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

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

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

DATE: June 20, 1996

INTRODUCTION

The Advisory Committee on Appellate Rules met on April 15, 1996, in San Francisco, California. The Committee also held a telephone conference on May 1, 1996. The Advisory Committee considered the public comments on the proposed amendments to the Appellate Rules that were published in September, 1995. After making several changes to the proposed amendments, the Advisory Committee approved them for presentation to the Standing Committee for final approval. The Advisory Committee requests, however, that these rules not be forwarded to the Judicial Conference for its fall meeting. The Advisory Committee would like to delay these changes so that they become effective at the same time as the restyled rules currently published for comment.

The Advisory Committee also approved one additional rule change and amendment of a form for presentation to the Standing Committee with a request for publication. The Advisory Committee requests that these proposals be published as soon as possible so that these changes can also proceed on the same schedule as the restyled rules.

Both packages of proposed amendments are discussed in the "Action Items" section of this report.

I. ACTION ITEMS

A. Proposed amendments to Federal Rules of Appellate Procedure 26.1, 29, 35, and 41 submitted for approval by the Standing Committee with a request for delayed transmittal to the Judicial Conference.

These proposed amendments were published for comment by the bench and bar in September 1995. The period for public comment closed on March 1, 1996. Thirty letters were received from commentators. Twenty-six letters commented on particular rules and are discussed below following the text of the relevant proposed amendment. Four letters contained only general statements regarding all published rules. One other letter contained a general comment in addition to comments regarding particular rules. The general comments were as follows:

1. Stanley I. Adelstein, Esquire,
3390 Kersdale Road
Pepper Pike, Ohio 44124-5607

Mr. Adelstein supports requiring:
- recycled paper;
- double-sided copying; and
- non-chlorine bleached recycled paper.

2. Aaron H. Caplan, Esquire
Perkins Coie
1201 Third Avenue, 40th Floor
Seattle, Washington 98101-3099
on behalf of 12 members of the Law Firm Waste Reduction Network

Supports proposals under consideration to permit, or preferably to require, the use of double-sided copies and recycled paper for documents submitted to the federal courts.

3. Anthony J. DiVenere, Esquire
McDonald, Hopkins, Burke & Haber
2100 Bank One Center
600 Superior Avenue, E.
Cleveland, Ohio 44114-2653

Supports requiring: recycled paper for all filings; double-sided

copying of documents; and use of non-chlorine bleached recycled paper.

4. Thomas H. Frankel, Esquire
102 E. Street
Davis, California 95616

Urges the use of recycled paper for all documents submitted to the courts.

5. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
1675 Broadway
New York, New York 10019-5820

States that most of the proposed amendments are well-considered and should be adopted but cautions against continuously fine-tuning the Federal Rules even if the changes are themselves worthwhile.

The first four "general" comments are addressed to the use of recycled paper and double-sided copying. They seem most relevant to Rule 32 (currently republished with the restyled rules). They are summarized here because they were submitted in response to this packet of rules. The comments will be retained for consideration at the close of the comment period for the restyled rules.

1. Synopsis of Proposed Amendments

(a) Rule 26.1 has been divided into three subdivisions to make it more comprehensible. The rule continues to require disclosure of a party's parent corporation but the proposed amendments delete the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. The amendments, however, add a requirement that a party list all its stockholders that are publicly held companies owning 10% or more of the party's stock.

(b) Rule 29 has been entirely rewritten and several significant changes are proposed.

- The provision in the former rule granting permission to conditionally file an amicus brief with the motion for leave to file is changed to require that the brief accompany the motion. In addition to identifying the movant's interest and

stating the general reasons why an amicus brief is desirable, the amended rule requires that the motion state the relevance of the matters asserted to the disposition of the case.

- The contents and form of the brief are specified.
- The amended rule limits an amicus brief to one-half the length of a party's principal brief.
- An amicus brief must be filed no later than 7 days after the principal brief of the party being supported.
- An amicus is not permitted to file a reply brief.

(c) Rule 35 is amended to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of a court of appeals' judgment and extend the period for filing a petition for writ of certiorari. The sentence in the existing rule stating that a request for rehearing en banc does not suspend the finality of the judgment or stay the mandate is deleted. In keeping with the intent to treat a request for a panel rehearing and a request for a rehearing en banc similarly, the term "petition for rehearing en banc" is substituted for the term "suggestion for rehearing en banc." The amendments also require each petition for en banc consideration to begin with a statement concisely demonstrating that the case meets the criteria for en banc consideration. Intercircuit conflict is cited as an example of a proceeding that might involve a question of "exceptional importance" — one of the traditional criteria for granting an en banc hearing. The amendments limit a petition for en banc review to 15 pages.

(d) Rule 41 is amended to provide that the filing of a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari delay the issuance of the mandate until the court disposes of the petition or motion. The amended rule also makes it clear that a mandate is effective when issued. The presumptive period for a stay of mandate pending petition for a writ of certiorari is extended to 90 days.

2. Text of Proposed Amendments, Summary of Comments Relating to Particular Rules, and GAP Report

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 26.1. Corporate Disclosure Statement

(a) *Who Shall File.* ~~Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. The statement must be filed with a party's~~ Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying all its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

(b) *Time for Filing.* A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever ~~first~~ occurs first, unless a local

rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents.

(c) *Number of Copies.* ~~Whenever~~ If the statement is filed before ~~a party's~~ the principal brief, the party must file an original and three copies, ~~of the statement must be filed~~ unless the court requires ~~the filing of~~ a different number by local rule or by order in a particular case. ~~The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed.~~

Committee Note

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

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

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

Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. The rule requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well. For example, if a party is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the shares of the party, the publicly traded grandparent corporation should be disclosed. Conversely, disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation.

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

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

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

Public Comments on Rule 26.1

Eleven letters commenting on the proposed amendments were received; the letter from the A.B.A. Section of Intellectual Property, however, included separate suggestions from two committees so there was a total of 12 commentators. Of the 12, four supported the amendments, none generally opposed the amendments, but 8 suggested revisions.

The comments were as follows:

1. Robert L. Baechtol, Esquire
Chair, Rules Committee
The Federal Circuit Bar Association
1300 I Street, N.W.
Suite 700
Washington, D.C. 20005-3315

The Association agrees that recusal will rarely be required based on a judge's ownership of stock in a litigant's subsidiary or affiliate; but states that "rarely" does not mean "never." The Association urges that the rule continue to require disclosure of subsidiaries and affiliates because it does not impose a significant burden and not requiring it risks adverse reflection on the court's neutrality when a judge would have elected recusal had the facts been disclosed.

2. Robert S. Belovich, Esquire
5638 Ridge Road
Parma, Ohio 44129

The rule will not assure disclosure of publicly held corporations which may be a joint venture partner of a party to an appeal, or of a publicly traded corporation which is a grandparent or great grandparent of a party to an appeal. He gives as an example a party that is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the majority shares of the party. The publicly traded corporation's disclosure would not be required under a strict reading of the rule.

3. Donald R. Dunner, Esquire
Chair, Section of Intellectual Property Law
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Mr. Dunner submitted comments prepared by two of the section's committees:

a. One committee says that the amendments appear reasonable.

b. Another committee says that the proposed deletions from the rule are well-advised but the committee has two concerns about requiring a party to disclose any publicly-held company owning 10% or more of the party's stock. First, it implies that a judge who owns any stock in a company that owns 10% of the stock in a party should recuse himself or herself; the committee thinks this "over-extends an assumption of disqualification in some circumstances" and that the provisions may prevent a judge from using mutual funds to avoid the appearance of impropriety. Second, the committee thinks that compliance with the disclosure requirement could be burdensome and that the burden is not justified by the indirect and potentially extremely minimal ownership interests it addresses.

4. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments of Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section of the Federal Bar Association. Mr. Laponsky thinks the changes generally make the rule more comprehensible but questions whether the new rule will generate adequate information. Substituting "stockholders that are publicly traded companies" for "affiliates" is helpful, but limiting disclosure to stockholders with 10% or greater interest in the party may cause difficulties in obtaining the requisite information from a corporate client. Although he does not disagree that a 10% threshold will identify stockholders whose interests are most likely to be affected by litigation, he thinks it would be easier for the corporation to simply identify all publicly traded stockholders.

5. Jack E. Horsley, Esquire
Craig & Craig
1807 Broadway Avenue
Post Office Box 689
Mattoon, Illinois 61938-0689

Attorney Horsley makes two comments:

a. He suggests that the rule be expanded to require the filing of a statement by the Chief Executive Officer and by members of the Board of Directors of the company.

b. He suggests amending lines 23-28 to state: "If the statement is filed before the principal brief, the party shall file an original and at least three copies, unless the court requires the filing of a ~~different~~ reasonable number by local rule or by order in a particular case."

6. Heather Houston, Esquire
Gibbs Houston Pauw
1111 Third Avenue, Suite 1210
Seattle, Washington 98101
on behalf of the Appellate Practice Committee of the Federal Bar Association for the Western District of Washington

It is not always clear whether a particular corporation is "publicly held." The committee suggests that the rule refer to companies "that have issued shares that are traded on exchanges or markets that are regulated by the Securities and Exchange Commission."

7. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
1675 Broadway
New York, New York 10019-5820

Agrees with eliminating the need to identify a party's subsidiaries or affiliates; but suggests amending lines 12-14 as follows:
"listing any stockholder[s] that is a [are] publicly held company[ies] and that owns[ing] 10% or more of the party's stock."
The changes are intended to make it clear that the rule does not call for identifying public companies that, collectively, might own a total of 10% of the party's stock.

Even though there are other forms of financial involvement other than "stock" that could be effected by a decision for or against a party, e.g. convertible notes and debentures, Attorney Lacovara says that the difficulties of defining a broader category of investments and in tracking the identity of the investors

make the focus on "stock" reasonable.

8. Don W. Martens, Esquire
President
American Intellectual Property Law Association
2001 Jefferson Davis Highway, Suite 203
Arlington, Virginia 22202

The AIPLA supports the additional requirement of listing owners of more than 10% of the stock of the party to the appeal, but it questions the need to delete the identification of subsidiaries and affiliates. Although it is unlikely that a subsidiary or affiliate would be affected by the outcome of the appeal, it may be and the judges should have that information as well.

9. Honorable A. Raymond Randolph
Chair, Committee on Codes of Conduct of the
Judicial Conference of the United States
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

The Committee supports the proposed revisions. Disclosure of only parent companies and public companies owning more than 10 percent of the party's stock should be adequate to ensure that the judges are made aware of parties' corporate affiliations and are able to make informed decisions about the need to recuse.

10. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

Notes only that the proposed amendment brings the Federal Rule in accordance with its Seventh Circuit analogue.

11. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

In addition to the comments submitted during the publication period, Judge James A. Parker wrote to Judge Logan after last summer's Standing Committee meeting. He was concerned that Rule 26.1 is too narrow because it deals only with corporations. Corporations are not the only form of organization that has numerous diverse owners. Judge Parker notes by way of example that the rule does not require a corporation that is a general or limited partner to disclose its interest in a limited partnership in which a judge may also be a limited partner. Judge Parker recommends broadening the language of Rule 26.1 to require identification of all types of organizations in which a party may have an interest that would create a conflict for a judge.

Gap Report on Rule 26.1

Changes were made at lines 11 and 12. Mr. Lacovara's suggestion was adopted so that it is clear the rule applies only when a single corporate stockholder owns at least 10% of a party's stock. And at line 11, the rule now requires disclosure of "all" of a party's parent corporations, rather than "any" parent corporation. The intent of the change is to require disclosure of grandparent and great-grandparent corporations. The Committee Note explains that change.

In addition a stylistic change was made in subdivision (c).

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.~~

(a) **When Permitted.** The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-

curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(b) **Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:

(1) the movant's interest;

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(c) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following:

(1) a table of contents, with page references;

(2) a table of authorities — cases

(alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae and its interest in the case; and

(4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review.

(d) **Length.** Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) **Time for Filing.** An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae who does not support either party must file its brief no later than 7 days after the

appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) **Reply Brief.** Except by the court's permission, an amicus curiae may not file a reply brief.

(g) **Oral Argument.** An amicus curiae may participate in oral argument only with the court's permission.

Committee Note

Rule 29 is entirely rewritten.

Subdivision (a). The major change in this subpart is that when a brief is filed with the consent of all parties, it is no longer necessary to obtain the parties' written consent and to file the consents with the brief. It is sufficient to obtain the parties' oral consent and to state in the brief that all parties have consented. It is sometimes difficult to obtain all the written consents by the filing deadline and it is not unusual for counsel to represent that parties have consented; for example, in a motion for extension of time to file a brief it is not unusual for the movant to state that the other parties have been consulted and they do not object to the extension. If a party's consent has been misrepresented, the party will be able to take action before the court considers the amicus brief.

The District of Columbia is added to the list of entities allowed to file an amicus brief without consent of all parties. The other changes in this material are stylistic.

Subdivision (b). The provision in the former rule, granting permission to conditionally file the brief with the motion, is changed to one requiring that the brief accompany

the motion. Sup. Ct. R. 37.4 requires that the proposed brief be presented with the motion.

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

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

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

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

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

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

Subdivision (e). The time limit for filing is changed. An amicus brief must be filed no later than 7 days after the principal brief of the party being supported is filed.

Occasionally, an amicus supports neither party; in such instances, the amendment provides that the amicus brief must be filed no later than 7 days after the appellant's or petitioner's principal brief is filed. Note that in both instances the 7-day period runs from when a brief is filed. The passive voice — "is filed" — is used deliberately. A party or amicus can send its brief to a court for filing and, under Rule 25, the brief is timely if mailed within the filing period. Although the brief is timely if mailed within the filing period, it is not "filed" until the court receives it and file stamps it. "Filing" is done by the court, not by the party. It may be necessary for an amicus to contact the court to ascertain the filing date.

The 7-day stagger was adopted because it is long enough to permit an amicus to review the completed brief of the party being supported and avoid repetitious argument. A 7-day period also is short enough that no adjustment need be made in the opposing party's briefing schedule. The opposing party will have sufficient time to review arguments made by the amicus and address them in the party's responsive pleading. The timetable for filing the parties' briefs is unaffected by this change.

A court may grant permission to file an amicus brief in a context in which the party does not file a "principal brief;" for example, an amicus may be permitted to file in support of a party's petition for rehearing. In such instances the court will establish the filing time for the amicus.

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

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

Subdivision (g). The language of this subdivision stating that an amicus will be granted permission to participate in oral argument "only for extraordinary reasons" has been deleted. The change is made to reflect more accurately the current practice in which it is not unusual for a court to permit an amicus to argue when a party is willing to share its argument time with the amicus. The Committee does not intend, however, to suggest that in other instances an amicus will be permitted to argue absent extraordinary circumstances.

Public Comments on Rule 29

Fifteen letters commenting on proposed Rule 29 were submitted. Two of the letters contained separate suggestions from two persons or committees so there was a total of 17 commentators. Of the 17 commentators, none generally opposed the amendments; 3 supported the amendments without reservation; 13 suggested revisions; and 1 made no substantive comment.

The comments were as follows:

1. Chicago Council of Lawyers
One Quincy Court Building
Suite 800
220 S. State Street
Chicago, Illinois 60604

The Council generally agrees with the proposed amendment but suggests amending subpart (d) so that the court has discretion to permit a longer brief. The Council suggests that (d) should read as follows:

> An amicus brief may be no longer than one-half the maximum length of a party's principal brief unless the Court grants the amicus leave to file a longer brief for good cause.

2. Donald R. Dunner, Esquire
Chair, Section of Intellectual Property Law
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Mr. Dunner submits comments from two of the section's committees:

One committee makes no substantive comment.

Another committee offers several suggestions:

a. that the District of Columbia should be added to the list of entities allowed to file an amicus brief without consent;
b. insert the word "or" at the end of subparagraph (a)(1), for clarity;
c. the rule should not require submission of the brief along with a motion for leave to file, instead the rule should require that the motion concisely state the arguments that will be made in the brief;
d. the late filing of an amicus brief should be permitted by stipulation of all parties;
e. subparagraph (f) is unclear; it may leave ambiguity as to whether an amicus may request leave to file a reply;
f. an amicus should be allowed to participate in oral argument if the party supported grants a portion of that party's allotted time to the amicus and the court is so informed.

3. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments to two different persons.

a. Sydney Powell, Esquire, the Chair of Appellate Law and Trial Practice Committee of the Federal Litigation Section. Attorney Powell suggests:

- It would be simpler to limit an amicus brief to 25 pages rather than "no more than one-half the maximum length of a party's principal brief." Currently it is not clear if "maximum" means maximum length "allowed" for a party's principal brief. She further notes that if a party is granted permission to file a longer brief, the rule appears to give the amicus one-half the expanded length. In which case, what happens if there are two appellants and one is allowed additional pages and the other is not? What happens when permission to file a longer brief is granted to the party very close to or contemporaneous with the deadline for filing the party's brief?
- It would be better to allow the filing of the motion and the brief within 15 days after the filing of the principal brief of the party whose position as to affirmance or reversal the amicus brief will support. The amicus can make an informed decision regarding whether it supports either party and can avoid repetition of the party's arguments. Ms. Powell concedes that special provision would need to be made to allow an appellant to respond to a brief in support of an appellee.

b. Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section of the Federal Bar Association. Mr. Laponsky supports the amendments including specifically the requirement that the brief be submitted with the motion and the limit on the length of the brief.

4. Jack E. Horsley, Esquire
Craig & Craig
1807 Broadway Avenue
Post Office Box 689
Mattoon, Illinois 61938-0689

Attorney Horsley suggests that the language at lines 53-55 be made mandatory so that a summary of argument is required, not optional.

5. Heather Houston, Esquire
Gibbs Houston Pauw
1111 Third Avenue, Suite 1210
Seattle, Washington 98101
on behalf of the Appellate Practice Committee of the Federal Bar Association for the Western District of Washington

The committee agrees that an amicus brief is most helpful when it does not unnecessarily repeat the arguments and authorities relied upon by the parties. But in order to avoid such repetition, an amicus must be familiar with the party's arguments and authorities well before the time the amicus must file its brief.

- Because the proposed rule requires an amicus to file its brief at the same time as the party being supported, an amicus will rarely have an adequate opportunity to review the party's brief before filing its own.
- In addition to the fact that a draft of the party's brief may not be available until a few days before the filing deadline, the party being supported is not always willing to cooperate with the amicus. If the amicus does not support the position of either party, the amicus brief is due within the time allowed the appellant. An amicus who does not support either party is especially unlikely to receive the cooperation of the parties' counsel and the amicus cannot possibly be confident that it is not repeating the respondent's arguments.

The committee recommends that the brief of an amicus curiae be due within the time that a reply brief may be filed. The amicus would have an opportunity to review the parties' principal briefs. If a party believes additional briefing is necessary to respond to an amicus, a motion for leave to file such a brief should be permitted.

Alternatively the committee suggests:

a. Before the appellant's brief is due, an amicus should be permitted to file a motion for leave to file a brief and the motion need not be accompanied by the brief. If the brief does not accompany the motion, the amicus must indicate whether any of the parties have consented to the participation of the amicus and, if any have consented, the amicus must describe the information it has received from the parties regarding their arguments. The amicus also must state whether it has had an adequate opportunity to review the parties' arguments in the trial court and how much time it needs to prepare its brief. Based on that information, the court will set a deadline for the amicus to file its brief.

b. If an amicus supports neither party, it may file its brief within the time allowed the respondent. If an amicus needs more time to prepare an adequate brief, it may file a motion without the brief and explain why it requires more time. If the parties have consented, the court will determine only whether the extra time will be allowed; if they have not, the court will rule on the motion for leave to file as well as on the request for extra time.

6. Miriam A. Krinsky, Esquire
Assistant United States Attorney
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Opposes the requirement that a motion for leave to file an amicus brief be accompanied by the brief; the requirement puts the parties and the court in the uncomfortable position of having to disregard the substance of the brief if the request is denied.

If that provision is not changed, she suggests that (e) be amended to require the court to promptly decide the request so that the opposing party is able to respond in its later brief to the arguments made in the amicus brief.

She also suggests that the rule provide for the filing of a short responsive brief if an amicus brief is filed in opposition to a request for rehearing en banc.

7. William J. Genego and Peter Goldberger, Esquires
Co-Chairs, National Association of Criminal
Defense Lawyers, Committee On Rules of Procedure
1627 K. Street, N.W.
Washington, D.C. 20006

The Association makes three suggestions:

a. It opposes limiting an amicus brief to 25 pages under present rules, or 20-22 pages under pending proposals. The Association files amicus briefs for three reasons:

i) to show the flag, such briefs are rare and may be quite short;

ii) when an issue in the case has important ramifications beyond the facts of the particular party's situation; and

iii) when the issue is a good one but the association knows, or suspects, that the skills of the lawyer on the case are not really up to the task, in such cases the Association files an entire "shadow" brief with a full statement of the case and parallel argument.

The Association believes that an amicus brief of the third variety can be very helpful to the court and can "correct the defects in our adversary process that occasionally result from a mismatch of ability between counsel, where important rights hinging on the resolution of difficult issues are at stake." (But in such cases the Association would not be inclined to state for the record the real reason it feels the need to file.) Briefs in the latter two categories often demand more than 25 pages to fulfill their mission.

The Association prefers that an amicus have the same limitations as a party but if something shorter is thought to be necessary, it urges a rule in the 70-80% range so that an amicus has about 35 pages when the party's limit is 50.

b. Consent of parties. NACDL suggests that a representation by amicus counsel located and clearly labeled within the brief itself, that the parties have authorized counsel to state that they consent to the filing should be sufficient.

c. Time for filing. NACDL suggests that the presumptive time for filing an amicus brief should be within 10 days after the filing of the principal brief of the party supported and that the opposing party should have the normal period of time to respond, measured from the filing of the amicus brief.

8. Bert W. Rein, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
January 18, 1996
on behalf of 6 attorneys in the firm

They do not oppose the shorter page limits for an amicus brief but note that there is "considerable tension" between the "emphasis on brevity and non-repetition, on the one hand, and the requirement that an amicus brief be submitted within the time allowed for the party being supported, on the other." They assert that it is not justified to assume that an amicus is in a position to coordinate its efforts with the party it is supporting or that the amicus will receive an advance copy of the party's brief well before the filing date. As to the latter, they point out that because appeals often address unpublished district court opinions, even a diligent amicus may not learn of the case until the briefing schedule is underway, making it quite difficult to comply with a contemporaneous filing requirement.

They recommend adopting the Fifth Circuit's local rule 29.1 under which an amicus submits its brief

> "within 15 days after the filing of the principal brief of the party whose position . . . the amicus will support."

Because FRAP 31(a) provides only 14 days for an appellant to file a reply brief, they further suggest amending rule 29(e) to read:

> An amicus curiae shall file its brief, accompanied by a motion for filing when necessary, within 15 days after the filing of the principal brief of the party being supported when that party is the appellant, or within 7 days after the filing of the principal brief of the party being supported when that party is the appellee.

9. Kent S. Scheidegger, Esquire
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
on behalf of the Criminal Justice Legal Foundation, the American Alliance for Rights and Responsibilities, and the Institute for Justice

The organizations make several suggestions:

a. They object to limiting the length of an *amicus* brief to one-half the length of a party's principal brief. They argue that in the courts of appeals amicus briefing is the exception rather than the rule and is likely to be in cases of greater complexity than average and a 25 page

limit will result in routine motions to exceed the limits or in briefs of reduced usefulness to the court. In circuits such as the Ninth, which limits a principal brief to 35 pages, an amicus brief will be limited to even less than 25 pages. They suggest the following:

> (d) Length. An amicus brief may be no more than 35 pages, except by permission of the court or as specified by local rule.

b. The rule requires written consent of the parties or a motion. With the decline in professional courtesy, counsel for a party increasingly fail to return written consent even though they have no particular objection. The organizations suggest a new subpart (b) with the present subparts (b)-(g) redesignated:

> (b) Consent by Default. When a party fails to respond in writing to a written request for consent to file an amicus brief within two weeks of the request, that party shall be deemed to have consented. A declaration of counsel for amicus setting forth the requisite facts may accompany the brief in lieu of the written consent.

c. The comment to subdivision (e) implies that an amicus brief may be permitted in support of a petition for rehearing; that should be reflected in the body of the rule.

d. The requirement for a formal corporate disclosure statement will very often be unnecessary. They suggest adding a sentence to Rule 26.1 stating: "If the amicus is a nonprofit corporation with no stockholders, a statement to that effect is sufficient.

10. Benjamin G. Shatz, Esquire
Crosby, Heafey, Roach & May
700 South Flower Street, Suite 2200
Los Angeles, California 90017
on behalf of the Appellate Courts Committee of the Los Angeles County Bar Association

The committee opposes limiting the length of an amicus brief to one-half the length of a party's principal brief. An amicus brief can assist the court by compensating for a party's inadequate presentation of an issue, by analyzing the broader impact of a position, and by presenting alternative viewpoints. That may require more than one-half the length allowed the party.

11. Reagan Wm. Simpson, Esquire
Fulbright & Jaworski
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
on behalf of the Tort & Insurance Practice Section (TIPS) of the American Bar Association

TIPS opposes three aspects of the amendments:

a. An amicus brief should not be required to accompany the motion for leave to file. Such a requirement causes a potential amicus to incur the cost of preparing a brief before it knows whether it can be filed.
b. The page limit is too restrictive.
c. The rule should not ban any reply brief by an amicus

12. Arthur B. Spitzer, Esquire
Legal Director
American Civil Liberties Union of the National Capital Area
1400 20th Street, N.W.
Washington, D.C. 20036

The ACLU of the National Capital Area makes two suggestions:

a. Consent of parties. The ACLU suggests that the rule be modified to provide that an amicus brief may be filed if "it is accompanied by a written representation that all parties consent." The D.C. Cir. Rule 29 so provides. The ACLU points out that it is not unusual for an amicus to become aware of a pending appeal in a court of appeal just before briefs are due. It may be difficult to obtain written consents in a very short time. It is common practice for counsel to represent, in a motion or notice, that counsel for other parties have consented to a given matter — for example, an extension of time or a brief exceeding page limits. If a party's consent to file is misrepresented, the party will have time to correct the error before the amicus brief is considered by the court.
b. Filing brief with motion. The ACLU opposes the requirement that the proposed amicus brief be presented with the motion for leave to file. There are two reasons why it is desirable to file the motion for leave to file in advance of the brief. First, filing a notice (when all parties consent) or a motion (when all parties do not consent) in advance allows all potential amici to become known to each other and allows the preparation of a joint amicus brief by those on the same side. That would not be possible if the brief must be filed with the motion. Second, a potential amicus may know that there will be opposition to its motion. It is less wasteful to file the motion and obtain the ruling before writing the brief.

13. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

The proposed amendments reflect a welcome simplification and unification of appellate practice. In particular, the statement as to why an amicus brief is desirable and that the matters asserted are relevant to the case should be helpful.

14. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

15. Hugh F. Young, Jr.
Executive Director
Product Liability Advisory Council
1850 Centennial Park Drive, Suite 510
Reston, Virginia 22091

The PLAC supports the effort to establish uniformity in determining the length of briefs and believes that 25 pages should be sufficient in virtually every instance. But PLAC points out that the Ninth Circuit limits a party's principal brief to 35 pages, and the D.C. Circuit limits a principal brief to 12,500 words. PLAC suggests that the rule should make it clear that an *amicus* brief may be no more than one-half the maximum length of a principal brief or 25 pages whichever is longer. Also, if a party is granted permission to file a longer principal brief, the *amicus* should automatically be entitled to one-half of the enlarged length.

PLAC also urges that the rule or Committee Note make it clear that an *amicus* may seek leave to file a longer brief.

Gap Report on Rule 29

In subdivision (a) the District of Columbia was added to the list of entities allowed to file an amicus brief without consent. The suggestion was adopted that a

statement that all parties have consented to the filing of the brief should be sufficient and it is not necessary to file the written consent of all the parties.

Subdivision (c) was amended so that the cover must identify the party supported and indicate whether the brief supports affirmance or reversal. In the rare instance in which the amicus does not support any party, the amicus can simply so indicate.

In subdivision (d) the limit on the length of an amicus brief is unchanged except to provide 1) that permission granted to a party to file a longer brief has no effect upon the length of an amicus brief, and 2) that a court may grant an amicus permission to file a longer brief.

Subdivision (e) was changed permit an amicus to file its brief up to 7 days after the principal brief of the party being supported is filed.

Subdivision (f) makes it clear that an amicus may request leave to file a reply.

In subdivision (g) the language stating that an amicus will be granted permission to participate in oral argument "only for extraordinary reasons" has been deleted. The change reflects more accurately current practice in which it is not unusual for a court to permit an amicus to argue when a party is willing to share its argument time with the amicus.

Stylistic changes also were made.

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

En Banc Determination

(a) **When Hearing or Rehearing ~~in~~ En Banc ~~will~~ May 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~~ en banc. ~~Such a~~ An en banc hearing or rehearing is not favored and ordinarily will not be ordered ~~except~~ unless:

(1) ~~when~~ en banc consideration ~~by the full court~~ is necessary to secure or maintain uniformity of the court's ~~its~~ decisions ~~;~~ :; or

(2) ~~when~~ the proceeding involves a question of exceptional importance.

(b) ~~Suggestion of a party~~ **Petition for Hearing or Rehearing ~~in~~ En Banc.** A party may ~~suggest the appropriateness of~~ petition for a hearing or rehearing ~~in~~ en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States

Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other federal court of appeals that has addressed the issue.

(2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages,

excluding material not counted under Rule 28(g).

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately unless separate filing is required by local rule.

~~No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need 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~~ Petition for Hearing or Rehearing ~~in~~ En Banc.** ~~; suggestion does not stay mandate. If a party desires to~~

~~suggest that~~ A petition that an appeal be heard initially ~~in~~ en banc ~~, the suggestion~~ must be ~~made~~ filed by the date ~~on which~~ when the appellee's brief is ~~filed~~ due. A ~~suggestion~~ petition for a rehearing ~~in~~ en banc must be ~~made~~ filed 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.~~

(d) **Number of Copies.** The number of copies ~~that must~~ to be filed ~~may~~ must be prescribed by local rule and may be altered by order in a particular case.

(e) **Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response.

(f) **Voting on a Petition.** The clerk must forward any such petition to the judges of the court who are in regular active service and, with respect to a

petition for rehearing, to any other members of the panel that rendered the decision sought to be reheard. But a vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge requests a vote.

Committee Note

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

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

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

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

Intercircuit conflict is cited as one reason for asserting

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

Some circuits have had rules or internal operating procedures that recognize a conflict with another circuit as a legitimate basis for granting a rehearing en banc. An intercircuit conflict may present a question of "exceptional importance" because of the costs that intercircuit conflicts impose on the system as a whole, in addition to the significance of the issues involved. It is not, however, the Committee's intent to make the granting of a hearing or rehearing en banc mandatory whenever there is an intercircuit conflict.

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

Counsel are reminded that their duty is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of subdivision (a) of this Rule and even then the granting of a petition is entirely within the court's discretion.

Paragraph (2) of this subdivision establishes a maximum length for a petition. Fifteen pages is the length currently used in several circuits. Each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. The extraordinary nature of the issue or the threat to uniformity of the court's decision can be established in most cases in less than fifteen pages. A court may shorten the maximum length on a case by case basis but the rule does not permit a circuit to shorten the length by local rule. The Committee has retained page limits rather than using a word count similar to that in proposed Rule 32 because there has not been a serious enough problem to justify importing the word count and typeface requirements that may become applicable to briefs into other contexts.

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

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

Subdivision (c). Two changes are made in this subdivision. First, the sentence stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate is deleted. Second, the language permitting a party to include a request for rehearing en banc in a petition for panel rehearing is deleted. The Committee believes that those circuits that want to require two separate documents should have the option to do so.

Subdivision (e). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b). The only changes are stylistic; no substantive changes are intended.

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

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

Public Comments on Rule 35

Fourteen letters commenting upon the proposed amendments to Rule 35 were received. One letter from an A.B.A. section, however, contained comments from two of the section's committees. There were, therefore, fifteen commentators. Of the fifteen commentators none expressed general opposition to the changes. Eight expressed general approval of the amendments, but 4 of the 8 suggested some revisions. Seven others also suggested revisions.

The comments were as follows:

1. Peter H. Arkison, Esquire
Suite 502
103 East Holly Street
Bellingham, Washington 98225-4728

Points out that there is an unnecessary double negative in both 35(b)(2) and (3) ("excluding material not counted"). The paragraphs are also unnecessarily wordy because they repeat "petition for rehearing and a petition for rehearing en banc." He also suggests excluding "except by the court's permission" because it is in Rule 28(g).

He suggests:

35(b)(2) "Rule 28(g) shall apply with a page limit of 15 pages for a petition."

35(b)(3) "For purposes of Rule 35(b)(2), a petition for panel rehearing and a petition for rehearing en banc shall be considered a single document regardless of whether they are filed separately."

2. Robert L. Baechtol, Esquire
Chair, Rules Committee
The Federal Circuit Bar Association
1300 I Street, N.W.
Suite 700
Washington, D.C. 20005-3315

The Association suggests that 35(b)(1)(B) should be expanded to include an additional consideration:

> . . . or involves an issue which is one of first impression or on which the prior law was unsettled in the circuit.

3. Donald R. Dunner, Esquire
Chair, Section of Intellectual Property Law
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Mr. Dunner submits comments from two of the section's committees:

One committee states that the 15-page limit "may be a bit too restrictive, especially where both a petition for en banc review and a petition for panel rehearing are filed. Perhaps 35(b)(3) could be further amended to provide for additional pages upon leave of court." The committee states that the remaining amendments "appear to be acceptable."

Another committee agrees that the distinction between a petition for rehearing and a petition for rehearing en banc should be abolished but disagrees that a panel decision needs to conflict with every other federal court of appeals in order to "present a question of exceptional importance." If a split is significant and the panel decision illuminates or heightens the conflict, the proceeding may present a question of exceptional importance warranting en banc treatment even when the decision joins one side of a preexisting conflict.

4. William J. Genego and Peter Goldberger, Esquires
Co-Chairs, National Association of Criminal
Defense Lawyers, Committee On Rules of Procedure
1627 K Street, N.W.
Washington, D.C. 20006

NACDL welcomes the elimination of the distinction between a petition for rehearing and a suggestion for rehearing en banc and approves expansion of the grounds for rehearing to include intercircuit conflicts. It does not oppose imposition of a uniform page length. But it does not see the point of changing the spelling of "in banc" which conforms to the statutory usage.

5. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments of Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section of the Federal Bar Association. Mr. Laponsky endorses the proposed amendments.

6. Miriam A. Krinsky
Assistant United States Attorney
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

"Wholeheartedly endorse[s]" the change so that a request for rehearing en banc suspends the finality of a judgment and extends the time for filing a petition for a writ of certiorari; the change eliminates a trap that is based upon an ill-advised distinction.

Urges consideration of an amendment that clarifies the precedential value of a panel opinion after rehearing en banc is granted. Most circuits either automatically, or usually, vacate the panel opinion when en banc review is granted; but the Ninth and Tenth Circuits presume that the three-judge panel opinion remains in effect pending disposition of the case by the en banc court. It may be undesirable to have, during the time the case is awaiting en banc resolution, a number of district court judgments handed down based on a panel decision that is likely to be modified.

7. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
1675 Broadway
New York, New York 10019-5820

Supports the change in terminology from "suggestion" to "petition" for rehearing en banc. But objects to two features of the proposed amendments to subpart (b).

a. Requiring in (b)(1) that the petition must explain that either the panel decision conflicts with other decisions or involves a question of exceptional importance implies that these are the only grounds for en banc treatment. The circuits have used en banc rehearings when a majority of the active judges believe that a panel decision is simply wrong. Mr. Lacovara says that the rule should not purport to deprive the circuits of this error-correcting capacity, even if the circuits are not often inclined to use it.
He suggests deleting "either" from line 18 and "or" from line 27 on page 17; striking the period on line 39 and inserting "or" and then adding the following:
"(C) there are other specific and compelling reasons for the court en banc to consider the matter."

b. Subsection (b)(1)(B) may imply that a circuit should not bother with a decision unless it is out of line with "every other" circuit. That test is too demanding and does not represent current, sound appellate practice. It is the prerogative of the full court to have the opportunity to decide, where there is otherwise an intercircuit conflict, whether to align itself with the other side of the split—or to adopt another approach—rather than acquiesce in the position taken by the panel. He suggests amending lined 36-39 to read:
"decisions of [every] other federal courts of appeals that have[as] addressed the issue . . . ."

Mr. Lacovara also questions the assertion in the Committee Note that, in order for a "petition" for rehearing en banc to extend the time for petitioning for certiorari, the Supreme Court would have to amend its Rule 13.3. At most, the commentary should indicate that it is not clear what effect the Supreme Court would extend to the new characterization.

8. Mr. John Mayer
3821 North Adams Road
Bloomfield Hills, Michigan 48304

Suggests using the plain English term "full court" rather than *in banc* or *en banc*.

9. Honorable Jon O. Newman
United States Circuit Judge
450 Main Street
Hartford, Connecticut 06103

Chief Judge Newman opposes three aspects of the proposed revisions.

a. He recommends deleting that portion of 35(b) which relates the existence of a question of exceptional importance to a conflict among circuits.

- He believes that the proposed wording states a bias in favor of an in banc rehearing whenever the panel decision conflicts with a decision of another circuit and it is "not the business of national rule-makers to construe the phrase 'exceptional importance,' which has been one of the two criteria" for a full court rehearing for decades.
- "[T]he rule invokes its new test of importance whenever a decision conflicts with the decision of just one other circuit." Whether a court should rehear such a case in banc is best left to the sound judgment of each court of appeals.

b. The amendment of 35(c) will create confusion by dropping the sentence that makes it clear a suggestion for a rehearing in banc does not stay the issuance of the mandate or affect finality. He suggests that the Committee try to coordinate the effective date of the proposed amendment to Rule 35(c) to coincide with an amendment to Supreme Court Rule 13.3, or provide that the amendment to Rule 35(c) does not become effective unless and until a corresponding change is made in Supreme Court Rule 13.3

c. Chief Judge Newman states that the change in spelling from "in banc" to "en banc" is extremely ill-advised. He would retain "in banc" because it conforms to the spelling used in the statute, 28 U.S.C. § 46(c), and there should be a compelling reason supporting any such variation. Second, "in banc" is a phrase of English words. Third, no rule change should be made unless there are significant reasons for it. The only reason given for the change is in the summary prepared by the Administrative Office; the summary says that "en banc" is in "much wider usage among the courts." That is not a substantial reason.

10. Honorable Jerry E. Smith
United States Circuit Judge
12621 United States Courthouse
515 Rusk
Houston, Texas 77002-2598

Urges the committee to use a word count similar to that in proposed in Rule 32 rather than a page limit. He says that attorneys circumvent the page limits

by using small typeface and single-spaced footnotes, etc. and that the problem is serious enough to warrant attention in the rules.

Judge Smith suggests either that 40(b) require petitions to be in the form prescribed in Rule 32(a) (with a corresponding changed to FRAP 32(b)) or that the rule could permit circuits to implement a local rule to control the use of compressed devices so as not to defeat the intent of the 15 page limit. He further states that it is incongruous to retain restrictions for petitions for panel rehearing but not for rehearing in banc.

11. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

Favors adoption of the changes and notes that Supreme Court Rule 13.3 will need to be conformed so that a "petition" for rehearing en banc will extend the time for filing a petition for certiorari.

12. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

13. Hugh F. Young, Jr.
Executive Director
Product Liability Advisory Council
1850 Centennial Park Drive, Suite 510
Reston, Virginia 22091

The PLAC suggests clarification of 35(b)(1)(b) on two points:

a. that intercircuit conflicts are not the only questions of exceptional importance that warrant *en banc* review; and
b. that a panel decision should not be required to conflict with <u>every</u> other circuit.

14. Michael Zachary, Esquire
Supervisory Staff Attorney
United States Court of Appeals
United States Courthouse
40 Foley Square
New York, New York 10007

Says it is unclear whether the language in (b)(1)(B) concerning a panel decision that creates a split among the circuits (a) gives an example of a proceeding that presents a question of exceptional importance and that the courts are free to grant en banc consideration in other circumstances presenting questions of exceptional importance; or (b) represents the only circumstance in which a question will be deemed of such exceptional importance as to warrant en banc consideration. He suggests that the Committee Note implies that the latter is true. Mr. Zachary does not state a preference for one approach over the other, however, he suggests that the Committee's intent should be clarified.

He also suggests that the Committee Note is unclear whether the intercircuit conflict language applies only to (b)(1)(B) or also to (b)(1)(A). He suggests that a sentence in the comment be amended as follows:

> The second situation that may be a strong candidate for a rehearing en banc is one in which the circuit persists in <u>an intercircuit</u> conflict created by a pre-existing decision of the same circuit . . . .

<u>Gap Report on Rule 35</u>

Two changes were made in the language of (b)(1)(B).

1. The discussion of intercircuit conflict is labeled as an example of a question of exceptional importance to avoid the implication that intercircuit conflict is the only circumstance in which a question is deemed of exceptional importance. In keeping with that change, the parenthetical (appearing in the published draft) requiring citation to conflicting cases was deleted.
2. The rule attempts to eliminate any suggestion that a court should grant en banc reconsideration whenever there is an intercircuit conflict. New language emphasized that <u>a party may assert</u> that the existence of intercircuit conflict gives rise to a question of exceptional importance.

Paragraph (b)(3) was amended so that if a local rule requires a party to file separate petitions for panel rehearing and petitions for rehearing en banc, the party is not limited to a total of 15 pages.

Subdivision (f) was amended to say that "a judge" may call for a vote on a petition for en banc consideration.

Stylistic changes were also made.

The Committee retained the "en banc" spelling despite some objections. Although 28 U.S.C. § 46 has used "in banc" since 1948, even statutory usage is inconsistent. Pub. L. No. 95-486, 92 Stat. 1633 authorizes a court of appeals having more than 15 active judges to perform its "en banc" functions with some subset of the court's members. The "en banc" spelling is overwhelmingly favored by courts. A computer search conducted in 1996 found that more than 40,000 circuit court cases have used the term "en banc" compared with just under 5,000 cases (11%) that have used the term "in banc." When the search was confined to cases decided after 1990, the pattern remained the same — 12,600 cases using "en banc" compared to 1,600 (11%) using "in banc." The Supreme Court has used "en banc" in 959 of its opinions and "in banc" in 46 opinions. Indeed, the Supreme Court uses "en banc" in its own rules. See Sup. Ct. R. 13.3. The Committee decided to follow the spelling most commonly used.

Rule 41. ~~**Issuance of Mandate; Stay of Mandate**~~ **Mandate: Contents; Issuance and Effective Date; Stay**

(a) ~~**Date of Issuance**~~ **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) **When Issued.** ~~The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or 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 court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing or rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) **Effective Date.** The mandate is effective when issued.

~~(b) Stay of Mandate Pending Petition for Certiorari. A party who filed a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must~~

(d) **Staying the Mandate.**

(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) **Pending Petition for Certiorari.**

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and

must show that ~~a petition for certiorari~~ the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay ~~cannot~~ must not exceed ~~30~~ 90 days, unless the period is extended for good cause ~~shown~~, or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk during the period of the stay. ~~unless during the period of the stay, a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ in which~~ In that case, the stay ~~will~~ continues until ~~final disposition by~~ the Supreme Court's final disposition.

(C) The court may require a bond or

other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. ~~The court may require a bond or other security as a condition to the grant or continuance of a stay of the mandate.~~

Committee Note

The rule has been restructured to add clarity.

Subdivision (a). The sentence describing the contents of a mandate has been rewritten and moved to the beginning of the rule; the substance remains unchanged from the existing rule.

Subdivision (b). The existing rule provides that the mandate issues 7 days after the time to file a petition for panel rehearing expires unless such a petition is timely filed. If the petition is denied, the mandate issues 7 days after entry of the order denying the petition. Those provisions are retained but the amendments further provide that if a timely petition for rehearing en banc or motion for stay of mandate are filed, the mandate does not issue until 7 days after entry of an order denying the last of all such requests. If a petition for rehearing or a petition for rehearing en banc is granted, the court enters

a new judgment after the rehearing and the mandate issues within the normal time after entry of that judgment.

Subdivision (c). Subdivision (c) is new. It provides that the mandate is effective when the court issues it. A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed. This amendment is intended to make it clear that the mandate is effective upon issuance and that its effectiveness is not delayed until receipt of the mandate by the trial court or agency, or until the trial court or agency acts upon it. This amendment is consistent with the current understanding. Unless the court orders that the mandate issue earlier than provided in the rule, the parties can easily calculate the anticipated date of issuance and verify issuance with the clerk's office. In those instances in which the court orders earlier issuance of the mandate, the entry of the order on the docket alerts the parties to that fact.

Subdivision (d) Amended paragraph (1) provides that the filing of a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari stays the issuance of the mandate until the court disposes of the petition or motion. The provision that a petition for rehearing en banc stays the mandate is a companion to the amendment of Rule 35 that deletes the language stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate. The Committee's objective is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and extend the period for filing a petition for writ of certiorari. Because the filing of a petition for rehearing en banc will stay the mandate, a court of appeals will need to take final action on the petition but the procedure for doing so is left to local practice.

Paragraph (1) also provides that the filing of a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari stays the mandate until the court disposes of the motion. If the court denies the motion, the court must issue the mandate 7 days after entering the order denying the motion. If the court grants the motion, the mandate is stayed according to the terms of the order granting

the stay. Delaying issuance of the mandate eliminates the need to recall the mandate if the motion for a stay is granted. If, however, the court believes that it would be inappropriate to delay issuance of the mandate until disposition of the motion for a stay, the court may order that the mandate issue immediately.

Paragraph (2). The amendment changes the maximum period for a stay of mandate, absent the court of appeals granting an extension for cause, to 90 days. The presumptive 30-day period was adopted when a party had to file a petition for a writ of certiorari in criminal cases within 30 days after entry of judgment. Supreme Court Rule 13.1 now provides that a party has 90 days after entry of judgment by a court of appeals to file a petition for a writ of certiorari whether the case is civil or criminal.

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

Subparagraph (C) is not new; it has been moved from the end of the rule to this position.

Public Comments on Rule 41

Seven letters were received which comment upon the proposed amendments to Rule 41. Two of the letters from A.B.A. sections, however, contained comments from two of the sections' committees. There were therefore nine commentators. Six of the commentators approved the amendments without reservation. Two other commentators suggested revisions. One commentator made no substantive comments. None of them expressed general disapproval of the proposed changes.

1. Donald R. Dunner, Esquire
Chair, Section of Intellectual Property Law
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Mr. Dunner submitted the comments of two of the section's committees.

One committee makes no substantive comments.

Another committee says that the rule should state when a court's mandate will issue if a petition for rehearing or rehearing en banc is granted. The committee also suggests that in subpart (b) the party, and not the Clerk of the Supreme Court, should have the burden of filing notice that the party has obtained a stay.

2. William J. Genego and Peter Goldberger, Esquires
Co-Chairs, National Association of Criminal
Defense Lawyers, Committee On Rules of Procedure
1627 K Street, N.W.
Washington, D.C. 20006

Thanks the committee for responding to NACDL's suggestions to conform the presumptive duration of a stay of mandate to the 90-day period allowed for filing a petition for a writ of certiorari.

3. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments of two different persons.

a. Sydney Powell, Esquire, the Chair of the Appellate Law and Trial Practice Committee of the Federal Litigation Section. Ms. Powell commends the committee for clarifying that "the mandate is effective when issued."

b. Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section. Mr. Laponsky approves the proposed amendments.

4. Miriam A. Krinsky
Assistant United States Attorney
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Supports the proposed changes and in particular the amendment to subpart (b) that changes the presumptive period for a stay to 90 days.

5. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
1675 Broadway
New York, New York 10019-5820

Approves enlarging the stay-of-mandate period to 90 days in most cases. Suggests language changes in lines 59-61 on page 29 to return to the existing language ("unless during the period of the stay, a notice from the clerk of the Supreme Court is filed showing . . . .") or to substitute new language ("If, however, during the period of the stay, the clerk of the court of appeals receives a notice from the clerk of the Supreme Court indicating that . . . .") Either formulation avoids the inaccurate implication that the Clerk of the Supreme Court files papers in a court of appeals (that is the responsibility of the clerk of the court of appeals; the Supreme Court Clerk does his filing at the Supreme Court).

6. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

Recommends adoption of the proposed amendments because they mesh with the Supreme Court rules and assist counsel and eliminate unnecessary motion practice.

7. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

Gap Report on Rule 41

All but one of the changes are stylistic. The stylistic changes are the same as those in the restyled rule published in April.

The one new change is in subparagraph (d)(2)(B). The language was changed to make it clear that the party, not the Supreme Court Clerk, has the burden of notifying the court of appeals when the party has filed a petition for a writ or

certiorari.

B. Proposed Amendments to Federal Rule of Appellate Procedure 5 and 5.1 and to Form 4 submitted for approval for publication.

1. Synopsis of Proposed Amendments

(a) Existing Rules 5 and 5.1 are combined in new Rule 5; Rule 5.1 was largely repetitive of Rule 5. New Rule 5 is intended to govern all discretionary appeals from district court orders, judgments, or decrees. Most of the changes are intended only to broaden the language so that the Rule applies to all discretionary appeals. The time for filing provision, for example, states only that the petition must be filed within the time provided by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal. A uniform time — 7 days — is established for filing an answer in opposition or a cross-petition.

(b) Form 4 is substantially revised to obtain more detailed information needed to assess a party's eligibility to proceed in forma pauperis.

2. Text of Proposed Amendments

PROPOSED AMENDMENTS TO THE FEDERAL RULES
OF APPELLATE PROCEDURE
SUBMITTED FOR APPROVAL FOR PUBLICATION

~~**Rule 5. Appeal 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. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.~~

~~(d) *Grant of permission; cost bond; filing of record.* Within 10 days after the entry of an order granting permission to appeal the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b). A notice of appeal need not be filed.~~

~~**Rule 5.1. Appeal by Permission Under 28 U.S.C. § 636(c)(5)**~~

~~(a) *Petition for Leave to Appeal; Answer or Cross Petition.* An appeal from a district court judgment, entered after an appeal under 28 U.S.C. § 636(c)(4) to a district judge from a judgment entered upon direction~~

~~of a magistrate judge in a civil case, may be sought by filing a petition for leave to appeal. An appeal on petition for leave to appeal is not a matter of right, but its allowance is a matter of sound judicial discretion. The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed. Within 14 days after service of the petition, a party may file an answer in opposition or a cross petition.~~

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

~~(c) *Form of Papers; Number of Copies.* All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.~~

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

Rule 5 Appeal by Permission

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must

be filed with the circuit clerk with proof of service on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless a district court first enters an order granting permission to do so or stating that the necessary conditions are present, a district court order may be amended to include the required statement and the time to petition runs from entry of the amended order.

(b) Contents of the Petition; Answer or Cross-Petition.

(1) The petition must include the following:

(A) the facts necessary to understand the question to be presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why, in the opinion of the petitioner, the appeal should be allowed — including reasons that the appeal is within the grounds, if any, established by the statute or rule claimed to authorize the appeal; and

(E) an attached copy of the order, decree, or judgment complained of and any related opinion or memorandum, including any stating the district court's permission or finding of any necessary conditions to appeal, if required.

(2) A party may file an answer in opposition or a cross-petition within 7 days after the petition is served.

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(c) **Form of Papers; Number of Copies.** All papers

must conform to Rule 32(a)(1). Three copies must be filed with the original, unless the court requires a different number by local rule or by order in a particular case.

(d) **Grant of Permission; Fees; Cost Bond; Filing the Record.**

(1) Within 10 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

(2) A notice of appeal need not be filed but the date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket.

The record must be forwarded and filed in accordance with Rules 11 and 12(c).

Committee Note

The amendment of Federal Rule of Civil Procedure 23, under the power conferred by 28 U.S.C. § 1292(e), prompts the amendment of this Rule 5 and the elimination of Rule 5.1.

In 1992 Congress added paragraph (e) to 28 U.S.C. § 1292. Paragraph (e) says that the Supreme Court has power to prescribe rules that "provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" in section 1292. Federal Rule of Civil Procedure 23 has been amended to permit interlocutory appeal from an order granting or denying class certification. Such an appeal is permitted in the sole discretion of the court of appeals.

The Committee believes that the amendment of Civil Rule 23 is only the first of what may eventually be several interlocutory appeal provisions. Rather than add a separate rule governing each such appeal, the Committee believes it is preferable to amend Rule 5 so that it will govern all such appeals.

In addition Rule 5.1 has been largely repetitive of Rule 5 and the Committee believes that its provisions could also be subsumed into Rule 5. Although Rule 5.1 did not deal with an interlocutory appeal, the similarity to Rule 5 was based upon the fact that both rules governed discretionary appeals.

This new Rule 5 is intended to govern all discretionary appeals from district court orders, judgments, or decrees. At this time that includes interlocutory appeals under 28 U.S.C. § 1292(b), (c), and (d) and Federal Rule of Civil Procedure 23(f), and the discretionary appeal under 28 U.S.C. § 636(c) from a district-court judgment entered after an appeal from a judgment entered on direction of a magistrate judge in a civil case. If additional interlocutory appeals are authorized under § 1292(e), the new Rule is intended to govern them if the appeals are discretionary.

Subdivision (a). Paragraph (a)(1) says that when granting an appeal is within a court of appeals' discretion, a party may file a petition for permission to appeal. The time for filing provision states only that the petition must be filed within the time provided in the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

Section 1292(b), (c), and (d) provide that the petition must be filed within 10 days after entry of the order containing the statement prescribed in the statute. Existing Rule 5(a) provides that if a district court amends an order to contain the prescribed statement, the petition must be filed within 10 days after entry of the amended order. The new rule similarly says that if a party cannot petition without the district court's permission or statement that necessary circumstances are present, the district court may amend its order to include such a statement and the time to petition runs from entry of the amended order.

The provision that the Rule 4(a) time for filing a notice of appeal should apply if the statute or rule is silent about the filing time was drawn from existing Rule 5.1.

Subdivision (b). The changes made in the provisions in paragraph (b)(1) are intended only to broaden them sufficiently to make them appropriate for all discretionary appeals.

In paragraph (b)(2) a uniform time — 7 days — is established for filing an answer in opposition or a cross-petition. Seven days is the time for responding under existing Rule 5 and is an appropriate length of time when dealing with an interlocutory appeal. Although existing Rule 5.1 provides 14 days for responding, the Committee does not believe that the longer response time is necessary because an appeal under § 636(c)(5) is a second appeal and the party involved will have had sufficient time to develop a response or cross-petition.

Subdivision (c). Subdivision (c) is substantively unchanged.

Subdivision (d). Paragraph (d)(2) to state that "the date when the order granting permission to appeal is entered serves as the date of the notice of appeal" for purposes of calculating

time under the rules. That language simply clarifies existing practice.

Form 4. Affidavit to Accompany Motion for Permission 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 swear or affirm under penalty of perjury that because of my poverty I am unable to pay the docket fees of my appeal or to post a bond for them. I believe I am entitled to a different result than that reached in the district court. My issues on appeal are:
[List the issues on appeal.]

I further swear or affirm under penalty of perjury that the responses which I have made to the questions and instructions below relating to my ability to pay the fees for my appeal are true.

Instructions. Please complete all questions in this application and then sign it on the last page. If the answer to any question is "0" or "none," or the question is "not applicable", so indicate by writing "0", "none", or "not applicable (N/A)". If additional space is needed to answer any question or to explain your answer to any question, please use and attach a separate sheet of paper identified with your name, the docket number of your case and the number of the question.

1. Are you or your spouse currently employed? Yes _____ No _____

2. If you or your spouse are currently employed, state the name and address of your employer, the length of your employment with that employer, and your monthly gross pay. Gross pay is pay before any taxes or other deductions are taken. If you have more than one employer, please

provide the information requested below about the other employer(s) on a separate sheet of paper and attach it to this application.

Yourself:	Your Spouse:
Name and Address of Employer	Name and Address of Employer
_____	_____
_____	_____
_____	_____
Length of Employment	Length of Employment
_____ Years _____ Months	_____ Years _____ Months
Monthly Gross Pay $_____	Monthly Gross Pay $_____

3. If you are currently unemployed, state the date of your last employment and your monthly gross pay during your last month of employment. Gross pay is pay before any taxes or other deductions are taken.

Date of last employment (Month/Year) for yourself _____; spouse _____

Monthly gross pay during last month of employment $_____

4. State whether you or your spouse have received money from any of the following sources during the past twelve months, and, if so, the average monthly amount from that source. Adjust any money that was received weekly, bi-weekly, quarterly, semi-annually, or annually to show the monthly rate.

Did you receive money from any of the following sources during the past 12 months?	Average monthly amount during past 12 months for you and your spouse if applicable.		Amount expected next month	
	You	Spouse	You	Spouse
Self-employment	Y/N ___ $ _____	$ _____	$ _____	$ _____
Income from real property (such as rental income)	Y/N ___ $ _____	$ _____	$ _____	$ _____
Interest and dividends	Y/N ___ $ _____	$ _____	$ _____	$ _____
Gifts	Y/N ___ $ _____	$ _____	$ _____	$ _____

Alimony	Y/N ___	$ _____	$ _____	$ _____	$ _____
Child Support	Y/N ___	$ _____	$ _____	$ _____	$ _____
Retirement income from sources such as social security, private pensions, annuities, or insurance policies	Y/N ___	$ _____	$ _____	$ _____	$ _____
Disability payments such as social security, other state or federal government, or insurance payments	Y/N ___	$ _____	$ _____	$ _____	$ _____
Unemployment payments	Y/N ___	$ _____	$ _____	$ _____	$ _____
Public assistance payments such as welfare payments	Y/N ___	$ _____	$ _____	$ _____	$ _____
Other sources of money (specify: _____)	Y/N ___	$ _____	$ _____	$ _____	$ _____
TOTAL			$ _____	$ _____	$ _____

5. State the amount of cash you and your spouse have: $ _____

State below any money you or your spouse have in savings, checking, or other accounts in a bank or other financial institution.

Bank or Other Financial Institution:	Type of Account such as savings, checking, or CD:	Amount you have:	Amount your spouse has:
_____	_____	$ _____	$ _____
_____	_____	$ _____	$ _____
_____	_____	$ _____	$ _____

If you have funds in a prison or other similar institutional account, the Certified Statement of Institutional Account for the Past Six Months at the end of this form must be completed by the institution.

6. State below the assets owned by you and your spouse. **Do not list ordinary household furnishings and clothing.**

Home	Address:	Value: $ _____
	_____	Amount owed on mortgages and
	_____	liens: $ _____
Other real	Address:	Value: $ _____
estate	_____	Amount owed on mortgages and
	_____	liens: $ _____
Motor vehicle	Model/Year:	Value: $ _____
	_____	Amount owed: $ _____
Motor vehicle	Model/Year:	Value: $ _____
	_____	Amount owed: $ _____
Other	Description: _____	Value: $ _____
	_____	Amount owed: $ _____

7. State below any person, business, organization, or governmental unit that owes you or your spouse money and the amount that is owed.

Name of Person, Business, or Organization that Owes You or Your Spouse Money	Amount Owed You:	Amount Owed Your Spouse:
_____	$ _____	$ _____
_____	$ _____	$ _____

8. State the individuals who rely on you and your spouse for support. Indicate their relationship to you, their age, and whether they live with you.

Name	Relationship	Age	Does this person live with you?
_____	_____	_____	Yes _____ No _____

_____	_____	_____	Yes ____	No ____
_____	_____	_____	Yes ____	No ____
_____	_____	_____	Yes ____	No ____

9. Complete this question by estimating the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, bi-weekly, quarterly, semi-annually, or annually to show the monthly rate.

	You	Spouse
Rent or home mortgage payment (include lot rented for mobile home)	$ _____	$ _____
Are real estate taxes included? Yes ____ No ____		
Is property insurance included? Yes ____ No ____		
Utilities: Electricity and heating fuel	$ _____	$ _____
Water and sewer	$ _____	$ _____
Telephone	$ _____	$ _____
Other _____	$ _____	$ _____
Home maintenance (Repairs and upkeep)	$ _____	$ _____
Food	$ _____	$ _____
Clothing	$ _____	$ _____
Laundry and dry cleaning	$ _____	$ _____
Medical and dental expenses	$ _____	$ _____
Transportation (not including car payments)	$ _____	$ _____
Recreation, clubs and entertainment, newspapers, magazines, etc.	$ _____	$ _____
Charitable contributions	$ _____	$ _____

Insurance (not deducted from wages or included in home mortgage payments)		
Homeowner's or renter's	$ _____	$ _____
Life	$ _____	$ _____
Health	$ _____	$ _____
Auto	$ _____	$ _____
Other _____	$ _____	$ _____
Taxes (not deducted from wages or included in home mortgage payments) (specify) _____		$ _____
Installment payments		
Auto:	$ _____	$ _____
Credit Card: (name) _____	$ _____	$ _____
Department Store: (name) _____	$ _____	$ _____
Other _____	$ _____	$ _____
Other _____	$ _____	$ _____
Alimony, maintenance, and support paid to others	$ _____	$ _____
Payments for support of additional dependents not living at your home	$ _____	$ _____
Regular expenses from operation of business, profession, or farm (attach detailed statement)	$ _____	$ _____
Other _____	$ _____	$ _____
TOTAL MONTHLY EXPENSES	$ _____	$ _____

10. Do you expect any major changes to your monthly income or expenses during the next four months? Yes _____ No _____

If yes, describe.

11. Have you paid an attorney any money for services in connection with this case, including the completion of this form? Yes _____ No _____

If yes, how much? $ _____

If yes, provide the name, address, and telephone number of the attorney:

_____

_____

_____

Have you promised to pay or do you anticipate paying an attorney any money for services in connection with this case, including the completion of this form? Yes _____ No _____

If yes, how much? $ _____

If yes, provide the name, address, and telephone number of the attorney:

_____

_____

_____

12. Have you paid anyone other than an attorney (such as a paralegal, typing service, or another person) any money for services in connection with this case, including the completion of this form? Yes _____ No _____

If yes, how much? $ _____

If yes, provide the name, address, and telephone number of the person or service:

_____

_____

_____

Have you promised to pay or do you anticipate paying anyone other than an attorney (such as a paralegal, typing service, or another person) any money for services in connection with this case, including the completion of this form? Yes _____ No _____

If yes, how much? $ _____

If yes, provide the name, address, and telephone number of the person or service:

_____

_____

_____

13. How much can you pay each month toward the docket fee for your appeal.

$ _____

14. Please provide any other information that helps to explain why you are unable to pay the docket fees for your appeal.

15. State the address of your legal residence:

_____

_____

_____

Your daytime phone number:

(_____)_____

Your age: _____

Years of schooling: _____

Your social security number:

_____

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT. 28 U.S.C. § 1746, 18 U.S.C. § 1621.

Date: _____ Signature: _____

CERTIFIED STATEMENT OF INSTITUTIONAL ACCOUNT

This is to certify that the movant has on deposit drawable funds in the amount of $_____.

In the past six months, the balance in movant's account is certified as follows:

Month:	Amount:
_____	$ _____
_____	$ _____
_____	$ _____
_____	$ _____
_____	$ _____
_____	$ _____

A certified copy of the statement of movant's account (or institutional equivalent) is attached.

Date:_____ Signature of Authorized Officer:

_____

Title: _____

ORDER

Docket number: _____

Let the applicant proceed without prepayment of fees or posting a bond for them.

_____,

District Judge

II. INFORMATION ITEMS

A. Restyled Rules

The packet of restyled rule was published in April. Public hearings are scheduled for July 8 in Washington, D.C., and August 2 in Denver, Colorado. Because the comment period does not close until the end of the year and the Advisory Committee does want to begin any new projects until the close of that comment period, the Advisory Committee does not plan to hold a fall meeting.

B. Other Activities

Draft minutes of the Advisory Committee's April meeting and May telephone conference are attached. In addition, a copy of the Advisory Committee's table of agenda items is also attached.