particular case.

C. Objections

- The intercircuit conflict does not impose a hardship on parties, as it does not require them to do or not to do anything.

- The case-majority counting method will increase the number of en banc hearings.

- The case-majority approach will result in en banc determinations by less than a majority of the judges.

D. Rules Committees' Consideration

The committees were concerned that Rule 35(a) was being interpreted and applied differently by the courts of appeals, inconsistent with the primary purpose of uniform national rules. Although the committees recognized that local conditions occasionally may justify exceptions from the general policy supporting uniform procedures in the federal courts, the committees did not find any good reason to depart from the general policy in these circumstances, particularly given that important rights are at stake.

The committees considered, but were not persuaded by, the arguments against adopting the case-majority counting method. They found no indication that the courts of appeals following the case-majority approach experienced an increased number of en banc hearings. As a practical matter, the number of en banc hearings is regulated by the members of the court through their votes, and the members of a court can control the number of hearings under any counting method. The committees also considered concerns that the case-majority approach could lead to en banc determinations by less than a majority of the judges, establishing precedent not fully endorsed by a majority of the court. But a similar problem arises under the absolute-majority rule, and in even more extreme form: When several judges are recused, the absolute-majority rule makes the panel opinion unreviewable en banc; that opinion can become the law of the circuit, even though it may have the support of only one or even no active judge of the circuit. Under either counting method, the full court is not prevented from reconsidering the precedent in a later case. Finally, the committees did not read *Shenker v. Baltimore & Ohio R.R. Co.,* 374 U.S. 1 (1963), which addressed the litigants' "right to know the administrative machinery that will be followed and the right to suggest that the en banc

procedure be set in motion," to be inconsistent with the proposed amendment. *Shenker* in no way suggested that "majority" should mean one thing in some circuits, and another thing in other circuits.

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