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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
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September 2, 1967

The Honorable Albert B. Maris, Chairman
Committee on Rules of Practice
and Procedure
5050 United States Courthouse
Philadelphia, Pennsylvania 19107

Dear Judge Maris:

I have received under date of August 29, 1967 a memorandum addressed to the Chairman, Reporter and Members of the Advisory Committee on Appellate Rules transmitting a copy of "the Committee report together with Judge Prettyman's letter of August 28, 1967, to Judge Maris regarding Rule 30." The enclosure is a complete set of Federal Rules of Appellate Procedure. I assume that that same set has been sent to the members of the Standing Committee. In the interest of clarifying matters, I should like to explain the exact origin of this most recent draft of Federal Rules of Appellate Procedure.

The final draft of proposed Uniform Rules of Federal Appellate Procedure was submitted by the Advisory Committee on Appellate Rules to the Standing Committee on Rules in August, 1966, and was considered by the Standing Committee at its meeting on September 7, 1966.

At that meeting the Standing Committee approved, with certain expressly directed modifications, all of the rules proposed by the Advisory Committee on Appellate Rules except proposed Rule 30 on Reproduction of Necessary Parts of the Record and proposed Rule 9 on Bail.

With respect to proposed Rule 30, the Standing Committee determined to circulate it among the bench and bar of the country as the proposal of the Advisory Committee on Appellate Rules along with two alternative drafts. Proposed Rule 9 was recommitted to the Reporter of the Appellate Rules Committee for further study in the light of the then recently enacted Bail Reform Act.

The Advisory Committee on Appellate Rules understood the action of the Standing Committee to be a request that it

(1) study the suggestions received in response to the circulation of the three drafts directed by the Standing Committee and make a final recommendation on a proposed rule on reproduction of necessary parts of the record in the light of that study; and (2) resubmit a proposed rule on release of prisoners in place of its proposed Rule 9 on Bail.

This it has done, and proposed Rule 9 on Release of Prisoners and proposed Rule 30 on Appendix to the Briefs constitute amendments to the final draft of proposed Uniform Rules of Federal Appellate Procedure originally submitted to the Standing Committee in August, 1966.

The Advisory Committee on Appellate Rules did not, however, feel free to restudy the modifications of its proposals that were directed by the Standing Committee at its meeting of September 7, 1966. Those modifications have been inserted in the set of Federal Rules of Appellate Procedure now being circulated, presumably to members of both Committees, but they do not form a part of the final recommendations of the Advisory Committee on Appellate Rules. They were inserted by the Reporter of that Committee on the instructions of the Standing Committee.

There is still another source of difference between the final recommendations of the Advisory Committee on Appellate Rules and the draft of Federal Rules of Appellate Procedure now being circulated. The Reporter of the Appellate Rules Committee assumed it to be his responsibility to both Committees to make such changes as seemed clearly necessary in the light of new legislation, court rules and decisions. With the exception of a change in Rule 23 on Custody of Prisoners in Habeas Corpus Proceedings to cause it to conform with the Supreme Court Rule adopted in June, 1967, such changes are confined to the Committee Notes. A single change results from an oversight (see Appendix, Rule 6).

There is set out in an appendix attached hereto a list of all changes from whatever source from the draft of Proposed Uniform Rules of Federal Appellate Practice submitted to the Standing Committee by the Advisory Committee on Appellate Rules in August, 1966.

With every best wish, I am,

Sincerely Yours,

Bernard J. Ward, Reporter
Appellate Rules Committee

APPENDIX

EXPLANATION OF DIFFERENCES BETWEEN DRAFT OF PROPOSED UNIFORM RULES OF FEDERAL APPELLATE PROCEDURE SUBMITTED BY ADVISORY COMMITTEE ON APPELLATE RULES TO THE COMMITTEE ON RULES IN AUGUST, 1966, AND DRAFT TO BE CONSIDERED BY COMMITTEE ON RULES AT ITS MEETING OF SEPTEMBER 12, 1967.

Rule 1. Scope of Rules

The first paragraph of the Note is new. It was added by the Reporter to indicate the Act of November 6, 1966, as the basic authority for the promulgation of the rules.

Rule 2. Suspension of Rules

The text of this rule has been changed precisely in accordance with the direction of the Committee on Rules. See Minutes of the September 1966 Meeting of the Committee on Rules of Practice and Procedure (hereafter, Min.) p. 2.

Rule 4. Appeal as of Right--When Taken.

The fifth sentence of Rule 4(b) is changed by substituting "government" for "United States." This change cures what appears to be an unintended textual variation. The sentence is taken from FRCrP 37(a)(2), where "government" appears.

Rule 6. Appeals by Allowance in Bankruptcy Proceedings.

The text of Rule 6(a) has been changed to correct the Reporter's oversight. The Appellate Rules Committee recommended that the time for taking appeals in Bankruptcy be made the same as in civil cases generally. That recommendation was embodied in its draft of proposed Rule 4, and it was accepted by the Committee on Rules. The Appellate Rules Committee, at the time of making the above recommendation, instructed the Reporter to make any other necessary changes to cause the rules to be in harmony with the basic change.

That instruction involved a change in Rule 6(a) which the Reporter overlooked. Rule 6(a) as transmitted to the Standing Committee and approved by it provided that a petition for allowance should be filed with the clerk of the court of appeals "within the time provided by section 25 of the [Bankruptcy] Act." That provision was consistent with the case law, which required the petition to be filed within the time fixed by the Act for taking an appeal. But once the Appellate Rules Committee [illegible] to change the time fixed for taking

appeals in bankruptcy, adherence to the prior practice of allowing a petition for allowance to be filed at any time within the time fixed for taking an appeal of right required that Rule 6(a) be changed by substituting "within the time provided by Rule 4 for filing a notice of appeal" in place of "within the time provided by section 25 of the Act." This change has be belatedly made. The result seemed to require the addition of a final sentence to Rule 6(a): "A notice of appeal need not be filed." That sentence repeats the identical statement found as the last sentence of Rule 6(d), but the repetition seems functional.

The Note has been changed to direct attention to and to explain the change from present practice.

Rule 9. Release of Prisoners.

This rule is new. Rule 9 as originally proposed by the Appellate Rules Committee regulated review of bail orders. The Committee on Rules recommited it to the Reporter for study in the light of the Bail Reform Act of 1966. The Appellate Rules Committee offers this rule as an amendment to its original proposal.

Rule 11. Transmission of the Record.

The text of Rule 11(b) has been changed precisely in accordance with the direction of the Committee on Rules. Min., p. 5.

Rule 12. Docketing the Appeal; Filing of the Record.

The text of Rule 12(a) has been changed in accordance with the direction of the Committee on Rules, Min., p. 5, and in accordance with the letter of its Chairman to the Reporter of October 25, 1966.

Rule 13. Review of Decisions of the Tax Court.

The text of Rule 13(a) has been changed precisely in accordance with the direction of the Committee on Rules. Min., p. 13.

The Note has been changed in the light of the textual change and to identify the Act of November 6, 1966, as the authority for the promulgation of rules to regulate review of Tax Court decisions.

Rule 15. Review or Enforcement of Agency Orders--How Obtained; Intervention.

The text of Rule 15(a) has been changed in accordance with the direction of the Committee on Rules. See Min., p. ~~15.~~ 6.

The Note has been changed in the light of the textual change and to identify the Act of November 6, 1966 as the authority for the promulgation of rules to regulate review of agency orders.

Rule 22. Habeas Corpus Proceedings.

The Text of Rule 22(a) has been changed precisely in accordance with the direction of the Committee on Rules. Min., p. 7.

The second paragraph of the Note to Subdivision (a) is new. It is added in accordance with the direction of the Committee on Rules. Min., p. 7.

Rule 23. Custody of Prisoners in Habeas Corpus Proceedings.

Two changes have been made by the Reporter in this rule, both in the light of the promulgation by the Supreme Court on June 12, 1967 of a new rule on Custody of Prisoners in Habeas Corpus Proceedings (Supreme Court Rule 49). The Reporter assumed that the Committee on Rules would wish the changes made. He invites the careful consideration of the Committee to the changes.

The text has been changed by the addition of new subdivision (d).

The Note has been changed by striking it entirely and substituting "The rule is the same as Supreme Court Rule 49, as amended on June 12, 1967, effective October 2, 1967.

The change in the text restores a subdivision initially recommended to the Supreme Court by the Appellate Rules Committee in response to a request from the Court made in 1965 that the Committee study its rule on custody of prisoners with a view to suggesting improvement. Between the time of its recommendation to the Court and that of its recommendation to the Committee on Rules, the Appellate Rules Committee decided to omit what is added subdivision (d).

The Appellate Rules Committee is firmly of the view that there can be no difference between courts of appeals and Supreme Court regulation of the subject. As the Reporter ex-

plained to the Committee on Rules, the Appellate Rules Committee offered a new rule on the subject only with the understanding that the Supreme Court would be advised of the difference between its proposed rule and former Supreme Court Rule 49 and of the necessity for either abrogating or amending the latter.

As noted, the Supreme Court has since amended its Rule 49 precisely along the lines recommended by the Appellate Rules Committee. But a complicating incident is that in the meantime the Appellate Rules Committee reconsidered its recommendation to the Court and decided to omit subdivision (d) as superfluous. So once again the two rules are not precisely in accord. The solution offered by the Reporter is to add subdivision (d). It may be that the subdivision is superfluous, but this will lead to fewer problems than will a conflict between the Supreme Court Rule and the Uniform Rule.

The reason for reducing the original, very detailed Note to a single sentence is that the purpose of the original Note was to explain the reasons why the proposed rule differed from then Supreme Court Rule 49. Since the Court has since changed its rule, there seems little point in criticizing its former rule. It is true that the original note provides an interesting "legislative history" for the Supreme Court Rule as well as this rule. But since the Court itself declines to provide that sort of history for its own rules, there may be an impropreity involved in this Committee's providing it.

Rule 27. Motions.

The text of Rule 27(c) has been changed precisely in accordance with the direction of the Committee on Rules. Min., pp. 8-9.

Rule 28. Briefs.

The text of Rule 28(d) has been changed in accordance with the direction of the Committee on Rules, Min., p. 9, and in accordance with the letter of its Chairman to the Reporter of October 25, 1966. (The comma inserted between "names" and "of parties" in the second sentence is a typographical error and should be omitted.)

The text of Rule 28(e) has been changed precisely in accordance with the direction of the Committee on Rules. Min., p. 9.

Rule 30. Appendix to the Briefs.

This rule is new. It is submitted by the Advisory Committee on Appellate Rules as its final recommendation with respect to a rule on reproduction of parts of the record on appeal.

Rule 31. Filing and Service of Briefs and the Appendix.

The textof Rule 31(c) has been changed precisely in accordance with the direction of the Committee on Rules. Min., p. 11. (It should be noted that if proposed Rule 30 is accepted, this rule must be revised to eliminate references to the appendix, since proposed Rule 30 itself fixes the time for filing and the number of copies of the appendix.)

Rule 32. Form of Briefs, the Appendix and Other Papers.

The text of Rule 32(a) has been changed precisely in accordance with the direction of the Committee on Rules. Min., p. 11.

Rule 34. Oral Argument.

The text of Rule 34(b) has been changed precisely in accordance with the direction of the Committee on Rules. Min., p. 11.

The note to Rule 34(b) has been changed to reflect the fact that a majority of circuits no longer allow 45 minutes of oral argument. Reduction of the time to 30 minutes by the Third Circuit in 1967 brings to seven the number of circuits which limit oral argument to 30 minutes in the ordinary case.

Rule 39. Costs.

Minor changes have been made in the notes to subdivisions (b),(c) and (e) to reflect changes in court rules and to add a relevant recent decision.

Rule 46. Attorneys.

The text of Rule 46(b) and of Rule 46(c) has been changed precisely in accordance with the direction of the Committee on Rules. Min., p. 13.

FEDERAL RULES OF APPELLATE PROCEDURE

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TITLE I. APPLICABILITY OF RULES

RULE 1. SCOPE OF RULES

(a) Scope of Rules. These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the Tax Court of the United States; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give.

(b) Rules Not to Affect Jurisdiction. These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.

Advisory Committee's Note

These rules are drawn under the authority of 28 U.S.C. § 2072, as amended by the Act of November 6, 1966, 80 Stat. 1323 (1 U.S. Code Cong. & Ad. News 1546 (1966)) (Rules of Civil Procedure); 28 U.S.C. § 2075 (Bankruptcy Rules); and 18 U.S.C. §§ 3771 (Procedure to and including verdict) and 3772 (Procedure after verdict). Those statutes combine to give to the Supreme Court power to make rules of practice and procedure for all cases within the jurisdiction of the courts of appeals. By the terms of the statutes, after the rules have taken effect all laws in conflict with them are of no further force or effect. Practice and procedure in the eleven courts of appeals are now regulated by rules promulgated by each court under the authority of 28 U.S.C. § 2071. Rule 47 expressly authorizes the courts of appeals to make rules of practice not inconsistent with these rules.

As indicated by the titles under which they are found, the following rules are of special application: Rules 3 through 12 apply to appeals from judgments and orders of the district courts; Rules 13 and 14 apply to appeals from decisions of the Tax Court (Rule 13 establishes an appeal as the mode of review of decisions of the Tax Court in place of the present petition for review); Rules 15 through 20 apply to proceedings for review or enforcement of orders

of administrative agencies, boards, commissions and officers. Rules 22 through 24 regulate habeas corpus proceedings and appeals in forma pauperis. All other rules apply to all proceedings in the courts of appeals.

RULE 2. SUSPENSION OF RULES

In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

Advisory Committee's Note

The primary purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules. The rule also contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result. Rule 26(b) prohibits a court of appeals from extending the time for taking appeal or seeking review.

TITLE II. APPEALS FROM JUDGMENTS AND ORDERS OF DISTRICT COURTS

RULE 3. APPEAL AS OF RIGHT--HOW TAKEN

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

(b) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(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; and in criminal cases, habeas corpus proceedings, or proceedings under 28 U.S.C. § 2255, the clerk shall mail 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, either by personal service or by mail addressed to him. 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 counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

Advisory Committee's Note

General Note. Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is "mandatory and jurisdictional" United States v. Robinson, 361 U.S. 220, 224 (1960), compliance with the provisions of these rules is of the utmost importance. But the proposed rules merely restate, in modified form, provisions now found in the civil and criminal rules (FRCP 5(e), 73; FRCrP 37), and decisions under the present rules which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules. Illustrative decisions are: Fallen v. United States, 378 U.S. 139 (1964) (notice of appeal by a prisoner, in the form of a letter delivered, well within the time fixed for appeal, to prison authorities for mailing to the clerk of the district court held timely filed notwithstanding that it was received by the clerk after expiration of the time for appeal; the appellant "did all he could" to effect timely filing); Richey v. Wilkins, 335 F.2d 1 (2d Cir. 1964) (notice filed in the court of appeals by a prisoner without assistance of counsel held sufficient); Halfen v. United States,

324 F.2d 52 (10th Cir. 1963) (notice mailed to district judge in time to have been received by him in normal course held sufficient); Riffle v. United States, 299 F.2d 802 (5th Cir., 1962) (letter of prisoner to judge of court of appeals held sufficient). Earlier cases evidencing "a liberal view of papers filed by indigent and incarcerated defendants" are listed in Coppedge v. United States, 369 U.S. 438, 442, n. 5 (1962).

Subdivision (a). The substance of this subdivision is derived from FRCP 73(a) and FRCrP 37(a)(1). The proposed rule follows those rules in requiring nothing other than the filing of a notice of appeal in the district court for the perfection of the appeal. The petition for allowance (except for appeals governed by Rules 5 and 6), citations, assignments of error, summons and severance--all specifically abolished by earlier modern rules--are assumed to be sufficiently obsolete as no longer to require pointed abolition.

Subdivision (b). The first sentence is derived from FRCP 74. The second sentence is added to encourage consolidation of appeals whenever feasible.

Subdivision (c). This subdivision is identical with corresponding provisions in FRCP 73(b) and FRCrP 37(a)(1).

Subdivision (d). This subdivision is derived from FRCP 73(b) and FRCrP 37(a)(1). The duty of the clerk to

forward a copy of the notice of appeal and of the docket entries to the court of appeals in a criminal case is extended to habeas corpus and 28 U.S.C. § 2255 proceedings.

RULE 4. APPEAL AS OF RIGHT - WHEN TAKEN

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion

for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion

in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

Advisory Committee's Note

Subdivision (a). This subdivision is derived from FRCP 73(a) without any change of substance. The requirement that a request for an extension of time for filing the notice of appeal made after expiration of the time be made by motion and on notice codifies the result reached under the present provisions of FRCP 73(a) and 6(b). North Umberland Mining Co. v. Standard Accident Ins. Co., 193 F.2d 951 (9th Cir., 1952); Cohen v. Plateau Natural Gas Co., 303 F.2d 273 (10th Cir., 1962); Plant Economy, Inc. v. Mirror Insulation Co., 308 F.2d 275 (3d Cir., 1962).

Since this subdivision governs appeals in all civil cases, it supersedes the provisions of section 25 of the Bankruptcy Act (11 U.S.C. § 48). Except in cases to which the United States or an officer or agency thereof is a party, the change is a minor one, since a successful litigant in a bankruptcy proceeding may, under section 25, oblige an aggrieved party to appeal within 30 days after entry of judgment - the time fixed by this subdivision in cases involving private parties only - by serving him with notice of entry on the day thereof, and by the terms of section 25 an aggrieved party must in any event appeal within 40 days after entry of judgment. No reason appears why the time

for appeal in bankruptcy should not be the same as that in civil cases generally. Furthermore, section 25 is a potential trap for the uninitiated. The time for appeal which it provides is not applicable to all appeals which may fairly be termed appeals in bankruptcy. Section 25 governs only those cases referred to in section 24 as "proceedings in bankruptcy" and "controversies arising in proceedings in bankruptcy." Lowenstein v. Reikes, 54 F.2d 481 (2d Cir., 1931), cert. den., 285 U.S. 539 (1932). The distinction between such cases and other cases which arise out of bankruptcy is often difficult to determine. See 2 Moore's Collier on Bankruptcy ¶ 24.12 through ¶ 24.36 (1962). As a result it is not always clear whether an appeal is governed by section 25 or by FRCP 73(a), which is applicable to such appeals in bankruptcy as are not governed by section 25.

In view of the unification of the civil and admiralty procedure accomplished by the amendments of the Federal Rules of Civil Procedure effective July 1, 1966, this subdivision governs appeals in those civil actions which involve admiralty or maritime claims and which prior to that date were known as suits in admiralty.

The only other change possibly effected by this subdivision is in the time for appeal from a decision of a

district court on a petition for impeachment of an award of a board of arbitration under the Act of May 20, 1926, c. 347, § 9 (44 Stat. 585), 45 U.S.C. § 159. The act provides that a notice of appeal from such a decision shall be filed within 10 days of the decision. This singular provision was apparently repealed by the enactment in 1948 of 28 U.S.C. § 2107, which fixed 30 days from the date of entry of judgment as the time for appeal in all actions of a civil nature except actions in admiralty or bankruptcy matters or those in which the United States is a party. But it was not expressly repealed, and its status is in doubt. See 7 Moore's Federal Practice ¶ 73.09[2] (1966). The doubt should be resolved, and no reason appears why appeals in such cases should not be taken within the time provided for civil cases generally.

Subdivision (b). This subdivision is derived from FRCrP 37(a)(2) without change of substance.

RULE 5. APPEALS BY PERMISSION UNDER 28 U.S.C. § 1292(b)

(a) Petition for Permission to Appeal. An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court with proof of service on all other parties to the action in the district court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.

(b) Content of Petition; Answer. The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. The petition shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. Within 7 days after service of the petition an adverse party may file an answer in opposition. The application and answer shall be submitted 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) Grant of Permission; Cost Bond; Filing of Record. If permission to appeal is granted the appellant shall file a bond for costs as required by Rule 7, within 10 days after entry of the order granting permission to appeal, and the record shall be transmitted and filed and the appeal docketed in accordance with Rules 11 and 12. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of the entry of the order granting permission to appeal. A notice of appeal need not be filed.

Advisory Committee's Note

This rule is derived in the main from Third Circuit Rule 11 (2), which is similar to the rule governing appeals under 28 U.S.C. § 1292(b) in a majority of the circuits. The second sentence of subdivision (a) resolves a conflict over the question of whether the district court can amend an order by supplying the statement required by § 1292(b) at any time after entry of the order, with the result that the time fixed by the statute commences to run on the date of entry of the order as amended. Compare Milbert v. Bison Laboratories, 260 F.2d 431 (3d Cir., 1958) with Sperry Rand Corporation v. Bell Telephone Laboratories, 272 F.2d 29 (2d Cir., 1959), Hadjipateras v. Pacifica, S.A., 290 F.2d 697 (5th Cir., 1961), and Houston Fearless Corporation v. Teter, 313 F.2d 91 (10th Cir., 1962). The view taken by the Second, Fifth and Tenth Circuits seems theoretically and practically sound, and the rule adopts it. Although a majority of the circuits now require the filing of a notice of appeal following the grant of permission to appeal, filing of the notice serves no function other than to provide a time from which the time for transmitting the record and docketing the appeal begins to run.

RULE 6. APPEALS BY ALLOWANCE IN BANKRUPTCY PROCEEDINGS

(a) Petition for Allowance. Allowance of an appeal under section 24 of the Bankruptcy Act (11 U.S.C. § 47) from orders, decrees, or judgments of a district court involving less than $500, or from an order making or refusing to make allowances of compensation or reimbursement under sections 250 or 498 thereof (11 U.S.C. § 650, § 898) shall be sought by filing a petition for allowance 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.

(b) Content of Petition; Answer. The petition 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 of any opinion or memorandum relating thereto. Within 7 days after service of the petition an adverse party may file an answer in opposition. The petition and answer shall be submitted 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; Cost Bond; Filing of Record. If the appeal is allowed the appellant shall file a bond for costs as required by Rule 7, within 10 days of the entry of the order granting permission to appeal, and the record shall be transmitted and filed and the appeal docketed in accordance with Rules 11 and 12. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of the entry of the order allowing the appeal. A notice of appeal need not be filed.

Advisory Committee's Note

This rule is substantially a restatement of present procedure. See D. C. Cir. Rule 34; 6th Cir. Rule 11; 7th Cir. Rule 10(d); 10th Cir. Rule 13.

Present circuit rules commonly provide that the petition for allowance of an appeal shall be filed within the time allowed by Section 25 of the Bankruptcy Act for taking appeals of right. For the reasons explained in the Note accompanying Rule 4, that rule makes the time for appeal in bankruptcy cases the same as that which obtains in other civil cases and thus supersedes Section 25. Thus the present rule simply continues the former practice of making the time for filing the petition in appeals by allowance the same as that provided for filing the notice of appeal in appeals of right.

RULE 7. BOND FOR COSTS ON APPEAL IN CIVIL CASES

Unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal, in civil cases a bond for costs on appeal or equivalent security shall be filed by the appellant in the district court with the notice of appeal; but security shall not be required of an appellant who is not subject to costs. The bond or equivalent security shall be in the sum or value of $250 unless the district court fixes a different amount. A bond for costs on appeal shall have sufficient surety, and it or any equivalent security shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed, or of such costs as the court of appeals may direct if the judgment is modified. If a bond or equivalent security in the sum or value of $250 is given, no approval thereof is necessary. After a bond for costs on appeal is filed, an appellee may raise for determination by the clerk of the district court objections to the form of the bond or to the sufficiency of the surety. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

Advisory Committee's Note

This rule is derived from FRCP 73(c) without change in substance.

RULE 8. STAY OR INJUNCTION PENDING APPEAL

(a) Stay Must Ordinarily be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals. Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

(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 agent upon whom any papers affecting his liability on the bond or undertaking may be served. His 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.

(c) Stays in Criminal Cases. Stays in criminal cases shall be had in accordance with the provisions of Rule 38(a) of the Federal Rules of Criminal Procedure.

Advisory Committee's Note

Subdivision (a). While the power of a court of appeals to stay proceedings in the district court during the pendency of an appeal is not explicitly conferred by statute, it exists by virtue of the all writs statute, 28 U.S.C. § 1651. Eastern Greyhound Lines v. Fusco, 310 F.2d 632 (6th Cir., 1962); United States v. Lynd, 301 F.2d 818 (5th Cir., 1962); Public Utilities Commission v. Capital Transit Co., 214 F.2d 242 (D.C. Cir., 1954). And the Supreme Court has termed the power "inherent" (In re McKenzie, 180 U.S. 536, 551 (1901)) and "part of its (the court of appeals') traditional equipment for the administration of justice." (Scripps-Howard Radio v. F.C.C., 316 U.S. 4, 9-10 (1942)). The power of a single judge of the court of appeals to grant a stay pending appeal was recognized in In re McKenzie, supra. Alexander v. United States, 173 F.2d 865 (9th Cir., 1949) held that a single judge could not stay the judgment of a district court, but it noted the absence of a rule of court authorizing the practice. FRCP 62(g) adverts to the grant of a stay by a single judge of the appellate court. The requirement that application be first made to the district court is the case law rule. Cumberland Tel. & Tel. Co. v. La. Public Service Commission, 260 U.S. 212, 219 (1922); United States v. El-O-Pathic Pharmacy, 192 F.2d 62 (9th Cir., 1951); United States v. Hansell, 109

F.2d 613 (2d Cir., 1940). The requirement is explicitly stated in FRCrP 38(c) and in the rules of the First, Third, Fourth and Tenth Circuits. See also Supreme Court Rules 18 and 27.

The statement of the requirement in the proposed rule would work a minor change in present practice. FRCP 73(e) requires that if a bond for costs on appeal or a supersedeas bond is offered after the appeal is docketed, leave to file the bond must be obtained from the court of appeals. There appears to be no reason why matters relating to supersedeas and cost bonds should not be initially presented to the district court whenever they arise prior to the disposition of the appeal. The requirement of FRCP 73(e) appears to be a concession to the view that once an appeal is perfected, the district court loses all power over its judgment. See In re Federal Facilities Realty Trust, 227 F.2d 651 (7th Cir., 1955) and cases cited at 654-55. No reason appears why all questions related to supersedeas or the bond for costs on appeal should not be presented in the first instance to the district court in the ordinary case.

Subdivision (b). The provisions respecting a surety upon a bond or other undertaking are based upon FRCP 65.1.

RULE 9. RELEASE IN CRIMINAL CASES

(a) Appeals from Orders Respecting Release Entered Prior to a Judgment of Conviction. An appeal authorized by law from an order refusing or imposing conditions of release shall be determined promptly. Upon entry of an order refusing or imposing conditions of release, the district court shall state in writing the reasons for the action taken. The appeal shall be heard without the necessity of briefs after reasonable notice to the appellee upon such papers, affidavits, and portions of the record as the parties shall present. The court of appeals or a judge thereof may order the release of the appellant pending the appeal.

(b) Release Pending Appeal from a Judgment of Conviction. Application for release after a judgment of conviction shall be made in the first instance in the district court. If the district court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee. The court of appeals or a judge thereof may order the release of the appellant pending disposition of the motion.

Advisory Committee's Note

Subdivision (a). The appealability of release orders entered prior to a judgment of conviction is determined by the provisions of 18 U.S.C. § 3147, as qualified by 18 U.S.C. § 3148, and by the rule announced in Stack v. Boyle, 342 U.S. 1 (1951), holding certain orders respecting release appealable as final orders under 28 U.S.C. § 1291. The language of the rule, "(a)n appeal authorized by law from an order refusing or imposing conditions of release," is intentionally broader than that used in 18 U.S.C. § 3147 in describing orders made appealable by that section. The summary procedure ordained by the rule is intended to apply to all appeals from orders respecting release, and it would appear that at least some orders not made appealable by 18 U.S.C. § 3147 are nevertheless appealable under the Stack v. Boyle rationale. See, for example, United States v. Foster, 278 F.2d 567 (2d Cir., 1960), holding appealable an order refusing to extend bail limits. Note also the provisions of 18 U.S.C. § 3148, which after withdrawing from persons charged with an offense punishable by death and from those who have been convicted of an offense the right of appeal granted by 18 U.S.C. § 3147, expressly preserves "other rights to judicial review of conditions

of release or orders of detention."

The purpose of the subdivision is to insure the expeditious determination of appeals respecting release orders, an expedition commanded by 18 U.S.C. § 3147 and by the Court in Stack v. Boyle, supra. It permits such appeals to be heard on an informal record without the necessity of briefs and on reasonable notice. Equally important to the just and speedy disposition of these appeals is the requirement that the district court state the reasons for its decision. See Jones v. United States, 358 F.2d 543 (D.C. Cir., 1966); Rhodes v. United States, 275 F.2d 78 (4th Cir., 1960); United States v. Williams, 253 F.2d 144 (7th Cir., 1958).

Subdivision (b). This subdivision regulates procedure for review of an order respecting release at a time when the jurisdiction of the court of appeals has already attached by virtue of an appeal from the judgment of conviction. Notwithstanding the fact that jurisdiction has passed to the court of appeals, both 18 U.S.C. § 3148 and FRCrP 38(c) contemplate that the initial determination of whether a convicted defendant is to be released pending the appeal is to be made by the district court. But at this point there is obviously no need for a separate appeal from the order of the district court respecting

release. The court of appeals or a judge thereof has power to effect release on motion as an incident to the pending appeal. See FRCrP 38(c) and 46(a)(2). But the motion is functionally identical with the appeal regulated by subdivision (a) and requires the same speedy determination if relief is to be effective. Hence the similarity of the procedure outlined in the two subdivisions.

RULE 10. THE RECORD ON APPEAL

(a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered. 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 deems necessary for inclusion in the record. 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 shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts to be included.

If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the district court for an order requiring the appellant to do so. At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(c) Statement of 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 recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 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.

(d) Agreed Statement as the Record on Appeal. In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as

the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the court of appeals as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 11. Copies of the agreed statement may be filed as the appendix required by Rule 30.

(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

Advisory Committee's Note

This rule is derived from FRCP 75(a), (b), (c) and (d) and FRCP 76, without change in substance.

RULE 11. TRANSMISSION OF THE RECORD

(a) Time for Transmission; Duty of Appellant. The record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the court of appeals within 40 days after the filing of the notice of appeal unless the time is shortened or extended by an order entered under subdivision (d) of this rule. After filing the notice of appeal the appellant shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is taken, each appellant shall comply with the provisions of Rule 10(b) and this subdivision, and a single record shall be transmitted within 40 days after the filing of the final notice of appeal.

(b) Duty of Clerk to Transmit the Record. When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it 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 the documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted by the clerk unless he 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.

Transmission of the record is effected when the clerk of the district court mails or otherwise forwards the record to the clerk of the court of appeals. The clerk of the district court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the court of appeals.

(c) Temporary Retention of Record in District Court for Use in Preparing Appellate Papers. Notwithstanding the provisions of subdivisions (a) and (b) of this rule, the parties may stipulate, or the district court on motion of any party may order, that the clerk of the district court shall temporarily retain the record for use by the parties in preparing appellate papers. In that event, the appellant shall nevertheless cause the appeal to be docketed and the record to be filed within the time fixed or allowed for transmission of the record by complying with the provisions of Rule 12(a) and by presenting to the clerk of the court of appeals a partial record in the form of a copy of the docket entries, accompanied by a certificate of counsel for the appellant, or of the appellant if he is without counsel, reciting that the record, including the transcript or parts

thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the court may order, the appellant shall request the clerk of the district court to transmit the record.

(d) Extension of Time for Transmission of the Record; Reduction of Time. The district court for cause shown may extend the time for transmitting the record. A request for extension must be made within the time originally prescribed or within an extension previously granted, and the district court shall not extend the time to a day more than 90 days from the date of filing of the first notice of appeal. If the district court is without authority to grant the relief sought or has denied a request therefor, the court of appeals may on motion for cause shown extend the time for transmitting the record or may permit the record to be transmitted and filed after the expiration of the time allowed or fixed. If a request for an extension of time for transmitting the record has been previously denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given. The district court or the court of appeals may require the record to be transmitted and the appeal to be docketed at any time within the time otherwise fixed or allowed therefor.

(e) Retention of the Record in the District Court by Order of Court. The court of appeals may provide by rule or

order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record or any part thereof is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record or parts thereof subject to the request of the court of appeals, and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow and copies of such parts as the parties may designate.

(f) Stipulation of Parties That Parts of the Record be Retained in the District Court. The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(g) Record for Preliminary Hearing in the Court of Appeals. If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for

any intermediate order, the clerk of the district court at the request of any party shall transmit to the court of appeals such parts of the original record as any party shall designate.

Advisory Committee's Note

Subdivisions (a) and (b). These subdivisions are derived from FRCP 73(g) and FRCP 75(e). FRCP 75(e) presently directs the clerk of the district court to transmit the record within the time allowed or fixed for its filing, which, under the provisions of FRCP 73(g) is within 40 days from the date of filing the notice of appeal, unless an extension is obtained from the district court. The precise time at which the record must be transmitted thus depends upon the time required for delivery of the record from the district court to the court of appeals, since, to permit its timely filing, it must reach the court of appeals before expiration of the 40-day period or an extension thereof. Subdivision (a) of this rule provides that the record is to be transmitted within the 40-day period, or any extension thereof; subdivision (b) provides that transmission is effected when the clerk of the district court mails or otherwise forwards the record to the clerk of the court of appeals; Rule 12(b) directs the clerk of the court of appeals to file the record upon its receipt following timely docketing and transmittal. It can thus be determined with certainty precisely when the clerk of the district court must forward the record to the clerk of the court of appeals in order to effect timely filing: the final day of the 40-day period or of any extension thereof.

Subdivision (c). This subdivision is derived from FRCP 75(e) without change of substance.

Subdivision (d). This subdivision is derived from FRCP 73(g) and FRCrP 39(c). Under present rules the district court is empowered to extend the time for filing the record and docketing the appeal. Since under the proposed rule timely transmission now insures timely filing (see note to subdivisions (a) and (b) above) the power of the district court is expressed in terms of its power to extend the time for transmitting the record. Restriction of that power to a period of 90 days after the filing of the notice of appeal represents a change in the rule with respect to appeals in criminal cases. FRCrP 39(c) now permits the district court to extend the time for filing and docketing without restriction. No good reason appears for a difference between the civil and criminal rule in this regard, and subdivision (d) limits the power of the district court to extend the time for transmitting the record in all cases to 90 days from the date of filing the notice of appeal, just as its power is now limited with respect to docketing and filing in civil cases. Subdivision (d) makes explicit the power of the court of appeals to permit the record to be filed at any time. See Pyramid Motor Freight Corporation v. Ispass, 330 U.S. 695 (1947).

Subdivisions (e), (f) and (g). These subdivisions are derived from FRCP 75(f), (a) and (g), respectively, without change of substance.

RULE 12. DOCKETING THE APPEAL; FILING OF THE RECORD

(a) Docketing the Appeal. Within the time allowed or f. 'd for transmission of the record, the appellant shall pay to the clerk of the court of appeals the docket fee fixed by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1913, and the clerk shall thereupon enter the appeal upon the docket. If an appellant is authorized to prosecute the appeal without prepayment of fees, the clerk shall enter the appeal upon the iocket at the request of a party or at the time of filing the record. The court of appeals may upon motion for cause shown enlarge the time for docketing the appeal or permit the appeal to be docketed out of time. 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 name, identified as appellant, shall be added to the title.

(b) Filing of the Record. Upon receipt of the record or of papers authorized to be filed in lieu of the record under the provisions of Rule 11(c) and (e) by the clerk of the court of appeals following timely transmittal, and after the appeal has been timely docketed, the clerk shall file the record. The clerk shall immediately give notice to all parties of the date on which the record was filed.

(c) Dismissal for Failure of Appellant to Cause Timely Transmission or to Docket Appeal. If the appellant shall fail to cause timely transmission of the record or to pay the docket fee if a docket fee is required, any appellee may file a motion in the court of appeals to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the district court showing the date and substance of the judgment or order from which the appeal was taken, the date on which the notice of appeal was filed, the expiration date of any order extending the time for transmitting the record, and by proof of service. The appellant may respond within 14 days of such service. The clerk shall docket the appeal for the purpose of permitting the court to entertain the motion without requiring payment of the docket fee, but the appellant shall not be permitted to respond without payment of the fee unless he is otherwise exempt therefrom.

Advisory Committee's Note

Subdivision (a). All that is involved in the docketing of an appeal is the payment of the docket fee. In practice, after the clerk of the court of appeals receives the record from the clerk of the district court he notifies the appellant of its receipt and requests payment of the fee. Upon receipt of the fee, the clerk enters the appeal upon the docket and files the record. The appellant is allowed to pay the fee at any time within the time allowed or fixed for transmission of the record and thereby to discharge his responsibility for docketing. The final sentence is added in the interest of facilitating future reference and citation and location of cases in indexes. Compare 3d Cir. Rule 10(2); 4th Cir. Rule 9(8); 6th Cir. Rule 14(1).

Subdivision (c). The rules of the circuits generally permit the appellee to move for dismissal in the event the appellant fails to effect timely filing of the record. See 1st Cir. Rule 21(3); 3d Cir. Rule 21(4); 5th Cir. Rule 16(1); 8th Cir. Rule 7(d).

TITLE III. REVIEW OF DECISIONS OF THE TAX COURT OF THE UNITED STATES

RULE 13. REVIEW OF DECISIONS OF THE TAX COURT

(a) How Obtained; Time for Filing Notice of Appeal. Review of a decision of the Tax Court of the United States shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.

The running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order disposing of such motion, or from the entry of decision, whichever is later.

(b) Notice of Appeal--How Filed. The notice of appeal may be filed by deposit in the office of the clerk of the Tax Court in the District of Columbia or by mail addressed to the clerk. If a notice is delivered to the clerk by mail and is received after expiration of the last day allowed for filing, the postmark date shall be deemed to be the date of delivery, subject to the provisions of § 7502 of the Internal Revenue

Code of 1954, as amended, and the regulations promulgated pursuant thereto.

(c) Content of the Notice of Appeal; Service of the Notice; Effect of Filing and Service of the Notice. The content of the notice of appeal, the manner of its service, and the effect of the filing of the notice and of its service shall be as prescribed by Rule 3. Form 2 in the Appendix of Forms is a suggested form of the notice of appeal.

(d) The Record on Appeal; Transmission of the Record; Filing of the Record. The provisions of Rules 10, 11 and 12 respecting the record and the time and manner of its transmission and filing and the docketing of the appeal in the court of appeals in cases on appeal from the district courts shall govern in cases on appeal from the Tax Court. Each reference in those rules and in Rule 3 to the district court and to the clerk of the district court shall be read as a reference to the Tax Court and to the clerk of the Tax Court respectively. If appeals are taken from a decision of the Tax Court to more than one court of appeals, the original record shall be transmitted to the court of appeals named in the first notice of appeal filed. Provision for the record in any other appeal shall be made upon appropriate application by the appellant to the court of appeals to which such other appeal is taken.

Advisory Committee's Note

Subdivision (a). This subdivision effects two changes in practice respecting review of Tax Court decisions: (1) Section 7483 of the Internal Revenue Code, 68A Stat. 891, 26 U.S.C. § 7483, provides that review of a Tax Court decision may be obtained by filing a petition for review. The subdivision provides for review by the filing of the simple and familiar notice of appeal used to obtain review of district court judgments; (2) Section 7483, supra, requires that a petition for review be filed within 3 months after a decision is rendered, and provides that if a petition is so filed by one party, any other party may file a petition for review within 4 months after the decision is rendered. In the interest of fixing the time for review with precision, the proposed rule substitutes "90 days" and "120 days" for the statutory "3 months" and "4 months", respectively. The power of the Court to regulate these details of practice is clear. Title 28 U.S.C., § 2072, as amended by the Act of November 6, 1966, 80 Stat. 1323 (1 U.S. Code Cong. & Ad. News 1546 (1966)), authorizes the Court to regulate ". . . practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States . . . ."

The second paragraph states the settled teaching of the case law. See Robert Louis Stevenson Apartments, Inc. v. C.I.R., 337 F.2d 681, (8th Cir., 1964); Denholm & McKay Co. v. C.I.R., 132 F.2d 243 (1st Cir., 1942); Helvering v. Continental Oil Co., 68 F.2d 750 (D.C. Cir., 1934); Burnet v. Lexington Ice & Coal Co., 62 F.2d 906 (4th Cir., 1933); Griffiths v. C.I.R., 50 F.2d 782 (7th Cir., 1931).

Subdivision (b). The subdivision incorporates the statutory provision (Title 26, U.S.C., § 7502) that timely mailing is to be treated as timely filing. The statute contains special provisions respecting other than ordinary mailing. If the notice of appeal is sent by registered mail, registration is deemed prima facie evidence that the notice was delivered to the clerk of the Tax Court, and the date of registration is deemed the postmark date. If the notice of appeal is sent by certified mail, the effect of certification with respect to prima facie evidence of delivery and the postmark date depends upon regulations of the Secretary of the Treasury. The effect of a postmark made other than by the United States Post Office likewise depends upon regulations of the Secretary. Current regulations are found in 26 CFR § 301.7502-1.

RULE 14. APPLICABILITY OF OTHER RULES TO REVIEW OF DECISIONS OF THE TAX COURT

All provisions of these rules are applicable to review of a decision of the Tax Court, except that Rules 4-9, Rules 15-20, and Rules 22 and 23 are not applicable.

Advisory Committee's Note

The proposed rule continues the present uniform practice of the circuits of regulating review of decisions of the Tax Court by the general rules applicable to appeals from judgments of the district courts.

TITLE IV. REVIEW AND ENFORCEMENT OF ORDERS OF ADMINISTRATIVE AGENCIES, BOARDS, COMMISSIONS AND OFFICERS

RULE 15. REVIEW OR ENFORCEMENT OF AGENCY ORDERS--HOW OBTAINED; INTERVENTION

(a) Petition for Review of Order; Joint Petition. Review of an order of an administrative agency, board, commission or officer (hereinafter, the term "agency" shall include agency, board, commission or officer) shall be obtained by filing with the clerk of a court of appeals which is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" shall include a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal). The petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency shall be named respondent. The United States shall also be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to

make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

(b) Application for Enforcement of Order; Answer; Default; Cross-Application for Enforcement. An application for enforcement of an order of an agency shall be filed with the clerk of a court of appeals which is authorized to enforce the order. The application shall contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief prayed. Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the clerk an answer to the application. If the respondent fails to file an answer within such time, judgment will be awarded for the relief prayed. If a petition is filed for review of an order which the court has jurisdiction to enforce, the respondent may file a cross-application for enforcement.

(c) Service of Petition or Application. A copy of a petition for review or of an application or cross-application for enforcement of an order shall be served by the clerk of the court of appeals on each respondent in the manner prescribed by Rule 3(d), unless a different manner of service is prescribed by an applicable statute. At the time of filing, the petitioner shall furnish the clerk with a copy

of the petition or application for each respondent. At or before the time of filing a petition for review, the petitioner shall serve a copy thereof on all parties who shall have been admitted to participate in the proceedings before the agency other than respondents to be served by the clerk, and shall file with the clerk a list of those so served.

(d) Intervention. Unless an applicable statute provides a different method of intervention, a person who desires to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and file with the clerk of the court of appeals a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene or other notice of intervention authorized by an applicable statute shall be filed within 30 days of the date on which the petition for review is filed.

Advisory Committee's Note

General Note. The power of the Supreme Court to prescribe rules of practice and procedure for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers is conferred by 28 U.S.C. § 2072, as amended by the Act of November 6, 1966, § 1, 80 Stat. 1323 (1 U.S. Code Cong. & Ad. News 1546 (1966)). Section 11 of the Hobbs Administrative Orders Review Act of 1950, 64 Stat. 1132, reenacted as 28 U.S.C. § 2352 (28 U.S.C.A. § 2352 (Supp. 1966)), repealed by the Act of November 6, 1966, § 4, supra, directed the courts of appeals to adopt and promulgate, subject to approval by the Judicial Conference rules governing practice and procedure in proceedings to review the orders of boards, commissions and officers whose orders were made reviewable in the courts of appeals by the Act. Thereafter, the Judicial Conference approved a uniform rule, and that rule, with minor variations, is now in effect in all circuits. Third Circuit Rule 18 is a typical circuit rule, and for convenience it is referred to as the uniform rule in the notes which accompany rules under this Title.

Subdivision (a). The uniform rule (see General Note above) requires that the petition for review contain "a concise statement, in barest outline, of the nature of the

proceedings as to which relief is sought, the facts upon which venue is based, the grounds upon which relief is sought, and the relief prayed." That language is derived from Section 4 of the Hobbs Administrative Orders Review Act of 1950, 64 Stat. 1130, reenacted as 28 U.S.C. § 2344 (28 U.S.C.A. § 2344 (Supp. 1966)). A few other statutes also prescribe the content of the petition, but the great majority are silent on the point. The proposed rule supersedes 28 U.S.C. § 2344 and other statutory provisions prescribing the form of the petition for review and permits review to be initiated by the filing of a simple petition similar in form to the notice of appeal used in appeals from judgments of district courts. The more elaborate form of petition for review now required is rarely useful either to the litigants or to the courts. There is no effective, reasonable way of obliging petitioners to come to the real issues before those issues are formulated in the briefs. Other provisions of this subdivision are derived from sections 1 and 2 of the uniform rule.

Subdivision (b). This subdivision is derived from sections 3, 4 and 5 of the uniform rule.

Subdivision (c). This subdivision is derived from section 1 of the uniform rule.

Subdivision (d). This subdivision is based upon section 6 of the uniform rule. Statutes occasionally permit intervention by the filing of a notice of intention to intervene. The uniform rule does not fix a time limit for intervention, and the only time limits fixed by statute are the 30-day periods found in the Communications Act Amendments, 1952, § 402(e), 66 Stat. 719, 47 U.S.C. § 402(e), and the Sugar Act of 1948, § 205(d), 61 Stat. 927, 7 U.S.C. § 1115(d).

RULE 16. THE RECORD ON REVIEW OR ENFORCEMENT

(a) Composition of the Record. The order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency shall constitute the record on review in proceedings to review or enforce the order of an agency.

(b) Omissions from or Misstatements in the Record. If anything material to any party is omitted from the record or is misstated therein, the parties may at any time supply the omission or correct the misstatement by stipulation, or the court may at any time direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.

Advisory Committee's Note

Subdivision (a) is based upon 28 U.S.C. § 2112(b). There is no distinction between the record compiled in the agency proceeding and the record on review; they are one and the same. The record in agency cases is thus the same as that in appeals from the district court--the original papers, transcripts and exhibits in the proceeding below. Subdivision (b) is based upon section 8 of the uniform rule (see General Note following Rule 15).

RULE 17. FILING OF THE RECORD

(a) Agency to File; Time for Filing; Notice of Filing. The agency shall file the record with the clerk of the court of appeals within 40 days after service upon it of the petition for review unless a different time is provided by the statute authorizing review. In enforcement proceedings the agency shall file the record within 40 days after filing an application for enforcement, but the record need not be filed unless the respondent has filed an answer contesting enforcement of the order, or unless the court otherwise orders. ~~If no time is fixed by statute for filing the record,~~ the court may shorten or extend the time above prescribed. The clerk shall give notice to all parties of the date on which the record is filed.

(b) Filing--What Constitutes. The agency may file the entire record or such parts thereof as the parties may designate by stipulation filed with the agency. The original papers in the agency proceeding or certified copies thereof may be filed. Instead of filing the record or designated parts thereof, the agency may file a certified list of all documents, transcripts of testimony, exhibits and other material comprising the record, or a list of such parts thereof as the parties may designate, adequately describing each, and the filing of the certified list shall constitute filing of the record. The parties may stipulate that neither the record nor a certified list be filed with the court. The stipulation shall be filed

with the clerk of the court of appeals and the date of its filing shall be deemed the date on which the record is filed. If a certified list is filed, or if the parties designate only parts of the record for filing or stipulate that neither the record nor a certified list be filed, the agency shall retain the record or parts thereof. Upon request of the court or the request of a party, the record or any part thereof thus retained shall be transmitted to the court notwithstanding any prior stipulation. All parts of the record retained by the agency shall be a part of the record on review for all purposes.

Advisory Committee's Note

Subdivision (a). This subdivision is based upon section 7 of the uniform rule (see General Note following Rule 15). That rule does not prescribe a time for filing the record in enforcement cases. Forty days are allowed in order to avoid useless preparation of the record or certified list in cases where the application for enforcement is not contested.

Subdivision (b). This subdivision is based upon 28 U.S.C. 2112 and section 7 of the uniform rule. It permits the agency to file either the record itself or a certified list of its contents. It also permits the parties to stipulate against transmission of designated parts of the record without the fear that an inadvertent stipulation may "diminish" the record. Finally, the parties may, in cases where consultation of the record is unnecessary, stipulate that neither the record nor a certified list of its contents be filed.

RULE 18. STAY PENDING REVIEW

Application for a stay of a decision or order of an agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial, or that the action of the agency did not afford the relief which the applicant had requested. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant to the relief sought. Reasonable notice of the motion shall be given to all parties to the proceeding in the court of appeals. The court may condition relief under this rule upon the filing of a bond or other appropriate security. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

Advisory Committee's Note

While this rule has no counterpart in present rules regulating review of agency proceedings, it merely assimilates the procedure for obtaining stays in agency proceedings with that for obtaining stays in appeals from the district courts. The same considerations which justify the requirement of an initial application to the district court for a stay pending appeal support the requirement of an initial application to the agency pending review. See Note accompanying Rule 8. Title 5, U.S.C. § 705 (5 U.S.C.A. § 705 (1966 Pamphlet)) confers general authority on both agencies and reviewing courts to stay agency action pending review. Many of the statutes authorizing review of agency action by the courts of appeals deal with the question of stays, and at least one, the Act of June 15, 1936, 49 Stat. 1499 (7 U.S.C. § 10a), prohibits a stay pending review. The proposed rule in nowise affects such statutory provisions respecting stays. By its terms, it simply indicates the procecure to be followed when a stay is sought.

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 shall within 7 days thereafter serve upon the agency and file with the clerk a proposed judgment which he deems to be in conformity with the opinion. The court will thereupon settle the judgment and direct its entry without further hearing or argument.

Advisory Committee's Note

This is section 12 of the uniform rule (see General Note following Rule 15) with changes in phraseology.

RULE 20. APPLICABILITY OF OTHER RULES TO REVIEW OR ENFORCEMENT OF AGENCY ORDERS

All provisions of these rules are applicable to review or enforcement of orders of agencies, except that Rules 3-14 and Rules 22 and 23 are not applicable. As used in any applicable rule, the term "appellant" includes a petitioner and the term "appellee" includes a respondent in proceedings to review or enforce agency orders.

Advisory Committee's Note

The proposed rule continues the present uniform practice of the circuits of regulating agency review or enforcement proceedings by the general rules applicable to appeals from judgments of the district courts.

TITLE V. EXTRAORDINARY WRITS

RULE 21. WRITS OF MANDAMUS AND PROHIBITION DIRECTED TO A JUDGE OR JUDGES AND OTHER EXTRAORDINARY WRITS

(a) Mandamus or Prohibition to a Judge or Judges: Petition for Writ; Service and Filing. Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) Denial; Order Directing Answer. If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to

the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument~~s~~. The proceeding shall be given preference over ordinary civil cases.

(c) Other Extraordinary Writs. Application for extraordinary writs other than those provided for in subdivisions (a) and (b) of this rule shall be made by petition filed with the clerk of the court of appeals with proof of service on the parties named as respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule.

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

Advisory Committee's Note

The authority of courts of appeals to issue extraordinary writs is derived from 28 U.S.C. § 1651. Subdivisions (a) and (b) regulate in detail the procedure surrounding the writs most commonly sought--mandamus or prohibition directed to a judge or judges. Those subdivisions are based upon Supreme Court Rule 31, with certain changes which reflect the uniform practice among the circuits (Seventh Circuit Rule 19 is a typical circuit rule). Subdivision (c) sets out a very general procedure to be followed in applications for the variety of other writs which may be issued under the authority of 28 U.S.C. § 1651.

TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

RULE 22. HABEAS CORPUS PROCEEDINGS

(a) Application for the Original Writ. An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

(b) Necessity of Certificate of Probable Cause for Appeal. In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant

for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.

Advisory Committee's Note

Subdivision (a). Title 28 U.S.C. § 2241(a) authorizes circuit judges to issue the writ of habeas corpus. Section 2241(b), however, authorizes a circuit judge to decline to entertain an application and to transfer it to the appropriate district court, and this is the usual practice. The first two sentences merely make present practice explicit. Title 28 U.S.C. § 2253 seems clearly to contemplate that once an application is presented to a district judge and is denied by him, the remedy is an appeal from the order of denial. But the language of 28 U.S.C. § 2241 seems to authorize a second original application to a circuit judge following a denial by a district judge. In re Gersing, 145 F.2d 481 (D.C. Cir., 1944) and Chapman v. Teets, 241 F.2d 186 (9th Cir., 1957) acknowledge the availability of such a procedure. But the procedure is ordinarily a waste of time for all involved, and the final sentence attempts to discourage it.

A court of appeals has no jurisdiction as a court to grant an original writ of habeas corpus, and courts of appeals have dismissed applications addressed to them. Loum v. Alvis, 262 F.2d 836 (6th Cir., 1959); In re Berry, 221 F.2d 798 (9th Cir., 1955); Posey v. Dowd, 134 F.2d 613 (7th Cir., 1943). The fairer and more expeditious practice is for the court of appeals to regard an application addressed to it as being

addressed to one of its members, and to transfer the application to the appropriate district court in accordance with the provisions of this rule. Perhaps such a disposition is required by the rationale of In re Burwell, 350 U.S. 521 (1956).

Subdivision (b). Title 28 U.S.C. § 2253 provides that an appeal may not be taken in a habeas corpus proceeding where confinement is under a judgment of a state court unless the judge who rendered the order in the habeas corpus proceeding, or a circuit justice or judge, issues a certificate of probable cause. In the interest of insuring that the matter of the certificate will not be overlooked and that, if the certificate is denied, the reasons for denial in the first instance will be available on any subsequent application, the proposed rule requires the district judge to issue the certificate or to state reasons for its denial.

While 28 U.S.C. § 2253 does not authorize the court of appeals as a court to grant a certificate of probable cause, In re Burwell, 350 U.S. 521 (1956) makes it clear that a court of appeals may not decline to consider a request for the certificate addressed to it as a court but must regard the request as made to the judges thereof. The fourth sentence incorporates the Burwell rule.

Although 28 U.S.C. § 2253 appears to require a certificate of probable cause even when an appeal is taken by a state or its representative, the legislative history strongly suggests

that the intention of Congress was to require a certificate only in the case in which an appeal is taken by an applicant for the writ. See United States ex rel. Tillery v. Cavell, 294 F.2d 12 (3d Cir., 1960). Four of the five circuits which have ruled on the point have so interpreted section 2253. United States ex rel. Tillery v. Cavell, supra; Buder v. Bell, 306 F.2d 71 (6th Cir., 1962); United States ex rel. Calhoun v. Pate, 341 F.2d 885 (7th Cir., 1965); State of Texas v. Graves, 352 F.2d 514 (5th Cir., 1965). Cf. United States ex rel. Carrol v. Lavallee, 342 F.2d 641 (2d Cir., 1965). The final sentence makes it clear that a certificate of probable cause is not required of a state or its representative.

RULE 23. CUSTODY OF PRISONERS IN HABEAS CORPUS PROCEEDINGS

(a) Transfer of Custody Pending Review. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.

(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 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 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.

(d) Modification of Initial Order Respecting Custody. An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.

Advisory Committee's Note

The rule is the same as Supreme Court Rule 49, as amended on June 12, 1967, effective October 2, 1967.

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 inability to pay fees and costs or to give security therefor, his belief that he is entitled to redress, and a statement of the issues which he 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 an 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.

(b) Leave to Proceed on Appeal or Review in Forma Pauperis in Administrative Agency Proceedings. A party to a proceeding before an administrative agency, board, commission or officer (including, for the purpose of this rule, the Tax Court of the United States) who desires to proceed on appeal or review in a court of appeals in forma pauperis, when such appeal or review may be had directly in a court of appeals, shall file in the court of appeals a motion for leave so to proceed, together with the affidavit prescribed by the first paragraph of subdivision (a) of this rule.

(c) Form of Briefs, Appendices and Other Papers. Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form, and may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.

Advisory Committee's Note

Subdivision (a). Authority to allow prosecution of an appeal in forma pauperis is vested in "[a]ny court of the United States" by 28 U.S.C. § 1915(a). The second paragraph of section 1915(a) seems to contemplate initial application to the district court for permission to proceed in forma pauperis, and although the circuit rules are generally silent on the question, the case law requires initial application to the district court. Hayes v. United States, 258 F.2d 400 (5th Cir., 1958), cert. den. 358 U.S. 856 (1958); Elkins v. United States, 250 F.2d 145 (9th Cir., 1957) see 364 U.S. 206 (1960); United States v. Farley, 238 F.2d 575 (2d Cir., 1956) see 354 U.S. 521 (1957). D. C. Cir. Rule 41(a) requires initial application to the district court. The content of the affidavit follows the language of the statute; the requirement of a statement of the issues comprehends the statutory requirement of a statement of "the nature of the . . . appeal. . . ." The second sentence is in accord with the decision in McGann v. United States, 362 U.S. 309 (1960). The requirement contained in the third sentence has no counterpart in present circuit rules, but it has been imposed by decision in at least two circuits. Ragan v. Cox, 305 F.2d 58 (10th Cir., 1962); United States ex rel Breedlove v. Dowd, 269 F.2d 693 (7th Cir., 1959).

The second paragraph permits one whose indigency has been previously determined by the district court to proceed on appeal in forma pauperis without the necessity of a redetermination of indigency, while reserving to the district court its statutory authority to certify that the appeal is not taken in good faith, 28 U.S.C. § 1915(a), and permitting an inquiry into whether the circumstances of the party who was originally entitled to proceed in forma pauperis have changed during the course of the litigation. Cf. Sixth Circuit Rule 26.

The final paragraph establishes a subsequent motion in the court of appeals, rather than an appeal from the order of denial or from the certification of lack of good faith, as the proper procedure for calling in question the correctness of the action of the district court. The simple and expeditious motion procedure seems clearly preferable to an appeal. This paragraph applies only to applications for leave to appeal in forma pauperis. The order of a district court refusing leave to initiate an action in the district court in forma pauperis is reviewable on appeal. See Roberts v. United States District Court, 339 U.S. 844 (1950).

Subdivision (b). Authority to allow prosecution in forma pauperis is vested only in a "court of the United States" (see Note to subdivision (a), above). Thus in proceedings brought directly in a court of appeals to review decisions of agencies or of the Tax Court, authority

to proceed in forma pauperis should be sought in the court of appeals. If initial review of agency action is had in a district court, an application to appeal to a court of appeals in forma pauperis from the judgment of the district court is governed by the provisions of subdivision (a).

TITLE VII. GENERAL PROVISIONS

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, in which event he 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 on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

(c) Manner of Service. Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(d) Proof of Service. Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the person served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment or proof of service but shall require such to be filed promptly thereafter.

Advisory Committee's Note

The rule that filing is not timely unless the papers filed are received within the time allowed is the familiar one. Ward v. Atlantic Coast Line RR Co., 265 F.2d 75 (5th Cir., 1959), rev'd on other grounds 362 U.S. 396 (1960); Kahler-Ellis Co. v. Ohio Turnpike Commission, 225 F.2d 922 (6th Cir., 1955). An exception is made in the case of briefs and appendices in order to afford the parties the maximum time for their preparation. By the terms of the exception, air mail delivery must be used whenever it is the most expeditious manner of delivery.

A majority of the circuits now require service of all papers filed with the clerk. The usual provision in present rules is for service on "adverse" parties. In view of the extreme simplicity of service by mail, there seems to be no reason why a party who files a paper should not be required to serve all parties to the proceeding in the court of appeals, whether or not they may be deemed adverse. The common requirement of proof of service is retained, but the rule permits it to be made by simple certification, which may be endorsed on the copy which is filed.

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, Sunday or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, 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, Washington's Birthday, Memorial Day, Independence Day, Labor 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.

(b) Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done

after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

(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 and the paper is served by mail, 3 days shall be added to the prescribed period.

Advisory Committee's Note

The provisions of this rule are based upon FRCP 6(a), (b) and (e). See also Supreme Court Rule 34 and FRCrP 45. Unlike FRCP 6(b), this rule, read with Rule 27, requires that every request for enlargement of time be made by motion, with proof of service on all parties. This is the simplest, most convenient way of keeping all parties advised of developments. By the terms of Rule 27(b) a motion for enlargement of time under Rule 26(b) may be entertained and acted upon immediately, subject to the right of any party to seek reconsideration. Thus the requirement of motion and notice will not delay the granting of relief of a kind which a court is inclined to grant as of course. Specifically, if a court is of the view that an extension of time sought before expiration of the period originally prescribed or as extended by a previous order ought to be granted in effect ex parte, as FRCP 6(b) permits, it may grant motions seeking such relief without delay.

RULE 27. MOTIONS

(a) Content of Motions; Response; Reply. Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

(b) Determination of Motions for Procedural Orders. Notwithstanding the provisions of the preceding paragraph as to motions generally, motions for procedural orders, including any motion under Rule 26(b) may be acted upon at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.

(c) Power of a Single Judge to Entertain Motions. In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

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

Advisory Committee's Note

Subdivisions (a) and (b). Many motions seek relief of a sort which is ordinarily unopposed or which is granted as of course. The provision of subdivision (a) which permits any party to file a response in opposition to a motion within 7 days after its service upon him assumes that the motion is one of substance which ought not be acted upon without affording affected parties an opportunity to reply. A motion to dismiss or otherwise determine an appeal is clearly such a motion. Motions authorized by Rules 8, 9, 18 and 41 are likewise motions of substance; but in the nature of the relief sought, to afford an adversary an automatic delay of at least 7 days is undesirable, thus such motions may be acted upon after notice which is reasonable under the circumstances.

The term "motions for procedural orders" is used in subdivision (b) to describe motions which do not substantially affect the rights of the parties or the ultimate disposition of the appeal. To prevent delay in the disposition of such motions, subdivision (b) provides that they may be acted upon immediately without awaiting a response, subject to the right of any party who is adversely affected by the action to seek reconsideration.

Subdivision (c). Within the general consideration of procedure on motions is the problem of the power of a single circuit judge. Certain powers are granted to a single judge of a court of appeals by statute. Thus, under 28 U.S.C. § 2101(f) a single judge may stay execution and enforcement of a judgment to enable

a party aggrieved to obtain certiorari; under 28 U.S.C. § 2251 a judge before whom a habeas corpus proceeding involving a person detained by state authority is pending may stay any proceeding against the person; under 28 U.S.C. § 2253 a single judge may issue a certificate of probable cause. In addition, certain of these rules expressly grant power to a single judge. See Rules 8, 9 and 18.

This subdivision empowers a single circuit judge to act upon virtually all requests for intermediate relief which may be made during the course of an appeal or other proceeding. By its terms he may entertain and act upon any motion other than a motion to dismiss or otherwise determine an appeal or other proceeding. But the relief sought must be "relief which under these rules may properly be sought by motion."

Examples of the power conferred on a single judge by this subdivision are: to extend the time for transmitting the record or docketing the appeal (Rules 11 and 12); to permit intervention in agency cases (Rule 15), or substitution in any case (Rule 43); to permit an appeal in forma pauperis (Rule 24); to enlarge any time period fixed by the rules other than that for initiating a proceeding in the court of appeals (Rule 26(b)); to permit the filing of a brief by amicus curiae (Rule 29); to authorize the filing of a deferred appendix (Rule 30(c)), or dispense with the requirement of an appendix in a specific case (Rule 30(d)), or permit carbon copies of briefs or appendices to be used (Rule 32(a)); to permit the filing of additional briefs (Rule 28(c)),

or the filing of briefs of extraordinary length (Rule 28(g)); to postpone oral argument (Rule 34(a)), or grant additional time therefor (Rule 34(b)).

Certain rules require that application for the relief or orders which they authorize be made by petition. Since relief under those rules may not properly be sought by motion, a single judge may not entertain requests for such relief. Thus a single judge may not act upon requests for permission to appeal (see Rules 5 and 6); or for mandamus or other extraordinary writs (see Rule 21), other than for stays or injunctions pendente lite, authority to grant which is "expressly conferred by these rules" on a single judge under certain circumstances (see Rules 8 and 18); or upon petitions for rehearing (see Rule 40).

A court of appeals may by order or rule abridge the power of a single judge if it is of the view that a motion or a class of motions should be disposed of by a panel. Exercise of any power granted a single judge is discretionary with the judge. The final sentence in this subdivision makes the disposition of any matter by a single judge subject to review by the court.

RULE 28. BRIEFS

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

(1) 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 brief where they are cited.

(2) A statement of the issues presented for review.

(3) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.

(5) A short conclusion stating the precise relief sought.

(b) Brief of the Appellee. The brief of the appellee shall conform to the requirements of subdivision (a)(1)-(4), except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(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.

(d) References in Briefs to Parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee". It promotes clarity to use the designations used in the lower court or in the agency proceeding, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore," etc.

(e) References in Briefs to the Record. References in the briefs to parts of the record reproduced in the appendix filed with the brief of the appellant (see Rule 30(a)) shall be to the pages of the appendix at which those parts appear. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 30(c). If the record is reproduced in accordance with the provisions of Rule 30(f), or if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence the admissibility

of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) Reproduction of Statutes, Rules, Regulations, Etc. If determination of the issues presented requires the study of statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.

(g) Length of Briefs. Except by permission of the court, principal briefs shall not exceed 50 pages of standard typographic printing or 70 pages of printing by any other process of duplicating or copying, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. And except by permission of the court, reply briefs shall not exceed 25 pages of standard typographic printing or 35 pages of printing by any other process of duplicating or copying.

(h) Briefs in Cases Involving Cross Appeals. If a cross appeal is filed, the plaintiff in the court below shall be deemed the appellant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and argument involved in his appeal as well as the answer to the brief of the appellant.

(i) Briefs in Cases Involving Multiple Appellants or Appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

Advisory Committee's Note

This rule is based upon Supreme Court Rule 40. For variations in present circuit rules on briefs see 2d Cir. Rule 17, 3d Cir. Rule 24, 5th Cir. Rule 24, and 7th Cir. Rule 17. All circuits now limit the number of pages of briefs, a majority limiting the brief to 50 pages of standard typographic printing. Fifty pages of standard typographic printing is the approximate equivalent of 70 pages of typewritten text, given the page sizes required by Rule 32 and the requirement set out there that text produced by a method other than standard typographic must be double spaced.

RULE 29. BRIEF OF AN AMICUS CURIAE

A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.

Advisory Committee's Note

Only five circuits presently regulate the filing of the brief of an amicus curiae. See D. C. Cir. Rule 18(j); 1st Cir. Rule 23(10); 6th Cir. Rule 17(4); 9th Cir. Rule 18(9); 10th Cir. Rule 20. This rule follows the practice of a majority of circuits in requiring leave of court to file an amicus brief except under the circumstances stated therein. Compare Supreme Court Rule 42.

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. 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 within 40 days of the date on which the record is filed. 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 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 ten 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.

(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 appellant shall so elect, or 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. Notice of the election by the appellant to defer preparation of the appendix shall be filed and served by him within 10 days after the date on which the record is filed. 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 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 brief directly to pages of the appendix, he may serve and file typewritten or page proof copies of his 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 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.

(d) Arrangement of the Appendix. At the beginning of the appendix there shall be inserted a list of the parts of the record which it contains, in the order in

which the parts are set out therein, with references to the pages of the appendix at which each part begins. The relevant docket entries shall be set out following the list of contents. Thereafter, other parts of the record shall be set out in chronological order. When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.

(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.

(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.

Advisory Committee's Note

Subdivision (a). Only two circuits presently require a printed record (5th Cir. Rule 23a; 8th Cir. Rule 10 (in civil appeals only)), and the rules and practice in those circuits combine to make the difference between a printed record and the appendix, which is now used in eight circuits and in the Supreme Court in lieu of the printed record, largely nominal. The essential characteristics of the appendix method are: (1) the entire record may not be reproduced; (2) instead, the parties are to set out in an appendix to the briefs those parts of the record which in their judgment the judges must consult in order to determine the issues presented by the appeal; (3) the appendix is not the record but merely a selection therefrom for the convenience of the judges of the court of appeals; the record is the actual trial court record, and the record itself is always available to supply inadvertent omissions from the appendix. These essentials are incorporated, either by rule or by practice, in the circuits that continue to require the printed record rather than the appendix. See 5th Cir. Rule 23a(9) and 8th Cir. Rule 10(a)-(d).

Subdivision (b). Under the practice in six of the eight circuits which now use the appendix method, unless the parties agree to use a single appendix, the appellant files with his brief an appendix containing the parts of the record which he deems it essential that the court read in order to determine the questions presented. If the appellee deems additional parts of the record necessary he must include such parts as an appendix to his brief. The proposed rule differs from that practice. By the new rule a single appendix is to be filed. It is to be prepared by the appellant, who must include therein those parts which he deems essential and those which the appellee designates as essential.

Under the practice by which each party files his own appendix the resulting reproduction of essential parts of the record is often fragmentary; it is not infrequently necessary to piece several appendices together to arrive at a usable reproduction. Too, there seems to be a tendency on the part of some appellants to reproduce less than what is necessary for a determination of the issues presented (see Moran Towing Corp.

v. M. A. Gammino Construction Co., 363 F.2d 108 (1st Cir. 1966); Walters v. Shari Music Publishing Corp., 298 F.2d 206 (2d Cir. 1962) and cases cited therein; Morrison v. Texas Co., 289 F.2d 382 (7th Cir. 1961) and cases cited therein), a tendency which is doubtless encouraged by the requirement in present rules that the appellee reproduce in his separately prepared appendix such necessary parts of the record as are not included by the appellant.

Under the proposed rule responsibility for the preparation of the appendix is placed on the appellant. If the appellee feels that the appellant has omitted essential portions of the record, he may require the appellant to include such portions in the appendix. The appellant is protected against a demand that he reproduce parts which he considers unnecessary by the provisions entitling him to require the appellee to advance the costs of reproducing such parts and authorizing denial of costs for matter unnecessarily reproduced.

Subdivision (c). This subdivision permits the appellant to elect to defer the ~~printing~~ production of the appendix to the briefs until the briefs of both sides are written, and authorizes a court of appeals to require such deferred filing by rule or order. The advantage of this method of preparing the appendix is that it permits the parties to determine what parts of the record need to be reproduced in the light of the issues actually presented by the briefs. Often neither side is in a position to say precisely what is needed until the briefs are completed. Once the argument on both sides is known, it should be possible to confine the matter reproduced in the appendix to that which is essential to a determination of the appeal or review. This method of preparing the appendix is presently in use in the Tenth Circuit (Rule 17) and in other circuits in review of agency proceedings, and it has proven its value in reducing the volume required to be reproduced. When the record is long, use of this method is likely to result in substantial economy to the parties.

Subdivision (e). The purpose of this subdivision is to reduce the cost of reproducing exhibits. While subdivision (a) requires that 10 copies of the appendix be filed, unless the court requires a lesser number, subdivision (e) permits exhibits necessary for the determination of an appeal to be bound separately, and requires only 4 copies of such a separate volume or volumes to be filed and a single copy to be served on counsel.

Subdivision (f). This subdivision authorizes a court of appeals to dispense with the appendix method of reproducing parts of the record and to hear appeals on the original record and such copies of it as the court may require.

Since 1962 the Ninth Circuit has permitted all appeals to be heard on the original record and a very limited number of copies. Under the practice as adopted in 1962, any party to an appeal could elect to have the appeal heard on the original record and two copies thereof rather than on the printed record theretofore required. The resulting substantial saving of printing costs led to the election of the new

practice in virtually all cases, and by 1967 the use of printed records had ceased. By a recent amendment, the Ninth Circuit has abolished the printed record altogether. Its rules now provide that all appeals are to be heard on the original record, and it has reduced the number of copies required to two sets of copies of the transmitted original papers (excluding copies of exhibits, which need not be filed unless specifically ordered). See 9 Cir. Rule 10, as amended June 2, 1967, effective September 1, 1967. The Eighth Circuit permits appeals in criminal cases and in habeas corpus and 28 U.S.C. § 2255 proceedings to be heard on the original record and two copies thereof. See 8 Cir. Rule 8(i)-(j). The Tenth Circuit permits appeals in all cases to be heard on the original record and four copies thereof whenever the record consists of two hundred pages or less. See 10 Cir. Rule 17(a). This subdivision expressly authorizes the continuation of the practices in the Eighth, Ninth and Tenth Circuits.

The judges of the Court of Appeals for the Ninth Circuit have expressed complete satisfaction with the practice there in use and have suggested that attention be called to the advantages which it offers in terms of reducing cost.

RULE 31. FILING AND SERVICE OF BRIEFS

(a) Time for Serving and Filing Briefs. The appellant shall serve and file his brief within 40 days after the date on which the record is filed. The appellee shall serve and file his 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.

(b) Number of Copies to be Filed and Served. Twenty-five copies of each brief shall be filed with the clerk, unless the court by order in a particular case shall direct a lesser number, and two copies shall be served on counsel for each party separately represented. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and three legible copies shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented.

(c) Consequence of Failure to File Briefs. If an appellant fails to file his 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 brief, he will not be heard at oral argument except by permission of the court.

Advisory Committee's Note

A majority of the circuits now require the brief of the appellant to be filed within 30 days from the date on which the record is filed. But in those circuits an exchange of designations is unnecessary in the preparation of the appendix. The appellant files with his brief an appendix containing the parts of the record which he deems essential. If the appellee considers other parts essential, he includes those parts in his own appendix. Since the proposed rule requires the appellant to file with his brief an appendix containing necessarv parts of the record as designated by both parties, the rule allows the appellant 40 days in order to provide time for the exchange of designations respecting the content of the appendix (see Rule 30(b)).

RULE 32. FORM OF BRIEFS, THE APPENDIX AND OTHER PAPERS

(a) Form of Briefs and the Appendix. Briefs and appendices may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper. Carbon copies of briefs and appendices may not be submitted without permission of the court, except in behalf of parties allowed to proceed in forma pauperis. All printed matter must appear in at least 11 point type on opaque, unglazed paper. Briefs and appendices produced by the standard typographic process shall be bound in volumes having pages 6 1/8 by 9 1/4 inches and type matter 4 1/6 by 7 1/6 inches. Those produced by any other process shall be bound in volumes having pages not exceeding 8 1/2 by 11 inches and type matter not exceeding 6 1/2 by 9 1/2 inches, with double spacing between each line of text. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents. Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available, the cover of the brief of the appellant should be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix, if separately printed, should be white.

The front covers of the briefs and of appendices, if separately printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 12(a)); (3) the nature of the proceeding in the court (e.g., Appeal; Petition for Review) and the name of the court, agency, or board below; (4) the title of the document (e.g., Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.

(b) Form of Other Papers. Petitions for rehearing shall be produced in a manner prescribed by subdivision (a). Motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8 1/2 by 11 inches in size. Lines of typewritten text shall be double spaced. Consecutive sheets shall be attached at the left margin. Carbon copies may be used for filing and service if they are legible.

A motion or other paper addressed to the court shall contain a caption setting forth the name of the court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper.

Advisory Committee's Note

Only two methods of printing are now generally recognized by the circuits--standard typographic printing and the offset duplicating process (multilith). A third, mimeographing, is permitted in the Fifth Circuit. The District of Columbia, Ninth, and Tenth Circuits permit records to be reproduced by copying processes. The Committee feels that recent and impending advances in the arts of duplicating and copying warrant experimentation with less costly forms of reproduction than those now generally authorized. The proposed rule permits, in effect, the use of any process other than the carbon copy process which produces a clean, readable page. What constitutes such is left in first instance to the parties and ultimately to the court to determine. The final sentence of the first paragraph of subdivision (a) is added to allow the use of multilith, mimeograph, or other forms of copies of the reporter's original transcript whenever such are available.

RULE 33. PREHEARING CONFERENCE

The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

Advisory Committee's Note

The uniform rule for review or enforcement of orders of administrative agencies, boards, commissions or officers (see the general note following Rule 15) authorizes a prehearing conference in agency review proceedings. The same considerations which make a prehearing conference desirable in such proceedings may be present in certain cases on appeal from the district courts. The proposed rule is based upon subdivision 11 of the present uniform rule for review of agency orders.

RULE 34. ORAL ARGUMENT

(a) Notice of Argument; Postponement. The clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed reasonably in advance of the date fixed for hearing.

(b) Time Allowed for Argument. Unless otherwise provided by rule for all cases or for classes of cases, each side will be allowed 30 minutes for argument. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument, he may request such additional time as he deems necessary. Requests may be made by letter addressed to the clerk reasonably in advance of the date fixed for the argument and shall be liberally granted if cause therefor is shown. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

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

(d) Cross and Separate Appeals. A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the court otherwise directs. If a case involves a cross-appeal, the plaintiff in the action below shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants

support the same argument, care shall be taken to avoid duplication of 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.

(f) Submission on Briefs. By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(g) Use of Physical Exhibits at Argument; Removal. If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the court room before the court convenes on the date of the argument. After the argument counsel shall cause the exhibits to be removed from the court room unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

Advisory Committee's Note

A majority of circuits now limit oral argument to thirty minutes for each side, with the provision that additional time may be made available upon request. The Committee is of the view that thirty minutes to each side is sufficient in most cases, but that where additional time is necessary it should be freely granted on a proper showing of cause therefor. It further feels that the matter of time should be left ultimately to each court of appeals, subject to the spirit of the rule that a reasonable time should be allowed for argument. The term "side" is used to indicate that the time allowed by the rule is afforded to opposing interests rather than to individual parties. Thus if multiple appellants or appellees have a common interest, they constitute only a single side. If counsel for multiple parties who constitute a single side feel that additional time is necessary, they may request it.

In other particulars this rule follows the usual practice among the circuits. See 3d Cir. Rule 31; 6th Cir. Rule 20; 10th Cir. Rule 23.

RULE 35. DETERMINATION OF CAUSES BY THE COURT IN BANC

(a) When Hearing or Rehearing in Banc Will be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) Suggestion of a Party for Hearing or Rehearing in Banc. A party may suggest the appropriateness of a hearing or rehearing in banc. The clerk shall transmit any such suggestion to the judges of the court who are in regular active service but a vote will not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) Time for Suggestion of a Party for Rehearing in Banc; Suggestion Does Not Stay Mandate. If a party desires to suggest a rehearing in banc, the suggestion must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

Advisory Committee's Note

Statutory authority for in banc hearings is found in 28 U.S.C. § 46(c). The proposed rule is responsive to the Supreme Court's view in Western Pacific Ry. Corp v. Western Pacific Ry. Co., 345 U.S. 247 (1953), that litigants should be free to suggest that a particular case is appropriate for consideration by all the judges of a court of appeals. The rule is addressed to the procedure whereby a party may suggest the appropriateness of convening the court in banc. It does not affect the power of a court of appeals to initiate in banc hearings sua sponte.

The provision that a vote will not be taken as a result of the suggestion of a party unless requested by a judge of the court in regular active service or by a judge who was a member of the panel that rendered a decision sought to be reheard is intended to make it clear that a suggestion of a party as such does not require any action by the court. See Western Pacific Ry. Corp. v. Western Pacific Ry. Co., supra, 345 U.S. at 262. The rule merely authorizes a suggestion, imposes a time limit on suggestions for rehearings in banc, and provides that suggestions will be directed to the judges of the court in regular active service.

In practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled "petition for rehearing in banc." Such a petition is in fact merely a petition for a rehearing,

with a suggestion that the case be reheard in banc. Since no response to the suggestion, as distirguished from the petition for rehearing, is required, the panel which heard the case may quite properly dispose of the petition without reference to the suggestion. In such a case the fact that no response has been made to the suggestion does not affect the finality of the judgment or the issuance of the mandate, and the final sentence of the rule expressly so provides.

RULE 36. ENTRY OF JUDGMENT

The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

Advisory Committee's Note

This is the typical rule. See 1st Cir. Rule 29; 3d Cir. Rule 32; 6th Cir. Rule 21. At present, uncertainty exists as to the date of entry of judgment when the opinion directs subsequent settlement of the precise terms of the judgment, a common practice in cases involving enforcement of agency orders. See Stern and Gressman, Supreme Court Practice, p. 203 (3d Ed., 1962). The principle of finality suggests that in such cases entry of judgment should be delayed until approval of the judgment in final form.

RULE 37. INTEREST ON JUDGMENTS

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

Advisory Committee's Note

The first sentence makes it clear that if a money judgment is affirmed in the court of appeals, the interest which attaches to money judgments by force of law (see 28 U.S.C. § 1961 and § 2411) upon their initial entry is payable as if no appeal had been taken, whether or not the mandate makes mention of interest. There has been some confusion on this point. See Blair v. Durham, 139 F.2d 260 (6th Cir., 1943) and cases cited therein.

In reversing or modifying the judgment of the district court, the court of appeals may direct the entry of a money judgment, as, for example, when the court of appeals reverses a judgment notwithstanding the verdict and directs entry of judgment on the verdict. In such a case the question may arise as to whether interest is to run from the date of entry of the judgment directed by the court of appeals or from the date on which the judgment would have been entered in the district court except for the erroneous ruling corrected on appeal. In Briggs v. Pennsylvania RR., 334 U.S. 304 (1948), the Court held that where the mandate of the court of appeals directed entry of judgment upon a verdict but made no mention of interest from the date of the verdict to the date of the entry of the judgment directed by the mandate, the district

court was powerless to add such interest. The second sentence of the proposed rule is a reminder to the court, the clerk and counsel of the Briggs rule. Since the rule directs that the matter of interest be disposed of by the mandate, in cases where interest is simply overlooked, a party who conceives himself entitled to interest from a date other than the date of entry of judgment in accordance with the mandate should be entitled to seek recall of the mandate for determination of the question.

RULE 38. DAMAGES FOR DELAY

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Advisory Committee's Note

Compare 28 U.S.C. § 1912. While both the statute and the usual rule on the subject by courts of appeals (Fourth Circuit Rule 20 is a typical rule) speak of "damages for delay," the courts of appeals quite properly allow damages, attorney's fees and other expenses incurred by an appellee if the appeal is frivolous without requiring a showing that the appeal resulted in delay. See Dunscombe v. Sayle, 340 F.2d 311 (5th Cir., 1965), cert. den., 382 U.S. 814 (1965); Lowe v. Willacy, 239 F.2d 179 (9th Cir., 1956); Griffin Wellpoint Corp. v. Munro-Langstroth, Inc., 269 F.2d 64 (1st Cir., 1959); Ginsburg v. Stern, 295 F.2d 698 (3d Cir., 1961). The subjects of interest and damages are separately regulated, contrary to the present practice of combining the two (see Fourth Circuit Rule 20) to make it clear that the awards are distinct and independent. Interest is provided for by law; damages are awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant.

RULE 39. COSTS

(a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

(b) Costs For and Against the United States. In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

(c) Costs of Briefs, Appendices, and Copies of Records. The cost of printing or otherwise producing necessary copies of briefs, appendices, or 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. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment.

(d) Clerk to Insert Costs in Mandate. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate. If the mandate has been issued before final determination of costs, the statement, or any amendment thereof, may be added to the mandate at any time upon request of the clerk of the court of appeals.

(e) Costs on Appeal Taxable in the District Courts. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

Advisory Committee's Note

Subdivision (a). Statutory authorization for taxation of costs is found in 28 U.S.C. § 1920. The provisions of this subdivision follow the usual practice in the circuits. A few statutes contain specific provisions in derogation of these general provisions. (See 28 U.S.C. § 1928, which forbids the award of costs to a successful plaintiff in a patent infringement action under the circumstances described by the statute.) These statutes are controlling in cases to which they apply.

Subdivision (b). The rules of the courts of appeals at present commonly deny costs to the United States except as allowance may be directed by statute. Those rules were promulgated at a time when the United States was generally invulnerable to an award of costs against it, and they appear to be based on the view that if the United States is not subject to costs if it loses, it ought not be entitled to recover costs if it wins.

The number of cases affected by such rules has been greatly reduced by the Act of July 18, 1966, 80 Stat. 308 (1 U.S. Code Cong. & Ad. News 349 (1966)), 89th Cong., 2d Sess., which amended 28 U.S.C. § 2412, the former general bar to the award of costs against the United States.

Section 2412 as amended generally places the United States on the same footing as private parties with respect to the award of costs in civil cases. But the United States continues to enjoy immunity from costs in certain cases. By its terms amended section 2412 authorizes an award of costs against the United States only in civil actions, and it excepts from its general authorization of an award of costs against the United States cases which are "otherwise specifically provided (for) by statute." Furthermore, the Act of July 18, 1966, supra, provides that the amendments of section 2412 which it effects shall apply only to actions filed subsequent to the date of its enactment. The second clause continues in effect, for these and all other cases in which the United States enjoys immunity from costs, the presently prevailing rule that the United States may recover costs as the prevailing party only if it would have suffered them as the losing party.

Subdivision (c). While only five circuits (D. C. Cir. Rule 20(d); 1st Cir. Rule 31(4); 3d Cir. Rule 35(4); 4th Cir. Rule 21(4); 9th Cir. Rule 25, as amended June 2, 1967) presently tax the cost of printing briefs, the proposed rule makes the cost taxable in keeping with the principle of this rule that all cost items expended in the prosecution of a proceeding should be borne by the unsuccessful party.

Subdivision (e). The costs described in this subdivision are costs of the appeal and, as such, are within the undertaking of the appeal bond. They are made taxable in the district court for general convenience. Taxation of the cost of the reporter's transcript is specifically authorized by 28 U.S.C. § 1920, but in the absence of a rule some district courts have held themselves without authority to tax the cost (Perlman v. Feldmann, 116 F. Supp. 102 (D. Conn., 1953); Firtag v. Gendleman, 152 F. Supp. 226 (D. D.C., 1957); Todd Atlantic Shipyards v. The Southport, 100 F. Supp. 763 (E.D. S.C., 1951)). Provision for taxation of the cost of premiums paid for supersedeas bonds is common in the local rules of district courts and the practice is established in the Second, Seventh, and Ninth Circuits. Berner v. British Commonwealth Pacific Air Lines, Ltd., 362 F.2d 799 (2d Cir. 1966); Land Oberoesterreich v. Gude, 93 F.2d 292 (2d Cir., 1937); In re Northern Ind. Oil Co., 192 F.2d 139 (7th Cir., 1951); Lunn v. F. W. Woolworth, 210 F.2d 159 (9th Cir., 1954).

RULE 40. PETITION FOR REHEARING

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) Form of Petition; Length. The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(c) for the service and filing of briefs. Except by permission of the court, a petition for rehearing shall not exceed 10 pages of standard typographic printing or 15 pages of printing by any other process of duplicating or copying.

Advisory Committee's Note

This is the usual rule among the circuits, except that the express prohibition against filing a reply to the petition is found only in the rules of the Fourth, Sixth and Eighth Circuits (it is also contained in Supreme Court Rule 58(3)). It is included to save time and expense to the party victorious on appeal. In the very rare instances in which a reply is useful, the court will ask for it.

RULE 41. ISSUANCE OF MANDATE; STAY OF MANDATE

(a) Date of Issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(b) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall

issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

Advisory Committee's Note

The proposed rule follows the rule or practice in a majority of circuits by which copies of the opinion and the judgment serve in lieu of a formal mandate in the ordinary case. Compare Supreme Court Rule 59. Although 28 U.S.C. § 2101(c) permits a writ of certiorari to be filed within 90 days after entry of judgment, seven of the eight circuits which now regulate the matter of stays pending application for certiorari limit the initial stay of the mandate to the 30-day period provided in the proposed rule. Compare D. C. Cir. Rule 27(e).

RULE 42. VOLUNTARY DISMISSAL

(a) Dismissal in the District Court. If an appeal has not been docketed, the appeal may be dismissed by the district court upon the filing in that court of a stipulation for dismissal signed by all the parties, or upon motion and notice by the appellant.

(b) Dismissal in the Court of Appeals. If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.

Advisory Committee's Note

Subdivision (a). This subdivision is derived from FRCP 73(a) without change of substance.

Subdivision (b). The first sentence is a common provision in present circuit rules. The second sentence is added. Compare Supreme Court Rule 60.

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 personal representative, or, if he has no personal representative, by his 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.

(b) Substitution for Other Causes. If substitution of a party in the court of appeals is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(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 official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his 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 official capacity he may be described as a party by his official title rather than by name; but the court may require his name to be added.

Advisory Committee's Note

Subdivision (a). The first three sentences describe a procedure similar to the rule on substitution in civil actions in the district court. See FRCP 25(a). The fourth sentence expressly authorizes an appeal to be taken against one who has died after the entry of judgment. Compare FRCP 73(b), which impliedly authorizes such an appeal.

The sixth sentence authorizes an attorney of record for the deceased to take an appeal on behalf of successors in interest if the deceased has no representative. At present, if a party entitled to appeal dies before the notice of appeal is filed, the appeal can presumably be taken only by his legal representative and must be taken within the time ordinarily prescribed. 13 Cyclopedia of Federal Procedure (3d. Ed.) § 63.21. The states commonly make special provision for the event of the death of a party entitled to appeal, usually by extending the time otherwise prescribed. Rules of Civil Procedure for Superior Courts of Arizona, Rule 73(t); New Jersey Rev. Rules 1:3-3; New York Civil Practice Law and Rules, Sec. 1022; Wisconsin Statutes Ann. 274.01(2). The provision in the proposed rule is derived from California Code of Civil Procedure, Sec. 941.

Subdivision (c). This subdivision is derived from FRCP 25(d) and Supreme Court Rule 48, with appropriate changes.

RULE 44. CASES INVOLVING CONSTITUTIONAL QUESTIONS WHERE UNITED STATES IS NOT A PARTY

It shall be the duty of a party who draws in question the constitutionality of any Act of Congress in any proceeding in a court of appeals to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the court of appeals, to give immediate notice in writing to the court of the existence of said question. The clerk shall thereupon certify such fact to the Attorney General.

Advisory Committee's Note

This rule is now found in the rules of a majority of the circuits. It is in response to the Act of August 24, 1937 (28 U.S.C. § 2403), which requires all courts of the United States to advise the Attorney General of the existence of an action or proceeding of the kind described in the rule.

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 as counselor in any court while he continues 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 Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor 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 judgments 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 prepare, under the direction of the court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, he 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.

(c) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of entry by mail upon each party to the proceeding together with a copy of any opinion respecting the order or judgment, and shall make a note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel.

(d) Custody of Records and Papers. The clerk shall have custody of the records and papers of the court. He shall not permit any original record or paper to be taken from his 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.

Advisory Committee's Note

The duties imposed upon clerks of the courts of appeals by this rule are those imposed by rule or practice in a majority of the circuits. The second sentence of subdivision (a) authorizing the closing of the clerk's office on Saturday and non-national legal holidays follows a similar provision respecting the district court clerk's office found in FRCP 77(c) and in FRCrP 56.

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 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 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 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 should not be suspended or disbarred. Upon his 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.

(c) Disciplinary Power of the Court Over Attorneys. A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

Advisory Committee's Note

Subdivision (a). The basic requirement of membership in the bar of the Supreme Court, or of the highest court of a state, or in another court of appeals or a district court is found, with minor variations, in the rules of ten circuits. The only other requirement in those circuits is that the applicant be of good moral and professional character. In the District of Columbia Circuit applicants other than members of the District of Columbia District bar or the Supreme Court bar must claim membership in the bar of the highest court of a state, territory or possession for three years prior to application for admission (D.C. Cir. Rule 7). Members of the District of Columbia District bar and the Supreme Court bar again excepted, applicants for admission to the District of Columbia Circuit bar must meet precisely defined prelaw and law school study requirements (D.C. Cir. Rule 7-1/2).

A few circuits now require that application for admission be made by oral motion by a sponsor member in open court. The proposed rule permits both the application and the motion by the sponsor member to be in writing, and ~~contemplates~~ requires action on the motion without the appearance of the applicant or the sponsor, unless the court otherwise orders.

Subdivision (b). The provision respecting suspension or disbarment is uniform. Third Circuit Rule 8(3) is typical.

Subdivision (c). At present only Fourth Circuit Rule 36 contains an equivalent provision. The purpose of this provision is to make explicit the power of a court of appeals to impose sanctions less serious than suspension or disbarment for the breach of rules. It also affords some measure of control over attorneys who are not members of the bar of the court. Several circuits permit a non-member attorney to file briefs and motions, membership being required only at the time of oral argument. And several circuits permit argument pro hac vice by non-member attorneys.

RULE 47. RULES BY COURTS OF APPEALS

Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.

Advisory Committee's Note

This rule continues the authority now vested in individual courts of appeals by 28 U.S.C. § 2071 to make rules consistent with rules of practice and procedure promulgated by the Supreme Court.

RULE 48. TITLE

These rules may be known and cited as the Federal Rules of Appellate Procedure.

APPENDIX OF FORMS

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

United States District Court for the _____ District of _____

File Number _____

A. B., Plaintiff

v. Notice of Appeal

C. D., Defendant

Notice is hereby given that C. D., defendant above named, hereby appeals to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from the order (describing it)) entered in this action on the ____ day of _____.

_____, 19_____.

(S) _____

_____
(Address)
Attorney for C. D.

NOTE

Counsel for the appellant is requested to furnish the clerk of the district court with a sufficient number of copies of the original notice to permit the clerk to serve a copy on each party other than the appellant.

Form 2. Notice of Appeal to a Court of Appeals from a Decision of the Tax Court

Tax Court of the United States

Washington, D.C.

A. B., Petitioner

v. Docket No. _____

Commissioner of Internal Revenue,
Respondent

Notice of Appeal

Notice is hereby given that A. B. hereby appeals to the United States Court of Appeals for the _____ Circuit from [that part of] the decision of this court entered in the above captioned proceeding on the _____ day of _____, 19____.

[relating to _____].

(S) _____

_____
(Address)
Counsel for A. B.

NOTE

Use the language enclosed in brackets if the appeal is from a designated part of a decision rather than from the entire decision. Counsel for the appellant is requested to furnish the clerk of the Tax Court with a sufficient number of copies of the original notice to permit the clerk to serve a copy on each party other than the appellant.

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

United States Court of Appeals for the _____ Circuit

A. B., Petitioner

v. Petition for Review

XYZ Commission,
Respondent

A. B. hereby petitions the court for review of the Order of the XYZ Commission (describe the order) entered on _____, 19____.

_____
Attorney for Petitioner
Address:

NOTE

If the statute authorizing review specifies the title of the paper to be filed to initiate the proceeding in the court of appeals (as, for example, a petition to set aside the order, a notice of appeal) the title specified in the statute should be used and the appropriate changes made in the above statement. Rule 15(c) requires the petitioner to provide the clerk with a copy for each respondent.

Form 4. Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis

United States District Court for the _____

District of _____

United States of America

v. No. _____

A. B.

Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis

I, _____, being first duly sworn, depose and say that I am the _____ in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

_____

SUBSCRIBED AND SWORN TO before me this _____

day of _____, 19_____.

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____
District Judge

Changes in the Federal Rules of Civil and Criminal Procedure required coincident with the adoption of the Federal Rules of Appellate Procedure.

I. Federal Rules of Civil Procedure

Rule 6(b). Strike out "60(b), and 73(a) and (g),"

and insert "and 60(b),"

Explanatory Note:

The amendment eliminates the references to Rule 73, which is to be abrogated.

Rule 9(h). Strike out "73(h),". At the end of the

section add "The reference in Title 28, U.S.C.

§1292(a)(3), to admiralty cases shall be

construed to mean admiralty and maritime claims

within the meaning of this subdivision (h)."

Explanatory Note:

The amendment eliminates the reference to Rule 73 which is to be abrogated and transfers to Rule 9(h) the substance of subsection (h) of Rule 73 which preserved the right to an interlocutory appeal in admiralty cases which is provided by 28 U.S.C. §1292 (a)(3).

Rule 41(a)(1). Strike out "Rule 23(c)" and insert

"Rule 23(e)."

Explanatory Note:

The amendment corrects an inadvertent error in the reference to amended Rule 23.

Rules 72, 73, 74, 75 and 76. To be abrogated.

Explanatory Note:

These are the civil rules relating to appeals, the provisions of which, except for Rule 73(h), are transferred to and covered by the Federal Rules of Appellate Procedure and in the case of Rule 72 by the Rules of the Supreme Court. The substance of Rule 73(h) is to be transferred to Rule 9(h). (See above).

Rule 77(d). At the end of the last sentence strike out "Rule 73(a)" and insert "Rule 4(a) of the Federal Rules of Appellate Procedure."

Explanatory Note:

The provisions of Rule 73(a) are incorporated in Rule 4(a) of the Federal Rules of Appellate Procedure.

Rule 81(a). In paragraph (1) strike out at the end of the paragraph "except to appeals therein"

Amend paragraph (2) to read:

"(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions,"

In the second sentence of paragraph (3) strike out "(1)"and also ", and (2) to appeals in such proceedings"

Explanatory Note:

The amendments eliminate inappropriate references to appellate procedure.

Form 27. To be abrogated.

Explanatory Note:

The form of notice of appeal is transferred to the Federal Rules of Appellate Procedure as Form 1.

II. Federal Rules of Criminal Procedure

Rules 37(b) and (c) and 39. To be abrogated.

Explanatory Note:

These are the criminal rules relating to appeals, the provisions of which are transferred to and covered by the Federal Rules of Appellate Procedure and (in the case of Rule 37(b) and (c)) by the Rules of the Supreme Court.

Rule 45(b). Strike out "35, 37(a)(2) and 39(c),"

and insert "and 35,"

Explanatory Note:

The amendment eliminates inappropriate references to Rules 37 and 39 which are to be abrogated.

Rule 49(c). Strike out "Rule 37(a)(2)" and insert

"Rule 4(b) of the Federal Rules of Appellate

Procedure"

Explanatory Note:

The amendment corrects the reference to Rule 37(a)(2), the pertinent provisions of which are contained in Rule 4(b) of the Federal Rules of Appellate Procedure.

Rule 56. Strike out of the first sentence "court of appeals and the"

Explanatory Note:

The provisions relating to the court of appeals are included in Rule 45 of the Federal Rules of Appellate Procedure.

Rule 57(a). Strike out "and courts of appeals" in the first sentence and "or by a court of appeals" in the second sentence.

Explanatory Note:

The provisions relating to courts of appeals are included in Rule 47 of the Federal Rules of Appellate Procedure.

Forms 26 and 27. To be abrogated.

Explanatory Note:

These forms relate to appellate procedure and are no longer appropriate in the Federal Rules of Criminal Procedure.