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The Proposed Federal Rules of Appellate Procedure

Sherman L. Cohn
Georgetown University Law Center

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THE PROPOSED FEDERAL RULES OF
APPELLATE PROCEDURE

Sherman L. Cohn*

After a discussion of the history of uniform procedural rules and the
authority of the Supreme Court to promulgate uniform appellate rules,
Professor Cohn discusses some of the problems of expense and delay which
are found in the appellate system today. In his analysis of the Proposed Uni-
form Rules of Federal Appellate Procedure, the author gives special empha-
sis to those areas where the rules constitute a departure from present prac-
tice. In addition, several changes are suggested in areas in which the author
believes further improvement can be made.

In 1960 the Chief Justice of the United States, acting pursuant to
a 1958 congressional grant of authority to the Judicial Conference
of the United States,1 appointed an advisory committee2 to study
the advisability of establishing uniform rules of federal appellate
procedure. Because the statutory authorization to the Supreme
Court to promulgate uniform civil rules is limited to rules for the
district courts,3 it is doubtful that the Supreme Court now has the
authority to promulgate general uniform rules for the appellate
courts—although the Court clearly has the authority to promulgate
appellate rules governing appeals in criminal and Tax Court cases,4
and the Judicial Conference has the authority to “approve” uniform

* Associate Professor of Law, Georgetown University Law Center. B.S.F.S., LL.B.,
L.L.M., Georgetown University.

The author, until September 1963, was Assistant Chief, Appellate Section, Civil Division,
United States Department of Justice. He is chairman of the Appellate Rules Committee
of the Federal Bar Association. Although he is solely responsible for the contents, much
of the article was compiled while the Appellate Rules Committee studied the proposed
appellate rules. The author is indebted to those members of the committee who assisted
in this task. He is also indebted to Mr. Gerald Laughlin of the Journal and Mr. Andrew
D. Merrick, third-year student at the Law Center, for research and editorial assistance of
the highest caliber.

2 This was the Advisory Committee on Appellate Rules to the Standing Committee on
Rules of Practice and Procedure of the Judicial Conference of the United States. The
chairman of the Advisory Committee is Senior Circuit Judge E. Barrett Prettyman of the
District of Columbia Circuit.
4 For a discussion of the Court’s rulemaking authority see pp. 436-38 infra.
rules governing procedure in administrative review cases. The Advisory Committee, nevertheless, in March 1964 completed the Preliminary Draft of Proposed Uniform Rules of Federal Appellate Procedure. It is this writer's understanding that, after receiving comments from the bar, the Advisory Committee recommended to the Standing Committee on Rules and Practice of the Judicial Conference and that committee recommended to the Conference itself certain changes to those portions of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, which, although governing procedure in the district courts, are a part of the appellate process. The Conference in turn has approved these recommendations for submission to the Supreme Court. As the procedures affected are those prior to the docketing of the case in the court of appeals, the matters concerned clearly fall within the authority granted the Court by Congress. It is this writer's further understanding that as of this writing the Advisory Committee has not submitted to the Standing Committee on Rules its recommendations concerning procedure after docketing. A major factor in this dichotomy may be the lack of statutory authority for uniform rules of appellate procedure in civil cases.

A bill to expand the authorization of the Judicial Conference to include uniform rules of appellate procedure is now pending in Congress. It is unknown at this time whether the final version of the Proposed Uniform Rules of Federal Appellate Procedure will be publicly released prior to the enactment of the authorizing legislation.

The purpose of this article is to discuss the significant changes which the preliminary draft of the Advisory Committee would make in appellate procedure. Before analyzing the preliminary draft of the Advisory Committee it is helpful to examine the history of earlier uniform federal rules as well as the present appellate rulemaking authority of the Supreme Court. It would also be helpful to examine the federal courts of appeals themselves and some of their problems of congestion, delay, and expense. While uniform appellate rules will not be a panacea for such problems, it would be well to consider the proposed rules within the perspective of today's situation. An objective of such consideration should be to eliminate, as far as is prac-

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8 H.R. 7556, 89th Cong., 1st Sess. (1965). At the close of the first session, this bill was in committee, but no action had been taken.
ticable, any element in present practice that contributes unnecessarily to these problems. A proposed change that will result in the consumption of more court time, more attorney time, or more expense should be accepted only after the most thorough deliberation demonstrates that such a change is fully justifiable for other compelling and overweighing reasons.

HISTORY

Prior to 1938 the procedure of the federal district courts in actions at law was required to conform to the local state practice. In 1937 the Supreme Court, acting under a 1934 congressional grant of authority, promulgated the Federal Rules of Civil Procedure. The rules, which established uniform procedure for all civil cases at law and in equity in the federal district courts, became effective the following year.

The 1938 Federal Rules were not, however, the first uniform rules of federal procedure. Indeed, the 1934 act was not the first congressional grant of authority for the promulgation of such rules by the Court. As early as 1792 Congress made a grant of permanent rulemaking authority to the Court by subjecting the law, equity, and admiralty procedure to “such alterations and additions as the [circuit and district courts] . . . shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same . . .” In 1842 the authorization of the Court to prescribe general rules of federal procedure was repeated in broader terms:

[T]he Supreme Court shall have full power and authority, from time to time, to prescribe, and regulate, and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity pending in the said courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding . . . before trustees appointed by the court, and generally to regulate the whole practice of the said courts, so as to prevent delays, and to

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11 302 U.S. 783 (1937).
13 Permanent Process Act, ch. 36, § 2, 1 Stat. 276 (1792).
promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein.\textsuperscript{14}

The Court first exercised its rulemaking power in 1822 when it promulgated uniform federal equity rules.\textsuperscript{15} These rules were comprehensively revised and reissued in 1842\textsuperscript{16} and 1912.\textsuperscript{17} In 1844 the Court promulgated uniform Admiralty Rules\textsuperscript{18} which were completely overhauled in 1920.\textsuperscript{19} The 1792 and 1842 congressional authorization regarding the promulgation of rules for actions at law, however, was never exercised.

The willingness of the Court to establish rules for both equity and admiralty while failing to do so for actions at law may be explained by the disparity in development of these three areas in the early days of the Republic. Whereas the states had well-established procedure for actions at law, equity was little used or entirely nonexistent in the courts of many states,\textsuperscript{20} and a procedure was never developed for admiralty in state courts.\textsuperscript{21} Thus, for many federal courts there was no state equity procedure to follow, and for all federal courts there was no state admiralty procedure to guide them. Perhaps on this basis, the Court believed that, although uniform federal procedure was appropriate for equity and admiralty, it was more appropriate "to yield, rather than encroach" upon state common-law procedure.\textsuperscript{22}

Notwithstanding the appropriateness of such a policy, the failure of the Court to exercise its rulemaking powers in the common-law field proved detrimental to the effective functioning of the federal

\textsuperscript{14} Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 518.
\textsuperscript{15} 20 U.S. (7 Wheat.) at xvii (1822).
\textsuperscript{16} 1 How. at xli (1842).
\textsuperscript{17} 226 U.S. 627 (1912).
\textsuperscript{18} 44 U.S. (3 How.) at ix (1844).
\textsuperscript{19} 254 U.S. 671 (1920). The rules became effective March 7, 1921.
courts. The deficiencies became progressively more apparent following the Court's construction of the 1792 act so as to require federal courts to utilize state procedure "as it existed in September, 1789 . . . not as it might afterwards be made." As state procedures evolved, the federal courts were forced to conform to outmoded procedural rules. Congress attempted some piecemeal amelioration, but basically the federal procedure was limited to what Professor Charles Allan Wright called "static conformity" to "state practice as of September 29, 1789 . . . regardless of changes which the states might thereafter have made."

The disparity between federal and state procedure intensified as many states abandoned common-law procedure altogether and adopted a version of the Field Code of 1848. When the Court failed to act under the power it undoubtedly had to keep federal procedure apace with changing views and conditions, Congress responded by rescinding that power, thus removing from the control of the Court the procedure of the district courts in actions at law. This was accomplished by the Conformity Act of 1872 which prescribed that:

[T]he practice, pleadings, and forms and modes of proceeding, in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held . . . 27

The Conformity Act precluded any rulemaking activity by the Court in the common-law field until the passage of the Act of 1934 which restored that power to the Court. The 1934 grant of authority resulted in the 1938 Federal Rules of Civil Procedure.

Throughout this earlier period little was done concerning criminal rules although the Supreme Court had such rulemaking power. Professors Hart and Wechsler term the criminal procedure of this era a "hodgepodge" of common-law practice, constitutional provisions, federal legislation, and references to state law. In 1933 Congress

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26 N.Y. Laws 1848; ch. 379. For a list of states which have adopted code procedure, together with the date of adoption see CLARK, CODE PLEADING 24-25 (2d ed. 1947).
29 HART & WECHSLER, OP. CIT. SUPRA note 20, at 581.
authorized the Court to promulgate rules concerning proceedings after verdict.\(^3\) Such rules were issued the next year.\(^31\) It was not until 1940 that Congress granted the Court authority to set down procedural rules for criminal proceedings prior to and including verdict,\(^32\) and not until 1946 were such rules promulgated.\(^33\)

Little was done concerning appellate procedure although, again, the Supreme Court had the power to act. The 1792 and 1842 acts authorized the Court to prescribe rules for the circuit courts as well as the district courts,\(^34\) and the circuit courts had appellate jurisdiction over the decisions of the district courts.\(^35\) But, except for certain equity rules,\(^36\) this power was not exercised.

### The Present Authority of the Court To Promulgate Uniform Appellate Rules

The late Judge Charles E. Clark, Reporter of the Advisory Committee on Rules for Civil Procedure of the United States Judicial Conference—the committee that drafted the Federal Rules of Civil Procedure—argued in 1936 that the Conformity Act of 1872 did not withdraw the power of the Supreme Court to make uniform rules of federal appellate procedure.\(^37\) This argument was based upon the premise that, while the 1842 act extended to the appellate jurisdiction of the circuit courts,\(^38\) the Conformity Act “removed the procedure of the district courts in actions at law from the control of the Supreme Court,”\(^39\) leaving intact the rulemaking power of the Court over appellate cases in the circuit courts. This analysis proves too much, however: the same language from which it could be argued that the 1842 act gave the Supreme Court rulemaking power over the appellate cases within the circuit courts’ jurisdiction,

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\(^{30}\) Act of Feb. 24, 1933, ch. 119, 47 Stat. 904 (now 18 U.S.C. § 3772 (1964)).

\(^{31}\) 292 U.S. 661 (1934).


\(^{33}\) 327 U.S. 821 (1946).

\(^{34}\) See notes 13 & 14 supra and accompanying text.

\(^{35}\) Act of Sept. 24, 1789, ch. 20, §§ 11, 21, 22, 1 Stat. 79, 83, 84; see WRIGHT, FEDERAL COURTS 3-4 (1963).


\(^{37}\) Id. at 1310-21.

\(^{38}\) See text accompanying note 14 supra.

\(^{39}\) Clark, supra note 36, at 1315.
is found within the 1872 act which withdrew that power as far as common-law cases were concerned.\textsuperscript{40}

When Congress in 1934 authorized the Supreme Court to promulgate uniform rules of federal civil procedure, it limited that authorization to cover the procedure "for the district courts of the United States and for the courts of the District of Columbia."\textsuperscript{41} The provision authorizing the Court to issue admiralty rules is likewise limited to procedure "in the district courts."\textsuperscript{42} The authorization for criminal rules goes further. It empowers the Supreme Court to prescribe rules of practice and procedure "with respect to any or all proceedings after verdict, or finding of guilty by the court if a jury has been waived, or plea of guilty, in criminal cases . . . in the United States district courts, . . . in the United States courts of appeals, and in the Supreme Court of the United States."\textsuperscript{43}

Thus, although the Court does possess rulemaking authority for criminal appellate procedure,\textsuperscript{44} it is doubtful that such power presently exists for the Court to promulgate uniform appellate rules in the civil field. Therefore, unless and until the authorizing legislation is passed by Congress, the Court will not be able to act on the Proposed Draft

\textsuperscript{40} The applicable language of the 1842 act, see text accompanying note 14 \textit{supra}, should be compared with the appropriate language of the Conformity Act, see text accompanying note 27 \textit{supra}.

It is noteworthy that each of the examples referred to by Judge Clark concern either equity or the power of the Supreme Court over the procedure governing appellate matters in its own court. As to the former, examples of equity cases do not show that the Supreme Court had power to issue rules involving law appeals in the circuit courts after 1872. And the latter falls within the Court's power to regulate its own procedure. Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83.


\textsuperscript{43} 18 U.S.C. § 3772 (1964).

\textsuperscript{44} FED. R. CRIM. P. 37 prescribes the form of notice of appeal and the time for taking an appeal to a court of appeals, and refers to the rules of the Supreme Court for appeals and certiorari petitions taken to that Court. Rule 38 pertains to stay of execution and other relief pending appeal. Rules 39(b) and (c) set forth requirements for the preparation of the record and its docketing with the court of appeals. Only rule 39(d) prescribes a matter of appellate procedure: requiring that criminal cases be given preference on the calendar, to be heard not less than thirty days after docketing but as soon thereafter as the calendar will permit. Rule 39(a) provides that, except as the rules otherwise provide, "the supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk . . . ." Thus in large measure the Supreme Court has delegated its rulemaking power to the individual appellate courts.
of Uniform Rules of Federal Appellate Procedure when it is completed.

TODAY'S FEDERAL APPELLATE SYSTEM

This apparent lack of concern for appellate procedure might partially be explained by its past inconsequentiality when compared with trial procedure. The volume of appellate litigation is much smaller than that of the trial court; hence, a narrower segment of the bar and the public are directly affected. More important is the pressing need which has existed for reform in the trial court. Even at its worst, appellate procedure does not cause the difficulties that are encountered at the trial level. Only now that the district courts have achieved relative uniformity and comparative simplicity in their procedure and have a continuing program for further improvement is there an opportunity to concentrate on appellate procedure.

In recent years the case load of the federal appellate courts has increased significantly. In fiscal 1947, for example, there were but 2,615 cases docketed in the appellate courts compared with 6,766 cases in fiscal 1965. The median time for completing federal appellate cases which go to argument or submission has risen to eight months. Thus, one-half of the cases take longer than eight months.

45 In fiscal year 1965, for example, while there were commenced in the district courts some 67,678 civil, 31,569 criminal, and 180,323 bankruptcy matters, there were but 6,766 matters docketed in the courts of appeals. 1965 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. pp. II-2, II-9, II-19, V-1 (preliminary print) [hereinafter cited as 1965 REPORT].

46 28 U.S.C. § 331 (1964) now provides in pertinent part:

The [Judicial] Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

The suggested revisions may be put into effect through the procedures of 28 U.S.C. §§ 2072-75 (1964) and 18 U.S.C. §§ 3771-72 (1964).

47 1956 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 109 [hereinafter cited as 1956 REPORT]. The number of appeals filed in 1940 was 3,446. A gradual decline lasted through 1947 when 2,615 appeals were filed. The number then began to increase. By 1956 there were 5,588 cases docketed. Ibid. By 1963 the number had climbed to 5,437. It reached 6,023 in 1964. 1965 REPORT p. II-4.

48 This constitutes a rise of 12.3% over 1964. Ibid.

49 Id. at II-7. In fiscal 1964 the median time was 7.4 months. At the end of the 1965
to complete. To grasp the full magnitude of this growing problem of delay, however, one must analyze the factors from which the median figure is derived. One interesting aspect is the large variance in the median figure from circuit to circuit. While in the Eighth and First Circuits the median time is 5.6 and 5.8 months respectively, in the Fifth and Sixth Circuits it is 10.0 and 11.2 months respectively. Even more significant is the fact that some case categories are given preference over others. Criminal appeals, for example, are to be heard "as soon after the expiration of [thirty days after docketing] ... as the state of the calendar will permit." The law requires that "preference shall be given to appeals in criminal cases over appeals in civil cases." A right of preference exists as well for many administrative appeals. Thus, the ordinary civil case in the Sixth Circuit is now coming to argument nine to ten months after all briefs are filed and twelve to thirteen months after docketing. In the Fifth Circuit argument in ordinary civil cases is being scheduled some ten to eleven months after briefs are filed and fourteen to sixteen months after docketing. When one includes an additional one to twelve months for decision, and makes allowance for the fact that the case may not have been docketed until two to five months after the district court decision, the problem appears to be greater than...
the eight-month median first indicates. While preference to criminal matters is not to be deprecated, one must ask if it is necessary that it should take one and one-half to two years to prosecute an appeal in a civil case.

A major cause of this congestion is the lack of an adequate number of judges to deal with the increasing case load. On June 30, 1965, for example, there were only 74 active judges on the federal courts of appeals to deal with the 6,766 filed cases. In 1956, on the other hand, to deal with only 3,588 filed cases there were 68 appellate judges, and in 1947, when there were only 2,615 cases filed, 59 judges were authorized to hear them. Even this is not the entire story, however. The number of judges varies from circuit to circuit. The First Circuit, for example, is authorized three judges, while the Second, Fifth, and Ninth are authorized nine apiece. The number of cases commenced per authorized judge in fiscal 1965 varied from 62 in the Third Circuit and 70 in the First Circuit to 114 in the Sixth Circuit, 118 in the Fifth Circuit, and 122 in the Fourth Circuit. The number of cases terminated after hearing or submission per authorized judge in fiscal 1965 varied from 28 in the Eighth and 30 in the Third to 69 in the Fifth. The circuit with the longest median time of disposition, the Sixth Circuit, disposed

appeal. This period may be extended by the district court for another 50 days. FED. R. CIV. P. 73(g). It is normal practice in most circuits not to transmit the record from the district court to the appellate court until close to the end of the period permitted. Except for a few isolated district courts, it is only in the First Circuit that as a matter of course the record is transmitted to the appellate court immediately after the filing of the notice of appeal. Even in those instances, however, a private appellant may obtain a postponement of docketing time (which starts time running for briefing, etc.) by failing to pay the docketing fee. The government, of course, not being subject to that fee has no such flexibility. From this author's experience he has concluded that with the exception of a few district judges, the granting of a motion for extension of docketing time from 40 to 90 days after the noting of an appeal is practically automatic.

56 1956 REPORT 109.
58 The 1965 REPORT p. II-2 gives a chart showing the total number of cases commenced in each circuit during the year. The number of cases commenced per authorized judge is easily computed. See 28 U.S.C. § 44 (1964) for the number of authorized judges in each circuit.
59 The 1965 REPORT p. II-7 gives a chart listing the number of cases terminated in each circuit during the year. The number of cases terminated per authorized judge is easily computed. See 28 U.S.C. § 44 (1964) for the number of authorized judges in each circuit.
of 50 cases per authorized judge in fiscal 1965.60 These figures do not take into account vacancies, illness, use of retired and district judges, and use of visiting judges from other circuits,61 but even with these unknowns, it is apparent that at least a large part of the current problem must be laid at the door of Congress for permitting a substantial time lag between increased judicial business and the authorization of increased personnel.62 Should the case load continue to increase63 with only the piecemeal increase in judgeships prevalent today, the congestion could result in appellate delay approaching that of even the busiest trial courts.64

Thus, the procedures of the appellate courts are not the only cause of delay. There are, however, procedural practices which contribute to this problem. For example, the Second Circuit still requires that judges hear oral argument on every motion that is made. This practice seems to be unnecessary for formal motions, such as those for extensions of time. The better practice, and the practice in most courts today, is to have these motions submitted without argument. Moreover, most formal motions are unopposed. In such a situation, if the grant of the motion would not prejudice the calendar of the court or materially affect progress of the case, there would seem to be little justification for not permitting court clerks to act,65 thus saving the time of all judges concerned. This is a practice which exists informally in a number of courts today. Judge time is too precious to be spent on nonessentials. Again, the Tenth and Fifth Circuits

60 See note 59 supra.
61 Authority is provided for such assignments by 28 U.S.C. §§ 291-94 (1964).
62 A bill to authorize additional appellate judges was passed by the Senate. S. 1666, 89th Cong., 1st Sess. (1965). No further action has been taken since that time, however. The bill provides for two additional circuit judges for the Fourth Circuit, two for the Sixth, one for the Seventh, and one for the Eighth Circuit. The bill would also authorize four additional judges for the Fifth Circuit on a temporary basis.
63 In fiscal 1965, filings in the Ninth Circuit increased 35%, in the Fourth Circuit 31%, in the Sixth 23%, and in the Second 20%; the pending caseload in the Fifth Circuit alone at the end of the fiscal year was 933. 1965 REPORT p. 1-2.
64 The median time for completing a civil case in the Eastern District of Pennsylvania was forty-one months. 1965 REPORT, Table C 10.
65 To allow subordinate court personnel to perform duties involving less than substantive matters is one manner of attacking the problem of congestion. Court commissioners have been recommended to fill this role. Breen, Solutions for Appellate Court Congestion, 47 J. AM. JUD. SOC'y 228, 229-30 (1964). In practice, however, the courts have been taking on additional duties instead of lightening the load. Wright, The Doubtful Omniscience of Appellate Courts, 41 MINN. L. REV. 751 (1957).
require the appellate record to be reproduced prior to briefing. This practice, which delays briefing and hence argument by one to five months, is not deemed necessary in other circuits. If court calendars are reasonably current, this time lag causes unnecessary delay in the progress of the case.

A close corollary of the problem of delay is the expense factor. Every additional paper required to be filed by an attorney, every additional hour spent in court, and every peculiarity of procedure that must be learned increases cost of litigation. It is instructive to count the number of attorneys sitting in the Second Circuit courtroom on motion day and then multiply by $25$ dollars per hour (minimum), add the cost of traveling both in time and fare from western New York or northern Vermont or Chicago or Boston or Washington, just to argue motions for extensions of time. On one such motion day the author counted fifty-four attorneys who by rough calculations stayed for an average of one and one-half hours (motions calendar took the entire morning). The majority of time was spent listening to cases called in which there were motions for extensions of time, most of which were unopposed. It would seem that much of this expense of litigation, whether chargeable to the client directly or as a part of overhead, constitutes a needless waste.

Another practice which might be mentioned as an example of needlessly increasing the expense of litigation is the requirement of the First Circuit that all briefs be printed. Thus, those who practice in that court are unable to use the newer and cheaper methods of reproduction that all other courts have found satisfactory.

In addition to the delay and expense factors, the changing nature of the appellate practice suggests the feasibility of uniform appellate rules. As we have become a national society, our litigation has become more national in scope. It is not at all rare today to find an attorney representing his client in several courts around the country. Nor is it...

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66 The "mountains" of printed material necessary for appeal constitute "one of our major barriers against justice" and are "a great economic waste." Wilcox, Karlen & Roemer, Justice Lost—By What Appellate Papers Cost, 33 N.Y.U.L. Rev. 934 (1958).

67 1st Cir. R. 23 (6).

68 Although the rules of the Fourth Circuit require that all briefs be printed, 4th Cir. R. 10(7), that court will permit on motion the filing of a multilithed brief. All other circuits permit the use of multilith or other new process. 2d Cir. R. 15(f); 3d Cir. R. 24(1); 5th Cir. R. 23(a)(10); 6th Cir. R. 17(1); 7th Cir. R. 16(g); 8th Cir. R. 12(f); 9th Cir. R. 37(A); 10th Cir. R. 17(1); D.C. Cir. R. 18(f).
rare to find both sides in a case represented by counsel who normally practice outside the circuit.\textsuperscript{69}

In this situation it is difficult to justify formal differences from court to court within the federal system, yet today such differences exist to a substantial degree. There are differences on such matters as color of paper and cover,\textsuperscript{70} time for filing,\textsuperscript{71} number of pages permitted,\textsuperscript{72} the manner of stating the questions before the court,\textsuperscript{73} and the inclusion of special statements or certificates.\textsuperscript{74} In addition, there are substantial differences in the manner of presenting the record to the court in a usable form.\textsuperscript{75} As litigation is evolving today, there is little reason for perpetuating these differences, for they lie as traps for the unwary. At best they are causes of expense in the litigation process, for the attorney is forced to research and assimilate different rules as he focuses upon different courts within the same federal system.

It is within the context of these problems that uniform rules should be examined. They should be designed, of course, to alleviate as many of the problems as is practicable within the aim of appellate procedure. Certainly, they should not aggravate these problems except where absolutely necessary.

\textbf{THE PROPOSED APPELLATE RULES}

In compiling the preliminary draft of the Uniform Rules of Federal Appellate Procedure, the Advisory Committee on Appellate Rules

\begin{itemize}
  \item \textsuperscript{70} In the District of Columbia Circuit the cover of appellant's brief is to be light blue; of the appellee's brief, light gray; of the reply brief, light yellow or buff; of an intervenor's brief, light green. D.C. Cir. R. 14(a). In the Seventh Circuit the cover of appellant's brief is to be light yellow; of the appellee's brief, light blue. 7TH Cir. R. 16(h).
  \item \textsuperscript{71} While the color of the paper of the brief is specified to be only opaque and unglazed in ten of the circuits, \textit{e.g.}, D.C. Cir. R 16(a), the Tenth Circuit requires India eggshell paper, 10TH Cir. R. 17.
  \item \textsuperscript{72} Compare 1ST Cir. R. 23(3) \textit{with} 4TH Cir. R. 12(1) (A).
  \item \textsuperscript{73} The maximum size of the appellant's brief varies from 50 pages, 5TH Cir. R. 24(2) (e), to 80 pages, 6TH Cir. R. 16(e).
  \item \textsuperscript{74} Compare 6TH Cir. R. 16(2), (4) \textit{and} 8TH Cir. R. 11(b) (Fourth) \textit{with} 2D Cir. R. 17(a) \textit{and} 1ST Cir. R. 23(3) (b), 23(4).
  \item \textsuperscript{75} The Fifth Circuit's requirement of a certificate of service, 5TH Cir. R. 24 (1), (3), (4), is unique in the federal appellate system.
  \item \textsuperscript{76} See notes 128-32 \textit{infra} and accompanying text.
\end{itemize}
considered the rules of the various federal appellate courts and borrowed from each court's experience. Thus, the rules as proposed will mean a change in practice for each appellate court. Moreover, the draft focuses upon and suggests solutions for certain inequities in the law that no circuit has yet treated. In this respect it represents a departure from the previous practice of all the courts.

The remainder of this article contains a general summary of the more significant proposed appellate rules with special emphasis on those areas in which the rules constitute a departure from present practice. In addition, there is a critical analysis of some areas in which this author believes that further improvement can be made. The proposed rules are grouped into specific areas in order to simplify discussion.

**NOTING AN APPEAL—PROPOSED RULES 3-5**

The proposed rules retain the simplified method of noting an appeal now provided in the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. These rules substituted the simple notice of appeal for the more cumbersome requirements of the practice which had previously existed. The proposed rules, however, do make several significant departures from present practice.

One of the most significant departures concerns the time for taking an appeal in a civil case. Under present law, the period permitted for noting an appeal in civil cases is jurisdictional. That is, if the notice of appeal is not filed with the clerk of the district court within the time limit provided, the appellate court has no jurisdiction to hear the appeal. This is based upon the principle that "litigation must at some definite point be brought to an end." The only exception presently provided by statute or rule is if a party shows

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76 Fed. R. Civ. P. 73(a); Fed. R. Crim. P. 37(a) (1).
78 This would be thirty days in ordinary civil cases, sixty days in cases in which the government or an officer or agency thereof is a party. 28 U.S.C. § 2107 (1964).
79 Spengler v. Hughes Tool Co., 169 F.2d 166, 167 (10th Cir. 1948); Federal Deposit Ins. Corp. v. Congregation Poiley Tzedeck, 159 F.2d 163, 166 (2d Cir. 1946); see FTC v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 213 (1952); Matton Steamboat Co. v. Murphy, 319 U.S. 412, 415 (1943); cf. 7 Moore, Federal Practice ¶ 73.10, at 3151 (2d ed. 1955).
80 FTC v. Minneapolis-Honeywell Regulator Co., supra note 79; see Matton Steamboat Co. v. Murphy, supra note 79.
"excusable neglect based on failure ... to learn of the entry of the judgment, order or decree," and even then only a thirty-day extension may be granted. These rules apply as well to cross-appeals. The appellee, although he may defend the judgment upon any ground appearing in the record, even if rejected in the district court, may not seek affirmative relief enlarging his judgment unless he has filed his own notice of appeal within the time limits provided. Thus, if the appellee does not wish to appeal unless his opponent appeals, and his opponent notes an appeal at the last moment, or for some other reason the appellee fails to learn of his opponent's appeal until the jurisdictional time has run, he is precluded from cross-appealing.

The proposed rules remedy the latter situation. Borrowing from Illinois practice, rule 4(a) provides: "If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 7 days of the date on which the first notice of appeal was filed." As the Advisory Committee Note points out, additional time for cross-appeals is common in state practice.

One problem that arises is that the present time-limit requirement is statutory. Thus, this provision cannot be adopted without a con-

83 International Milling Co. v. Brown S.S. Co., 264 F.2d 805, 804 (2d Cir. 1959); Gulberson Corp. v. Equipment Eng'rs, Inc., 252 F.2d 431, 432 (5th Cir. 1958).
84 At the writing of this article Mr. Justice Black is faced with a similar question involving the Supreme Court's jurisdiction. After the Fifth Circuit decided Florida E.C. Ry. v. United States, 348 F.2d 682 (5th Cir. 1965), petition for cert. filed, 34 U.S.L. Week 3202 (U.S. Nov. 29, 1965) (Nos. 750, 782, 783), partially in favor of the United States and partially in favor of the railroad, the United States on the ninetieth day after the Fifth Circuit decision applied to Mr. Justice Black for an extension of time in which to file a petition for a writ of certiorari. The time to file a petition, as the time for noting an appeal, is jurisdictional, Toledo Scale Co. v. Computing Scale Co., 261 U.S. 599, 418 (1923); 28 U.S.C. § 2101(c) (1964), but it may be extended upon application. Ibid. The railroad, on the ninety-seventh day, applied for an extension of time in which to file a cross-petition. After the government questioned the authority to grant an application filed late, Mr. Justice Black, on November 10, 1965, ruled: "Motion granted if within my power to do so." It thus appears that the jurisdictional question is deferred to full consideration by the Court provided the petitions for certiorari are not denied.
85 ILL. SUP. CT. R. 35.
86 Advisory Committee Note to proposed rule 4(a).
gessional grant of authority that would include a provision similar to 28 U.S.C. § 2072, which provides in the case of the Federal Rules of Civil Procedure that all laws in conflict with the rules "shall be of no further force or effect after such rules have taken effect." There can be little doubt that the time for noting an appeal is procedural and not a "substantive right" which the "rules shall not abridge, enlarge or modify," as required by 28 U.S.C. § 2072.

Another problem with the new provision that could cause injustice in a few situations and that could easily be prevented with no apparent disadvantage lies in the fact that the appellee's additional seven days in which to cross-appeal runs from the "filing" of the first notice. The other parties would know of the filing of the first notice only by being served by the clerk of the district court, as is now required by Rule 73(b) of the Federal Rules of Civil Procedure. Should the clerk not serve the other parties on the same day that he receives the first notice, the appellees may not have an opportunity to file within the time limit. This difficulty could be alleviated by providing that the seven days shall run from the filing and service of the first notice. Service, as it will be pointed out later, is complete on mailing. For example, should a notice of appeal be filed late on a Friday and the district court clerk not place a copy into the mail to the other party until Monday, and should the other party be some hundreds of miles away or across country, it is entirely possible—and at the Christmas season quite probable—that the other party will not be aware of the filing of a notice of appeal until after it is too late to file notice within the seven days allowed. This difficulty could be at least alleviated by providing that the seven days shall run from the filing and service of the first notice.

Another very significant change which proposed rule 4(a) would work relates to the extension of time to take an appeal. As has been noted, present law provides that this time may be extended upon motion only for "excusable neglect based on failure of a party to learn of the entry" of the order appealed from. The new rules would remove the limitation of failure to learn of the entry of the order and permit extension of time to note an appeal whenever there is "excusable neglect." The Advisory Committee observes that in

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88 Proposed rule 25(c).
view of the simple method of taking an appeal, no reason other than failure to learn of the judgment should ordinarily be the basis of such an extension. But, in its opinion, "the district court should have authority to permit the notice to be filed out of time in extraordinary cases where injustice would otherwise result." Although removing the limitation upon the excusable neglect exception would permit district courts in a few instances to prevent injustices that would otherwise occur, the resulting uncertainty is too heavy a price to pay. The entire basis for a limitation on the appeal period is that litigation must end at some time so that one can act safely upon a decision. As long as a party has knowledge of the judgment, this period should not be extended. By permitting the exception to apply whenever "excusable neglect" is found, the matter is left to the almost unlimited subjective judgment of a district court judge. 90

The Advisory Committee proposes that the time to appeal admiralty cases be made uniform with the requirements for general civil cases. 91 This is in conformity with the proposal of the Advisory Committee on Admiralty Rules that much of the distinction between admiralty and civil procedure be abolished. 92 The proposed new rules, however, retain two exceptions in the time to appeal, which in reason do not appear to require such distinction—appeals of a bankruptcy decision (forty days rather than thirty in certain situations) 93 and appeal of an arbitration board award under the Railway Labor Act (ten days). 94 The Advisory Committee points out that each of these exceptions is statutory. 95 If this should be the only ground for retaining such diversity, and none other is suggested, the Advisory Committee is violating its own logic by proposing a change in the time to appeal admiralty decisions and civil cases involving cross-appeals, for both of these situations are now governed by statute. 96 Since it seems clear that these are procedural matters and therefore

90 See id.

91 The time to appeal in admiralty is now ninety days after final orders and fifteen days after interlocutory orders. 28 U.S.C. § 2107 (1964).

92 See Advisory Committee Note to proposed rule 4 (a).

93 In bankruptcy, appeal time is thirty days after notice to the losing party of the entry of judgment or order if proof of service of that notice is filed within five days of the service itself. If there is no service or proof of service within the requisite time, appeal time is forty days. Bankruptcy Act of 1938, § 25, 52 Stat. 555, 11 U.S.C. § 48 (1964).


95 Advisory Committee Note to proposed rule 4 (a).

within the Court's rulemaking power, to retain these disparities is to forego an opportunity to effect needed uniformity with no concurrent disadvantage. Because "many actions which are termed bankruptcy actions in common speech are regarded as ordinary civil actions for the purpose of determining the time within which an appeal may be taken," the law as it now stands serves as another pitfall for the unwary.

The proposed rules for noting an appeal in a criminal case generally adhere to those used today. The ten-day period for appeal is retained. However, proposed rule 4(d) does change and clarify existing law since it incorporates two principles that have evolved through case law. A motion for leave to appeal in forma pauperis filed within ten days of judgment is to be treated as a notice of appeal, and a notice of appeal filed before judgment, but after announcement of a decision, sentence, or order, is treated as filed after judgment. The rule resolves the question whether a post-trial motion, filed within ten days but beyond the filing time limit of the applicable criminal procedure rule, allows an additional ten days for filing the appeal if the post-trial motion is denied. The Fifth Circuit has held that such a motion does not extend the time; the Tenth Circuit has disagreed. The proposed rule allows an extension only when the motion is "timely," thus adopting the position of the Fifth Circuit. Moreover, it expressly provides that a motion for a new trial based on newly discovered evidence extends the appeal time only if filed within the ten-day period. This is significant because the criminal procedure rules permit two years for such a motion.

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97 Advisory Committee Note to proposed rule 4(b); see Diaz v. Crom, 195 F.2d 517 (5th Cir. 1952); In re Finklestein, 102 F.2d 688 (2d Cir. 1939); Exchange Nat'l Bank v. Meikle, 61 F.2d 176, 178 (9th Cir. 1932); 2 Collin, BANKRUPTCY ¶ 25.02 (Moore ed. 1964). As bankruptcy proceedings have become available to more and more people, the limited, specialized bankruptcy bar has expanded and there is more and more chance of substantial rights being lost in the pitfall of different time periods. The number of bankruptcy cases filed has increased from 18,510 in 1948, to 180,323 in 1965. See 1965 REPORT p. V-1.
98 See Black v. United States, 269 F.2d 38, 40 n.2 (9th Cir. 1959); Tillman v. United States, 268 F.2d 422 (5th Cir. 1959).
100 Lott v. United States, 280 F.2d 24, 27 (5th Cir. 1960), rev'd on other grounds, 367 U.S. 421 (1961). The Supreme Court refused to decide the instant question. Id. at 425.
102 Fed. R. Crim. P. 33-34.
The proposed rule also resolves a conflict between the District of Columbia Circuit,\textsuperscript{105} on the one hand, and the Second\textsuperscript{106} and Fifth\textsuperscript{107} Circuits, on the other, by providing that the time to appeal starts to run not at the time of sentencing but at the time judgment was filed and entered in the docket. Also, proposed rule 4(d) eliminates the previous failure-to-learn-of-judgment limitation on the excusable-neglect exception.\textsuperscript{108} Here there is less reason for an inflexible rule since the necessity of ending litigation so that private persons may act upon the judgment is not present in a criminal case.

Finally, proposed rule 5 would change the method of taking an interlocutory appeal under 28 U.S.C. § 1292(b). The rules of most circuits today provide for the filing of a notice of appeal after the appellate court grants an application for permission to appeal.\textsuperscript{109} Proposed rule 5 recognizes that such a notice of appeal is superfluous and dispenses with it.\textsuperscript{110}

PENDENTE LITE RELIEF—PROPOSED RULE 8

Most circuit courts have not laid out in their rules the procedure for obtaining relief during the pendency of an appeal, although most make reference to such relief, usually by prescribing which parts of the record are to be used for such purpose. There can be no question of the authority of the appellate courts to grant a stay or injunction pendente lite; such authority clearly lies within the All Writs Statute.\textsuperscript{111}

\textsuperscript{106} United States v. Isabella, 251 F.2d 223, 225 (2d Cir. 1958).
\textsuperscript{107} Hyche v. United States, 278 F.2d 915, 916 (5th Cir. 1960).
\textsuperscript{108} See pp. 446-47 supra where this problem is discussed in connection with the civil procedure rules.
The problem of seeking interim relief on appeal arises with some frequency; time is usually of the essence. In addition to the advantage of promoting uniformity, a rule governing applications for stays and other interim relief would be of particular usefulness to an inexperienced counsel who must obtain quick relief for his client.

Proposed rule 8 generally prescribes the same procedure which is followed today. A motion for such relief may be made to the appellate court or to an appellate judge, but it must show that the district court turned down an application for such relief, that action of the district court did not afford the relief requested, or that application to the district court is impractical. The motion is to state reasons and, "if the facts are subject to dispute," is to be supported by affidavits or other sworn statements. Relevant portions of the record are to be filed with the motion. "Reasonable" notice is to be given all other parties. And the relief granted by the appellate court may be conditioned upon the giving of a bond or other appropriate security in the district court.

The proposed rule, however, appears deficient in two major ways. First, the provision that the motion shall be supported by affidavits or other sworn statements "if the facts are subject to dispute" is vague and subject to unnecessary argument. If a court must act hastily and on an incomplete record, there should be no question as to the facts presented to it. Thus, it would be better if the rule were to provide that the motion is to be supported by sworn statements unless the pertinent facts were conceded in the district court or are shown by the district court order or record.

Second, except for the cryptic statement that reasonable notice shall be given to all parties, the proposed rule makes no reference to procedure to be followed upon the filing of a motion for interim relief. For the guidance of both counsel and clerks, as well as for uniformity of treatment, it would be well to set out such a procedure, perhaps patterned upon Rules 50(1)-(3) of the Rules of the Supreme Court.

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112 For present practice see Cumberland Tel. & Tel. Co. v. Louisiana Pub. Serv. Comm'n, 260 U.S. 212, 219 (1922); United States v. El-O-Pathic Pharmacy, 192 F.2d 62, 79-80 (9th Cir. 1951); United States v. Hansell, 109 F.2d 613, 614 (2d Cir. 1940); FED. R. CRIM. P. 38(c).

113 Thus, the rule would provide that the motion should be filed with the clerk who is to transmit it to the court or an individual judge. It should be accompanied by proof of service, including in urgent cases proof of telegraphic dispatch. Request for oral argument, if desired, should accompany the motion.
This procedure could also be utilized in a provision for pendente-lite-relief requests in proceedings in which courts of appeals directly review administrative decisions. This form of relief is often requested and granted; it is unfortunate that the proposed rules do not provide a procedure for this situation.

**APPEAL RECORD AND DOCKETING—PROPOSED RULES 10-12**

The proposed rules recognize the obsolescence of Rules 75(a)-(g) of the Federal Rules of Civil Procedure which provide for the forwarding to the court of appeals of certified copies of designated portions of the district court record. No court now follows this procedure. Thus, proposed rule 10(a) provides that the record on appeal shall consist of the original papers and exhibits filed in the district court, along with the transcript of proceedings, if any, and a copy of the docket entries. The appellant is given the duty by rule 10(b) to order the portions of the transcript he will need. This order must be placed within ten days of the filing of the notice of appeal, a procedure now followed in the Fifth Circuit.114 Should the appellant fail to order the entire transcript,115 he is to file and serve on the appellee a statement of the issues that he intends to present on appeal. This statement, the Advisory Committee Note makes clear, is not the equivalent of the once-required but now obsolete assignment of errors, nor are the issues on appeal limited to those set forth in the statement.116

114 5th Cir. R. 23 (3).
115 On numerous occasions an appellant who orders only a portion of the transcript raises the question of sufficiency of the evidence. Naturally, the record in this posture will support his conclusion. It is thus necessary to engage in a complex series of motions in the court of appeals and the district court to force the appellant to provide the additional transcript. Much time and effort are consumed. To eliminate this problem, the rules ought to contain an explicit statement that if insufficiency of evidence is to be asserted on appeal, all of the evidence in any way pertaining to that issue must be transcribed. See Watson v. Button, 235 F.2d 235, 238 (9th Cir. 1956); United States v. Brodbeck, 139 F.2d 916 (3d Cir. 1944); Miller v. Miller, 72 App. D.C. 348, 350, 114 F.2d 596, 598 (1940).
116 This factor points up an area in which the rules might be improved. In present practice there are instances in which the appellant's brief presents broader or additional issues to those detailed in his statement of issues. As noted in the text, the statement of issues filed under proposed rule 10(b) is not intended to be binding upon the appellant. If the appellant in his brief should go beyond the statement of issues which he has filed, and if the appellee, because he relied upon the statement of issues, failed to counter-designate portions of the transcript needed to answer the questions raised in the appellant's brief, the appellee could presumably seek to have the record supplemented under the pro-
The time for sending the record to the appellate court has been altered. Rule 73(g) now provides that the record is to be “filed with the appellate court and the appeal there docketed within 40 days from the date of filing the notice of appeal.” Proposed rule 11(a) would require only that the record be “transmitted” to the appellate court within that time. The Advisory Committee Note states that this alteration in language was intended to change the procedure so that it will be sufficient if the record leaves the possession of the district court clerk on its way to the appellate court within the forty-day limit, rather than requiring an actual filing of the record within forty days. Thus, district courts which are located substantial distances from their appellate court (e.g., from Alaska to San Francisco) would not need to send the record substantially before the expiration of the time.

Another change made by the proposed rules deals with the district court’s authority to extend the time in which to transmit the record. At present, rule 73(g) provides that the district court has the discretion to extend the time for filing the record to a time not more than ninety days from the date the appeal was noted. No limitation is put upon that discretion, except that the order must be made before the expiration of the time for filing and docketing as originally prescribed or as previously extended. In criminal appeals the district court may extend the time “for cause shown.”117 No time limit is imposed. Proposed rule 11(c) retains the same civil and criminal time requirements, but with an alteration. In either type of action a motion for extension must “show that the inability of the appellant to cause timely transmission of the record is due to causes beyond his control or to circumstances which may be deemed excusable neglect.”

There is reason, however, for retaining the present procedure of an unconditioned forty-day period and an unlimited discretion on the granting of extensions in civil cases—which in all but a few districts means an almost automatic grant of a motion to extend the time. Counsel often use much of the ninety-day period to resolve questions of whether the appeal will be pursued. Bearing on these

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questions often is the possibility of settlement without appeal. Thus, restricting the grant of extension motions and shortening the forty-day period may well cause the transmittal of many records in cases for which appeals will never be prosecuted.

It should also be noted that by retaining the forty-day period in rule 11(a) the proposed rules fail to adopt the First Circuit practice which requires transmission of the record upon its completion, even if before the fortieth day. This latter policy is aimed at eliminating all delays possible in the appeal process.

Proposed rule 11(d) permits the court of appeals to provide by rule or order that the original record be kept in the district court subject to the right of any party to request at any time that designated parts of the record be transmitted to the appellate court. This adoption of an Eighth Circuit practice would alleviate the problem presented when parties need to consult the record for the preparation of the appendix and briefs and find that it has been transmitted to a court of appeals which may be many hundreds of miles away. On the other hand, the court or a party frequently has need to examine the record at the time of argument. This need is often not contemplated until the time of argument when, under the proposed rule, it would be too late to request that the record be then transmitted. It would therefore appear to be better practice to have the record sent to the appellate court at the time of argument unless either the district court or the court of appeals should otherwise direct.

Docketing, which is, of course, something separate from the filing of the record, is accomplished under proposed rule 12(a) by the clerk entering the appeal on the docket of the appellate court. Any docketing fee (currently twenty-five dollars) must be paid within the time allowed for transmission of the record. Proposed rule 12(c) provides that should the appellant fail to docket or cause the transmission of the record in time, the appellee may move for a dismissal of the appeal. By providing that the appellant, upon payment of the fee, may “appear” in response to a dismissal motion, the rule implies that there will be argument on such a motion. This is unfortunate. A similar practice in the Fourth Circuit, where the court’s rules are construed to require oral presentation of all motions to dismiss, results in unnecessary expense and effort by appellee’s counsel when he moves to dismiss an appeal because of appellant’s failure to docket. The better practice is to require no oral presentation by the appellee unless the appellant answers and the court directs argument.
The rule also provides that, instead of filing a motion to dismiss, the appellee may cause the record to be transmitted and may docket the appeal. The appeal shall then proceed as if the appellant had caused its docketing. This provision serves no useful purpose. Where the appellant has apparently abandoned his appeal but has not taken the trouble to have it dismissed, the proposed provision would permit the appellee to obtain a determination upon the merits instead of having the appeal dismissed. In effect, this permits the appellee to obtain a decision when there is no longer a real case or controversy and the court has no jurisdiction in the matter. If the appellee has cross-appealed, he should, of course, be allowed to proceed upon the merits of his own appeal.

FILING AND SERVICE—PROPOSED RULE 25

Proposed rule 25(a) provides that all "papers required or permitted to be filed must be placed in the custody of the clerk within the time fixed for filing."8 Papers may be mailed, but filing is not timely "unless the papers are actually received within the time fixed for filing." This procedure is designed to prevent counsel from taking an extra day or two to complete his papers before mailing them for filing, but this approach penalizes the vast majority of counsel who conscientiously try to follow the rules. In today's appellate practice, papers are filed by mail, and unfortunately, the mails are not always dependable. Counsel who in the best of faith mail briefs or other papers with what normally would be sufficient time for their arrival, may find that they are late. Since rarely, if ever, will it matter to the court if a brief is actually received on the thirty-first or thirty-second rather than the thirtieth day, there seems little reason for such a harsh rule.

Yet, it is recognized that time limits must exist, for otherwise the judicial process could drag on interminably. The solution suggested is to require the paper to be mailed in sufficient time to arrive in normal course at the clerk's office within the time fixed and to require the proof of service (which must be filed with the paper under rule 25(d)) to state the date of mailing to the court. Should the paper arrive late, the clerk may require the filing of an affidavit from counsel or the mailer showing the date of actual mailing.9

8 A slight variation occurs when a motion requests relief which may be granted by a single judge. In that situation the judge may permit the motion to be filed with him under proposed rule 25(a).

9 Except for the District of Columbia Circuit, the clerks of the various appellate courts
Proposed rule 25 (b) goes on to require that all papers filed by any party and not required to be served by the clerk shall be served, at or before filing, by the filing party on all other parties to the case. It should be noted that service is required upon all other parties, and not just those that counsel may consider adverse. Service may be made by mail, in which case it is complete upon mailing. Proof of service is required. Although the proposed rule appears to require that papers presented for filing “shall contain” an acknowledgment of service or proof of service, the remainder of the rule and the Advisory Committee Note make it clear that proof of service may be either on the document served or accompanying it. The requirement of some courts that if proof of service is signed by other than a member of the bar of the court, it must be sworn to is eliminated.

A potential problem exists in the provision that a clerk may permit filing of papers without acknowledgment or proof of service if such acknowledgment or proof of service is filed promptly thereafter. There is no reason why an attorney should not file proof of service at the time he files a document. If this proposed requirement is not strictly adhered to, the door may be opened to serving other parties substantially after the documents are filed.

COMPUTATION AND EXTENSION OF TIME—PROPOSED RULE 26

The proposed rule governing this subject, rule 26, largely adopts present practice. The only exception is that Saturdays are added to Sundays and legal holidays as days upon which papers need not be filed. This change would make court of appeals’ practice consistent with that of the district courts.121

One matter that deserves consideration is that most motions for extensions of time are unopposed and are granted almost as a matter of course, for they affect no substantial rights and they do not impede the progress of the case. Many of the appellate courts therefore permit such extensions upon the stipulation of parties. Other courts require that each such motion be submitted to a judge of the court. There appears to be little reason in the usual situation for not relieving judges of this paperwork unless substantial rights may be affected or the have permitted the filing of papers mailed prior to the date fixed for filing but received after that date.

120 E.g., D.C. Cir. R. 31 (h).
progress of the case may be impeded. There ought to be a provision added, therefore, to allow extensions by stipulation. At the same time, a method by which the court, through its clerk, can keep a control over such extensions so that the court's calendar or the progress of the case will not suffer should be retained.

Also, some courts of appeals now require that a motion for an extension of time which is itself late must be accompanied by another separate motion for leave to file the motion for an extension. This unnecessary paperwork (certificates of service, captions, docket entries, rulings, etc.) burdens both the court and the litigants. In addition, attorneys unfamiliar with this practice may find their tardily filed motions for extension of time returned, without having been considered on the merits, for lack of a motion for leave to file. The result is that a second motion must be prepared and the first motion redrafted. The practice of requiring a second separate motion for leave to file the first one serves no purpose other than to introduce further delays. The problem could be easily eliminated by including a provision permitting the request for permission to file the tardy motion to be included within the motion itself.

MOTIONS—PROPOSED RULE 27

Proposed rule 27 requires that, unless another form is prescribed by other rules, an application for an order or other relief must be in the form of a written motion stating the grounds urged and the relief sought. Briefs, affidavits, and other supporting papers are to be served with the motion. One substantial change from present practice in most circuits is the provision that "motions for procedural orders may be determined ex parte."

This provision appears to be a step in the wrong direction. Even such purely procedural matters as motions for continuances or for consolidations may be of importance to counsel or his client in some circumstances, and the importance of the matter frequently rests upon facts outside the court's knowledge. In addition,

122 This provision follows the practice in the Fifth and Ninth Circuits (although this practice is not contained in their rules) of acting upon certain procedural motions when received. Thus, opposing counsel often finds in the same mail a copy of the motion and the court's order granting the motion. It would take a most extraordinary situation for opposing counsel to seek at that point a reopening of the matter, although he may have had an argument to present in opposition prior to the entry of the order.
the line between procedural and substantive motions is certainly not clear.

There would appear to be no overriding consideration for not providing an opportunity to oppose procedural motions, especially since procedural motions do not ordinarily require immediate disposition. When urgent matters requiring prompt disposition arise, that urgency should be the valid basis for ex parte action, not the fact that the motion is procedural. Altering this provision would not affect the court's power to act in those situations where ex parte orders are proper and have been issued in the past. These situations usually involve such urgency as not to afford an opportunity to advise opposing counsel or give him an opportunity to respond, but ex parte disposition of motions should not be encouraged in other situations.

The proposed rule permits procedural motions to be disposed of by a single judge. This is a salutary procedure that most courts have already instituted. However, it would seem that valuable judge time could be saved if the clerks were authorized to grant those motions that are ordinarily granted as of course and are consented to or unopposed. The District of Columbia and Eighth circuits now provide such authority; other circuits follow the practice without a specific rule. It would be unfortunate if such a step toward efficiency were lost at this point.

Proposed rule 27 omits several provisions now in force in the various circuits. No provision is made for motions made in open court; rather all motions are required to be in writing. Several circuits now permit open-court motions as exceptions to the general rule that motions be in writing. Although such an exception has limited application, it is desirable to permit the court to act promptly upon a matter when both counsel are present.

The provision in the District of Columbia rules that submission of motions may be expedited by the filing of a waiver of the right to answer is not included in the proposed rule. However, there is no practical sanction for failure to file such an answer. And, the waiver procedure probably would not be followed by the clerks' offices, if the experience of the Court of Appeals for the District of Columbia Circuit is any guide. Furthermore, if there is need for submission earlier

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123 D.C. CIR. R. 31 (k) (2).
124 8TH CIR. R. 4(d).
125 E.g., D.C. CIR. R. 31(a); 8TH CIR. R. 5(c).
126 D.C. CIR. R. 31(i).
than is provided by the normal procedure, experience has shown that counsel can be expected to take affirmative steps to expedite submission, in cooperation with the clerk and with or without the cooperation of opposing counsel.

There is no special provision for a motion to dismiss or affirm, such as is presently provided for in rule 25(3) of the First Circuit. However, the proposed rule as now written is sufficiently flexible to provide for such a motion when needed, and it does not appear advisable to have a new and separate step prior to a full dress argument on the merits. It may be helpful in a few cases, but specific provision for it may encourage its use in a large number of cases where such a motion should not be filed. Counsel for appellees are likely to see many strategic advantages in filing a motion to dismiss or affirm when they have little expectation that it will be granted.

One provision that is missing and should be supplied pertains to oral argument on motions. Several circuits now have provisions advising counsel that ordinarily there shall be no oral argument on motions. This practice appears to be followed by proposed rules 5(b), 6(b), and 18. The court should be authorized to order oral argument in individual situations where it will be helpful, but this should generally be discouraged since in the the great majority of instances oral argument on motions is unnecessary. Certainly the present practice of some circuits, particularly the Second Circuit, where all motions are called for oral hearing, is a great waste of court and counsel time and a significant contributing factor to the cost of litigation.

**PREHEARING CONFERENCE—PROPOSED RULE 33**

One innovation is a provision in proposed rule 33 which makes the prehearing conference available at the court's discretion in all types of cases. Under prior practice prehearing conferences were available only in proceedings for review or enforcement of orders of administrative agencies, boards, commissions, or officers. As the Advisory Committee notes: "[T]he same considerations which make a prehearing desirable in such proceedings may be present in certain cases on appeal from the district courts." As with prehearing conferences on the district court level, the effectiveness of these conferences will depend mainly on the court. If used well, they may be able to simplify and thus expedite involved appeals.

197 E.g., 1ST CIR. R. 26(4); 6TH CIR. R. 18(3).
One of the problems most difficult to resolve in appellate procedure concerns the manner of presenting to the appellate court those portions of the record that pertain to the issues raised. At present, there are basically four different methods used in federal courts of appeals to select portions of the record to be reproduced and to fix the responsibility and the timing for reproduction and filing. For purposes of discussion these methods will be designated as "Separate Appendices," "Joint Appendix or Deferred Joint Appendix," "Record," and "Xerox Copies."

In the "Separate Appendices" method, the portions of the record which each of the parties believes to be pertinent are printed by the respective parties as appendices to their briefs and filed with the briefs.

In the "Joint Appendix" method, a joint appendix is printed by the appellant after each party selects the portions of the record he wishes to include. The appendix is filed with the appellant's brief. A variant of the joint appendix method is the "deferred joint appendix" procedure, in which the designations of the portions of the record to be printed are filed with the briefs. The printing of the joint appendix is deferred until all briefs are in.

Under the "Record" method the record is printed under super-

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128 This is the method used in most circuits. 1st Cir. R. 25(1); 2d Cir. R. 15(h); 3d Cir. R. 24(2)(5); 4th Cir. R. 10; 6th Cir. R. 16(2); 7th Cir. R. 17(a)(c); 8th Cir. R. 10. The Eighth Circuit is sometimes called a "record" circuit, for its rules prescribe the filing of a printed "record" by appellant and of a "supplement to printed record" by appellee. However, since these are essentially the same as separate appendices, the Eighth Circuit is here classified with the "appendix" circuits.

129 This is now the standard procedure in one court. D.C. Cir. R. 16. The rules of four other circuits provide for a joint appendix option to the separate appendix procedure. The Second, Third, and Sixth Circuits mention only the joint appendix, available by stipulation or court order, 2d Cir. R. 15(d); 3d Cir. R. 24(6), or by stipulation, 6th Cir. R. 16(5). The Seventh Circuit provides for use of a joint appendix, by stipulation or court order, with the time for filing left to the parties and the court. 7th Cir. R. 16(d).

130 In one circuit this is specified as an alternative available by stipulation or court order, D.C. Cir. R. 16(h).

131 See 5th Cir. R. 25(a); 9th Cir. R. 17. This follows the Supreme Court practice. The Fifth Circuit provides, as an alternative to be employed upon stipulation of the parties, for the deferral of the printing of the record until after the main briefs are filed (record to be filed twenty days after appellee's brief), with designations for printing to be made at the time the respective briefs are filed.
vision of the court clerk after the parties designate the portions to be printed, and the time allowed for the filing of briefs does not begin to run until completion of the printed record.

The "Xerox Copies" method\textsuperscript{\ref{footnote:xerox}} permits the use of photostatic or xerox copies of the original record papers.

Proposed rule 30 adopts the "deferred joint appendix" method as the routine practice. The parties would be required to file along with their briefs designations of the parts of the record to be reproduced, and the joint appendix would be printed and filed only after all briefs are filed. The briefs are to refer directly to the record, referring to the document and to the page of the document. As an alternative, a party may serve and file typewritten or page proof copies of his brief within the normal time required for the filing of briefs, referring to the record. Then, fourteen days after the appendix is filed a brief may be filed pursuant to proposed rule 28 (e) containing references to the pages of the appendix in place of the initial references to the record.

This procedure would tend to minimize unnecessary printing by assuring that only material relevant to the finally developed argument will be designated. On the other hand, it imposes a burden upon the parties by requiring them to prepare their briefs from the original transcript, exhibits, and other papers which are cumbersome to utilize and which are not always readily available, particularly in circuits encompassing a large geographic area.\textsuperscript{\ref{footnote:geographic}}

The deferred joint appendix has proved to be a useful technique in a limited class of cases—those having extremely large records and monetary interests substantial enough to warrant the added expense. It has been particularly helpful in judicial review of complicated and protracted proceedings before administrative agencies which are heard in the first instance by the court of appeals. In these cases, since the court of appeals provides the initial review, the issues frequently are not adequately crystallized at the commencement of the appellate proceeding, and the precise formulation of the parties' positions occurs only in the course of preparation of briefs (a factor which would be accentuated under proposed rule 15 (a) by the substitution of a simple notice for the elaborate petition for review required today). The record in such cases is often very large, and because of the scope of the

\textsuperscript{\ref{footnote:xerox}} Ninth Cir. 10 (4).

\textsuperscript{\ref{footnote:geographic}} This disadvantage can be mitigated by some utilization of the procedure provided by proposed rule 11 (d) for the retention of the record in the district court at least until argument. See p. 453 supra.
economic interests involved, each of the parties in court usually has been represented before the agency by counsel who has a complete file of the papers in the case. The disadvantages inherent in deferring the preparation of the printed record are reduced by these factors, and may often be clearly outweighed by the desirability of minimizing and postponing printing until the issues and positions are clearly defined.

None of these conditions is present, however, in the majority of the appeals from the district courts to the courts of appeals. The issues have often been well formulated by the parties in the lower court and the areas of controversy have been brought into focus. The record is often short and easily manageable; the portions relevant to the appeal are apparent at the outset. In addition, it is likely that the parties do not each have a complete set of the papers (particularly as regards exhibits) before the joint appendix has been compiled. And if counsel for all parties are not located in the same city as the clerk's office of the court of appeals, the original record is not readily accessible. These disadvantages, together with the fact that this method requires more attorney time, would caution against the adoption of the deferred joint appendix method as the basic procedure.

The choice of the best method to follow in the usual appeal is not an easy one. There are reasons favoring the standard "joint appendix" system. It avoids the disadvantage of fragmentation which, when a transcript of a hearing is involved, can be quite irritating. In addition, the standard joint appendix satisfies what many believe is the overriding consideration—the early availability of the reproduced joint appendix on the basis of which briefs can be prepared.

On the other hand, the standard joint appendix system is objectionable because, as each party must designate portions of the record to be reproduced in the appendix at an early date, the reproduced record is often much larger than it need be. It contains unnecessary material and often omits necessary material. Moreover, it is a costly procedure. Experience shows that a lawyer is often not able to ascertain exactly what parts of the record need be reproduced until he becomes immersed in the case while preparing his brief. Consequently, he will often over-designate in order to protect himself. The result is a bulky, unnecessarily long, and costly reproduced appendix which, nevertheless, may still omit pertinent parts of the original record. Still another difficulty is that, until the appellee reads the appellant's brief and understands precisely the nature of the arguments, he is in no position to know what will need to be reproduced. Often, he is surprised by
the nature of a particular argument and, if he had realized that such an argument was going to be made, he would have designated different portions of the record to rebut it. Likewise, the appellant is sometimes surprised by alternative arguments raised by the appellee for the first time in his brief.

Although the separate appendices method has been criticized because the court does not obtain a coherent picture of the case, one might question how great a burden the fragmentary nature of separate appendices really is. Seven circuits for many years have apparently found it not to be an impossible burden. The appellant should be on notice that he is under the primary obligation to print in the appendix to his brief all portions of the record relevant to the points he makes on appeal. If the courts enforce this requirement by refusing to consider assertions of error when the appellant has flagrantly violated this requirement by not reproducing all parts of the record bearing upon his arguments, the asserted defect in the separate appendix procedure will be largely rectified. The portions of the record relevant to the appellant’s argument will be in the appendix to the appellant’s brief. Normally, the appellee would have to reproduce little or no material. However, if the appellee attempts to defend the judgment upon a ground not covered by the appellant’s brief, it is appropriate for those parts of the record furnishing the basis for the appellee’s argument to be appended to the appellee’s brief. Experience in seven circuits shows that the separate appendix procedure results in the least amount of unnecessary material being printed and consequently is the least costly.

With the competing reasons thus presented, it is apparent that no solution is ideal. Perhaps the best answer in all but the largest of cases is the Ninth Circuit’s practice of using photostatic or xerox copies of the original record. This has proven to be cheap and relatively quick. Unfortunately, however, this writer is not optimistic that the judges in other circuits will desire to forego the convenience of an appendix already culled through by counsel and nicely reprinted and bound for their almost personal use. Left with a choice between the standard joint appendix system and the separate appendix system, this writer

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134 Note 128 supra. This method was first adopted by the Fourth Circuit in 1938 and developed by Chief Judge John J. Parker and Clerk Claude M. Dean of that court. See Wright, Federal Courts 408 (1963); 3A Barron & Holtzoff, Federal Practice and Procedure § 1592 (Wright ed. 1958); Dean, Transcript of Record, in 2 F.R.D. 27 (1943); Parker, Improving Appellate Methods, 25 N.Y.U.L. Rev. 1, 7 (1950).
would choose the latter, which in his experience has worked rather well in all but the largest cases. In the large cases the deferred joint appendix method is probably preferable. Using the deferred joint appendix method as routine, however, appears to be the least desirable of all solutions for the vast majority of appellate cases.

**BRIEFS—PROPOSED RULES 28, 29; 31, 32**

Proposed rule 28 permits filing of a brief for appellant, a brief for appellee, and a reply brief. The rule then provides that "no further briefs may be filed except with leave of court." Although such a restriction is probably salutary, experience has not shown any difficulty with the Fifth Circuit's current policy of allowing additional briefs to be filed at any time, including after argument. The parties should be able to draw the court's attention to new decisions or new statutes that may come to their attention; indeed, the court should welcome such information. Even in those courts that presently have the "no further briefs" rule, a party wishing to draw attention to a new development may file a motion for leave to do so.\[^{135}\] As a motion of this sort has, to this writer's knowledge, never been denied (and, indeed, it could not be denied without the material first being read), it would appear to be a totally unnecessary paper transaction.

The Fourth Circuit's practice regarding the designation of parties in the briefs has been adopted.\[^{136}\] References to parties by their formal designations (appellant, appellee) are to be kept to a minimum. Rather, descriptive terms such as "the employee," "the taxpayer," or "the injured person" are to be used.

Briefs that are reproduced by the standard typographic printing method are limited to fifty pages. Those that are reproduced by any other duplicating process may go seventy pages. This adopts the Fifth Circuit rule\[^{137}\] recognizing that one can get twenty-five to thirty per cent more on a page that is printed than on a typewritten page.

Reference in the briefs to the record or appendix has already been discussed.\[^{138}\] Briefs and appendices may be reproduced by standard typographic printing or by any "duplicating or copying process capable

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135 This is the practice in the Fourth Circuit although there is no such provision in the appellate rules of that court.
136 4TH CIR. R. 10.
137 5TH CIR. R. 24(2) (c).
138 See p. 459 supra.
of producing a clear black image on white paper.” Standard size of
the pages is prescribed, as is uniform color and form for covers.

Permission to use any method of reproduction that does the job is
a great advance forward. Printing costs have long been one of the
great and largely unnecessary costs of litigation. Under the proposed
rules, one may use, in the advisory committee’s words, “any process
capable of producing a neat, readable page.” The determination of
what constitutes such a process is left in first instance to the parties
and ultimately to the court. This change is being made, the com-
mittee feels, because “recent and impending advances in the arts of
duplicating and copying warrant experimentation with less costly
forms of reproduction than those now authorized.” Thus, a litigant
will no longer be limited to typographic printing (as he still is in the
First Circuit and, except on special motion, in the Fourth Circuit)
or even to the multilith method.

Briefs of amici curiae are regulated by proposed rule 29. It provides
that an amicus brief may be filed if consented to by all parties or by
leave of court on motion. The motion should identify the interest of
the applicant and state the reason that a brief of an amicus curiae is
desirable. As the Advisory Committee observes, this proposed rule
reflects the practice in a majority of the circuits today although a
minority would give the court alone, and not the parties, the authority
to permit the filing of such a brief.

One omitted provision that is included in each of the present appel-
late rules which deal specifically with amicus briefs is an allowance for
the United States, or an officer or agency thereof, to file an amicus brief
without express leave of court or consent of the parties. Sometimes
this right is extended as well to the states and their political subdivi-
sions. The present practice appears sound in recognizing that a spe-

139 Advisory Committee Note to proposed rule 32.
140 Ibid.
141 See note 67 supra.
142 Thus there could not be a repetition of a recent occurrence in the Fifth Circuit
where a prominent attorney filed a brief amicus curiae after argument without identifying
the interest he represented. Chandler v. Davis, 350 F.2d 669 (5th Cir. 1965).
143 Compare 9th Cir. R. 18 (9) and D. C. Cir. R. 18 (i) with 1st Cir. R. 21 (10).
144 D. C. Cir. R. 18 (i); 1st Cir. R. 23 (10); 9th Cir. R. 18 (9) (c). Compare U. S. Sup. Ct.
R. 42 (4) which permits an amicus brief by the United States without the consent of the parties.
145 U. S. Sup. Ct. R. 42; 1st Cir. R. 23 (10); 9th Cir. R. 18 (9) (c).
cial status is appropriate for the assertion of the public interest and that there is little danger of the privilege being abused. This writer finds it hard to believe that a court would deny such a motion and has been unable to find any historical instance of such a denial. It would thus appear unnecessary to require that permission be obtained in order to file such a brief.

ORAL ARGUMENT—PROPOSED RULE 34

Proposed rule 34 incorporates the practice generally followed at the present time in the various circuits. Each side is allowed thirty minutes for argument, but it is provided that a court by rule may change that limit.

One significant aspect of this topic that was not touched upon by the Advisory Committee relates to the circumstance in which less than three judges actually appear to hear the oral argument. The current practice in a number of the circuits is to seek agreement from counsel in open court that the absent judge may participate in the decision by reading the briefs and, in some instances, also by listening to a recorded tape of the oral argument. Many lawyers feel strongly that all judges who participate in the decision should be present for oral argument, and yet find it a delicate matter to raise an objection under the current practice.

This problem raises some troublesome issues, both legal and practical. The relevant statute provides generally that "cases and controversies shall be heard and determined by a court or division of not more than three judges," and further that a "majority of the number of judges authorized to constitute a court or division thereof . . . shall constitute a quorum." This provision, while authorizing a quorum of two members, does not in its terms authorize an absent member to decide what he has not heard. The policy decision has been made that the oral argument is an integral part of the appellate system. Its prime advantages are to permit the judge to convey to counsel the questions and problems which remain after study of the brief, and to furnish counsel an opportunity to respond. To permit a judge to participate in the decision when he has not had the benefit of this

146 Compare Morgan v. United States, 304 U.S. 1, 21 (1938); Morgan v. United States, 298 U.S. 468, 481 (1936).
147 28 U.S.C. §§ 46(c), (d) (1964).
argument is inconsistent with the policy determination as well as destructive of this advantage.

EN BANC DETERMINATIONS—PROPOSED RULE 35

Proposed rule 35 specifies two circumstances under which hearing or rehearing en banc may be ordered: First, when consideration by the full court is necessary to secure or maintain uniformity of its decisions, and, second, when the proceeding involves a question of exceptional importance. These circumstances are appropriate, but consideration ought also be given to providing an en banc proceeding when the decision of the court of appeals conflicts with a decision of one or more other courts of appeals. Conflict in the decisions of the courts of appeals for different circuits is not a rare occurrence, and usually the only practicable means of resolving the conflict is to petition the Supreme Court for a writ of certiorari. If, as happens reasonably often, the Supreme Court declines to hear the case, the result is that something may be "legal" in some circuits and "illegal" in others. It is thus possible that en banc proceedings might be used effectively in regard to cases which, although presenting difficult and controversial legal problems, may not be of sufficient national importance to warrant consideration by the Supreme Court. Of course, en banc consideration would not necessarily result in an elimination of conflicts among the circuits, but such decisions could be expected to carry more weight as precedent in future cases arising in other circuits and for this reason could prove useful as a means of achieving greater uniformity throughout the various circuits.

Under the proposed rules, a majority of the circuit judges in regular active service may order en banc hearing or rehearing. This is consistent with existing practice, except that the Ninth Circuit requires the assent of a majority of the panel assigned to the case before a vote of all active judges will be taken. The Ninth Circuit exception permits two members of the panel to block en banc hearing or rehearing even if it is desired by a majority of the active judges of the circuit. The proposed rule appears to be the better practice.

149 This is one of the possible criteria for the grant of certiorari. U.S. Sup. Ct. R. 19(1)(b).
150 28 U.S.C. § 46(c); 3d Cir. R. 4(3); 6th Cir. R. 3(2); 8th Cir. R. 4(a); 5th Cir. R. 23(5).
151 9th Cir. R. 23(5).
Consideration should be given to making uniform the treatment of the consequences that result where a panel reverses the district court, a rehearing en banc is ordered, and the full court ends up equally divided. The Second Circuit has held that the grant of rehearing automatically vacates the panel division and therefore, the even division of the en banc court operates to affirm the decision of the district court.\(^\text{102}\) Although there appears to be no inherent advantage to either this rule or one that would permit the panel decision to stand, the rule should be uniform.

**JUDGMENT—PROPOSED RULE 36**

Notation on the court of appeals' docket constitutes the entry of judgment under proposed rule 36. The clerk is to mail "promptly" a copy of the judgment and opinion, if any, to all parties. This scheme poses two problems. First, a party in many cases is represented by more than one attorney. Under the existing language, service would be required only on one of the attorneys for each party, and the attorney served might not be the principal attorney in charge of deciding such matters as whether to seek reconsideration of the decision, whether to file a petition for writ of certiorari, or whether to file a bill of costs. In view of the time limitations imposed upon such actions, it would appear that where a party is represented by more than one counsel, the clerk should mail opinions and judgments to each address.

The second problem arises from the provision that the clerk shall mail a copy of the opinion and judgment "promptly." The rule should be more specific. It should require that these items be mailed on the date received by the clerk. Experience has shown that in some of the courts of appeals, opinions are not available for distribution to counsel at the time of filing and may not be distributed until as much as a week later. In view of the short time available for requesting rehearing, there should be no delay between the filing of an opinion and its distribution to counsel.

On infrequent occasions a problem has arisen regarding the filing of either a petition for rehearing or a petition for certiorari because the court of appeals may enter an order in lieu of judgment or a judgment of reversal (or for that matter affirming a district court judgment) stating that an opinion will follow. Under such circumstances,

\(^\text{102}\) Parrand Optical Co. v. United States, 317 F.2d 875, 886 (2d Cir. 1963).
it is impossible to know whether further review should be sought until the opinion is written. And the time for certiorari runs from the date of judgment not the date of the opinion. While this situation is quite infrequent, it can be taken care of by a simple provision that if the court decides the case by an order which indicates that an opinion will follow, no judgment is to be entered until the opinion is received by the clerk, unless the court expressly finds that an emergency exists necessitating an exception.

Finally, proposed rule 36 provides that should the opinion direct settlement of the terms of the judgment, the judgment is not to be signed and entered until its precise terms are settled. This is a common problem in cases involving enforcement of agency orders. The proposed rule would have entry of judgment delayed until approval of the final form.

PETITION FOR REHEARING—PROPOSED RULE 40

Proposed rule 40 retains the basic approach in the existing rules but differs in several important details. The time provided for a petition for rehearing is fourteen days after the entry of judgment. Experience has shown this period to be too short. Frequently the opinion and judgment are not received until several days after judgment has been entered. Another week may be needed for printing and mailing the petition. Government counsel usually must clear any action they propose to take through appropriate official channels, and counsel for private parties must have time to obtain proper authorization from their clients. Sometimes inquiries must be made to determine the importance of the decision. If the court's decision goes in a direction unanticipated by either party, extensive research may be required before a petition can be adequately prepared. For these reasons, the time for filing a petition for rehearing would be better set at twenty-one days.

There is no requirement, such as is found in all but one of the existing rules, that the petition for rehearing include or be accompanied by a certificate of counsel stating that it is filed in good faith and not for

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18 Stern & Greisman, Supreme Court Practice 203 (3rd ed. 1962).
184 See pp. 467-68 supra.
185 In the Fourth Circuit, for example, the opinion is not sent to the printer until after judgment is entered. The opinion and judgment are therefore not mailed to opposing counsel until after the opinion has returned from the printer.
Such a requirement should be included, for, at a minimum, it serves as a reminder to counsel of his ethical duty to refrain from filing pleadings solely for purposes of delay, and it should serve as some deterrent, however slight, to abuse of the practice of filing petitions for rehearing.

**INTEREST, DAMAGES FOR DELAY, COSTS—PROPOSED RULES 30, 37-39**

When a money judgment in a civil case is affirmed, interest, established by law, is to run from the date of the district court judgment. Should the judgment be modified or reversed with direction to enter a money judgment, the mandate is to contain instructions with respect to interest. This rule should clear up the confusion as to whether upon affirmance interest is to run from the initial judgment. In addition, it should remove the problem of the current rule that, where a court of appeals directs entry of a money judgment, but makes no provision for interest, the district court is powerless to add interest to the judgment. Now, the appellate court will be reminded to make provision for interest in the mandate. And where the matter is overlooked, a party who believes himself entitled to interest will be able to seek recall of the mandate for determination of the question. The Advisory Committee Note so indicates.

One problem that is perpetuated by the Advisory Committee Note concerns the legal authority to award interest on a judgment. The Note cites 28 U.S.C. §§ 1961 and 2411, which contain the basic authority for such interest. But this authority has been seriously limited in cases involving the United States by the provisions of 31 U.S.C. § 724a. This latter provision should also be cited in the Note to prevent needless errors that will absorb the time of litigants and the court.

In accordance with statutory authority and normal current practice, proposed rule 38 provides that if an appeal delays proceedings

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156 E.g., 4TH Cir. R. 19; 6TH Cir. R. 22 (2).
157 See Blair v. Durham, 139 F.2d 260 (6th Cir. 1943).
159 One-third of all civil appeals filed during the past three years involved the federal government. 1965 REPORT p. II-4.
162 D.C. Cir. R. 23; 2d Cir. R. 26 (b); 3d Cir. R. 34 (2); 9TH Cir. R. 24 (2).
on the district court judgment and appears to have been taken merely for delay, the court may award just damages and single or double costs to the appellee. The courts have been very reluctant—perhaps too much so—to use this provision.\(^{163}\)

Costs are generally awarded to the winning party unless otherwise ordered by the court. The Advisory Committee Note makes clear that this provision applies only to costs awarded under the general authorization statute.\(^{164}\) Special cost statutes that provide for different results in specific situations are to govern where applicable.\(^{165}\)

28 U.S.C. § 2412 provides that the United States should not be subject to costs unless specifically authorized by statute. This is an archaic principle which has outlived its usefulness, and the possibility of changing this anomalous situation is apparently being considered by the Department of Justice.\(^{166}\) The present practice, and that adopted by the proposed rules, attempts to balance the rights of parties. If the courts cannot award costs against the government, they refuse to award costs to the government although a private litigant would be awarded costs in a similar situation.

The validity of this practice, however, along with the corresponding proposed rule, is open to question. As the Advisory Committee recognizes, the United States is entitled to recover costs just as is a private litigant.\(^{167}\) While costs are generally discretionary, the United States should be subject to the same discretion, exercised upon the same principles, as is a private party.\(^{168}\) It thus appears that the present rules purport to deprive the United States of a substantive right to receive costs on the same basis as a private litigant. This practice should not be perpetuated in the proposed uniform rules. Moreover, the present practice does not achieve its purpose. The fact that a litigant who loses to the government need not pay costs is of little consolation to the litigant who wins against the government but is unable to get costs.

\(^{163}\) See Mason v. Simmer Lake Irr. Dist., 216 F.2d 609 (9th Cir. 1954) (no damages even where appeal frivolous because not done in previous cases). But see Lowe v. Willacy, 239 F.2d 179 (9th Cir. 1956) (damages granted because appeal was frivolous).


\(^{165}\) It may be assumed that the statutory limitation on costs recoverable for printing briefs in admiralty appeals comes within this caveat. 28 U.S.C. § 1923 (1964).


\(^{167}\) Advisory Committee Note to proposed rule 39 (b).

\(^{168}\) In United States v. Verdier, 164 U.S. 213 (1896), the Court held that the government could not be deprived of its right to interest.
The proposed rule makes one significant improvement in current practice. It permits the cost of printing briefs to be taxed along with the cost of printing appendices. This follows the more liberal present practice of four circuits. As long as we operate upon a theory of taxing costs to the unsuccessful party, there is no reason not to include the cost of printing briefs.

Moreover, the proposed rule goes further and permits the taxing of the actual cost of printing or otherwise reproducing the briefs and appendices, limited to rates generally charged for such work. This is an improvement over the practice in at least some courts where the costs permitted reflect a pricing structure of a by-gone era. It may be a further improvement to limit the recovery to the cost that would be incurred by use of multilithing. Rule 32(a) of the proposed rules would authorize multilithing, and it would seem appropriate that the rule involving costs encourage the use of this process. It would be unfair to disadvantage the losing party by permitting the winning party—perhaps the more affluent of the two—to charge the cost of a more expensive process.

Often the largest part of the costs taxed is the cost of the appendix. In analyzing the problem of who bears the cost of the appendix, one must distinguish between the initial incidence and the final incidence of cost. Following the terms of some of the present rules, the proposed rules provide that the appellant will bear the initial expense of printing the appendix as designated by both parties, with one exception. The appellant may shift to the appellee the initial expense of printing material designated by the latter, if he advises the appellee of his belief that such material is “unnecessary for the determination of the issues presented”; in that event the appellee “shall advance the cost of including such parts.” One problem that has developed under this practice is the tendency of appellants to print less than is needed to decide the case. The tendency may continue under the proposed rules because an appellant can designate little and can require the appellee to pay initially for all which the latter designates by simply “advising” him that the additional material is unnecessary. While there is no provision for challenging the appellant’s “advice” at the time it is given,

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169 D.C. Cir. R. 20(d); 1ST Cir. R. 31(4); 3d Cir. R. 35(4); 4TH Cir. R. 21(4).
170 For illustrations of the costs now allowed by some courts see 1ST Cir. R. 31(4); 3d Cir. R. 35(8).
171 E.g., D.C. Cir. R. 16(a).
an appellee who prevails on the merits can recover costs at the end of the case.

The same is not true, however, for litigation involving the government. As long as the rule prevails that there be no costs allowed for or against the United States unless authorized by statute, the initial allocation of the printing expense is also the final one. In the Supreme Court, for example, the appellant in government cases must pay for printing the entire record, regardless of the source of the designations, and this writer is unaware of any judicial shifting of this burden on the grounds of improper or unnecessary designation. Some courts of appeals using the record or joint appendix procedure, however, have interposed these grounds in government cases to shift expenses. The District of Columbia Circuit, on the other hand, permits no questioning of the appellant's advice that the appellee's designation is unnecessary. But, since the initial allocation in government cases is the final one, the rules should provide that the appellee in a government case may challenge the appellant's "advice" as to the need for the material designated by the appellee. This challenge should be decided either immediately or deferred until the merits of the appeal are decided at which time the court probably would be better able to determine relevance. Such court supervision would appear to be valid on the theory that it does not constitute a taxation of costs, but simply an imposition upon the appellant of a burden which he should have assumed in the first place.

**BAIL—PROPOSED RULE 9**

The proposed rules generally follow the present practice of Rules 38(c) and 46(a)(2) of the Federal Rules of Criminal Procedure. But it is expressly provided that an application for bail pending appeal of a conviction must ordinarily be first made to the district court. If the district court fails to grant the applicant relief to which he considers himself entitled, the judge is to "state with particularity the reasons for the denial or for the refusal of the relief sought." This should remove a difficulty found by the appellate courts in situations where a district court fails to state its reasons.\(^{172}\) Upon denial in the trial court, the appellant may apply for bail to the court of appeals or to a judge thereof, showing his application to the trial court and its

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\(^{172}\) See, e.g., Rhodes v. United States, 275 F.2d 78 (4th Cir.), cert. denied, 364 U.S. 912 (1960); United States v. Williams, 253 F.2d 144 (7th Cir. 1958).
denial, or the reason that application to the trial court is not prac-
ticable. The application shall also state the reasons for the relief re-
quested and the facts relied upon. If the facts are subject to dispute, 
the application is to be supported by affidavits or other sworn state-
ments. This procedure might be improved by two additional provi-
sions: In the event of a dispute of fact in the district court, the district 
court shall grant a prompt hearing thereon; and should a subsequent 
application be made to the appellate court, the district court upon 
notice of the application shall transmit the record of the factual hear-
ing.

Provision is also made for an appeal from “an order respecting 
bail entered prior to an appeal from a judgment of conviction.” Such 
an appeal is to be expedited and heard without the necessity of 
b briefs. This provision recognizes that, under the rationale of Cohen 
v. Beneficial Indus. Loan Corp., orders revoking bail or refusing 
to extend bail limits are appealable, and that “relief in this type of 
case must be speedy if it is to be effective.”

HABEAS CORPUS—PROPOSED RULES 21, 22

Proposed rule 21 provides that an application for a writ of habeas 
corpus is to be made to the district court for the district in which 
the applicant is in custody. If made to an appellate judge or court, 
the application ordinarily is to be transferred to the appropriate 
district court. This makes present practice explicit. The rule then 
goes on to provide that, should the district court deny the application, 
renewal of the application before a circuit judge is “not favored”; 
instead the remedy is appeal. The Advisory Committee notes that 
28 U.S.C. § 2241 seems to authorize a second original writ to an 
appellate judge or court. But as 28 U.S.C. § 2253 provides for 
appeal from the denial of a writ, the second application is a waste of 
time.

The rule also prescribes that, before an appeal can be taken in 
a proceeding involving detention by order of a state court, a certificate 
of probable cause must be obtained in accordance with section 2253.

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174 United States v. DiPietro, 302 F.2d 612 (2d Cir. 1962); Carbo v. United States, 
The certificate must first be sought from a district judge. If denied, the applicant may then request issuance of a certificate from a circuit judge. If he addresses his application to the appellate court, it is deemed to be addressed to a judge or judges of that court. The rule expressly states that an appeal may not be taken unless a certificate of probable cause is issued.

Although section 2253 does require the issuance of a certificate of probable cause, it does not require that there be filed a second piece of paper specifically denominated a request for a certificate. Thus, the requirement that a second request be filed is a useless formality and may be a potential trap to substantial rights. It can easily be eliminated by providing that, if an appellant does not file a specific request for a certificate, his notice of appeal should be deemed to be such a request addressed to the court of appeals and considered accordingly. This will solve another problem as well. Some circuits, for example the Seventh, have held that, where the certificate of probable cause had been refused by the court of appeals before the time to appeal had expired, the court was without the power to grant the application and the appeal was dismissed.

The proposed rules also provide that, pending review of a decision refusing a writ of habeas corpus, the prisoner is not to be moved except on order of court. Pending review of a decision discharging such a writ, the prisoner may be remanded to the custody from which he was taken or he may be released on recognizance with surety. Pending review of a decision discharging a prisoner, he "shall be enlarged" with or without bail. The only qualification that might be made is to the apparent requirement that the prisoner be given his freedom, with or without bail, pending review of a grant of a writ. Favorable action on the part of the district court lends great weight to the argument that the prisoner should not be detained a moment longer. There are circumstances, however, which might make continued custody a wiser decision. Illness, mental difficulty, or outstanding warrants for other offenses are typical situations in which the prisoner might be better off continuing the service of his sentence.

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177 Under proposed rule 3(a) the notice of appeal is to be transmitted to the clerk of the court of appeals when it is filed.

178 See United States ex rel. Geach v. Ragen, 231 F.2d 455 (7th Cir. 1956); Ex parte Whistler, 154 F.2d 500 (7th Cir.), cert. denied, 327 U.S. 797 (1946); United States ex rel. White v. Ragen, 153 F.2d 778 (7th Cir.), cert. denied, 327 U.S. 802 (1946).
Proposed appellate rules

Proposed rule 23 requires that an initial forma pauperis application be made to the district court. If granted, the party may proceed on appeal without payment of fees or costs or the giving of security for fees or costs. If denied, the district court is to state the reasons for the denial. Upon the denial of the application by the district court, the appellant may move in the court of appeals for leave to proceed in forma pauperis. But he must do so thirty days after entry of the order of denial by the district court. That means that he will have to move in the court of appeals usually prior to docketing and sometimes prior to the expiration of the time for the filing of a notice of appeal.

No provision is now made for review of administrative agency proceedings in forma pauperis. Some agency actions significantly affect the rights of individuals. Where review proceedings are brought in the district courts, the proposed rule would permit proceeding in forma pauperis in an appeal taken from any ruling entered. But many agency review actions start directly in the appellate court. There should also be a right to obtain such review in forma pauperis. The statutory authorization, 28 U.S.C. § 1915, is broad enough to cover such situations.

Writs of mandamus and prohibition directed to a judge and other extraordinary writs—proposed rule 20

This proposed rule sets forth the procedure for obtaining from the appellate court extraordinary writs, particularly those directed to lower judges. A petition must be filed containing a statement of the facts, issues presented, relief sought, and a statement of the “reasons why the extraordinary writ of mandamus or prohibition should issue.” This could be sharpened by requiring an additional statement why the relief sought is not available through regular appellate processes. Although such a requirement is not in the present

rules of the courts of appeals, it is contained in the Supreme Court rules. This requirement would serve to emphasize the extraordinary character of the writ and would thereby tend to discourage the undesirable efforts, too frequently made, of abusing the extraordinary writs.

In addition, there should be required either a statement that an application had been made to the district court for a certification under 28 U.S.C. § 1292 (b) (permitting interlocutory appeals) and was unsuccessful, or the reasons that an application was inappropriate. Ordinarily, relief by way of mandamus or prohibition is not granted where other remedies are available, and an interlocutory appeal under section 1292 (b) would in many instances afford an adequate remedy, and might therefore preclude relief by extraordinary writ. This procedural requirement was recently adopted by the Third Circuit.

However, it must be recognized that there are circumstances in which no application need be made for a certification under section 1292 (b) because relief thereunder would not be appropriate. For example, mandamus is available to enforce a party's right to a jury trial, even though there is no "controlling issue of law" or no "substantial ground for a difference of opinion." In such circumstances, the petitioner should not need to apply for a section 1292 (b) certificate but should only need to show that an appeal under that statute was inappropriate.

The proposed rule as written does require that all parties answer the petition. This is faulty for two reasons. First, the trial judge should not be required to answer but should be given a choice as to whether he wishes to become involved. The elimination of a duty to answer will avoid the "unfortunate consequence of making the judge a litigant" in cases where he is not a real party in interest. Secondly, it would save everyone's time and effort if the appellate court would first examine the petition to determine whether it presents

180 U.S. Sup. Cr. R. 31 (2).
182 Rapp v. Van Dusen, 350 F.2d 806 (3d Cir. 1965).
183 See in re Watkins, 271 F.2d 771 (5th Cir. 1959). See also Dairy Queen v. Wood, 369 U.S. 469 (1962), where there was no discussion of the possibility of permissive appeal. A duty to answer exists in certain of the present rules. 3d Cir. 19(3); 6th Cir. R. 29(4); 7th Cir. R. 19(c). But those requirements pertain to situations where the court issues an order to show cause, a procedure not included in the proposed uniform rules.
a case sufficient to require an answer. This is in effect the practice of those circuits not requiring an answer until there has been issued an order to show cause, and this practice has much to commend it.

ADMINISTRATIVE REVIEW AND ENFORCEMENT PROCEEDINGS—PROPOSED RULES 15-19

The current uniform rule, taken from the Hobbs Act, requires that administrative review proceedings commence with a petition for review which shall contain "a concise statement, in barest outline, of the nature of the proceedings as to which relief is sought, the facts upon which relief is sought, and the relief prayed." The proposed new rule retains the petition for review in name but requires only that it specify the parties seeking review, the respondent, and the order or part thereof to be reviewed. Thus, the petition for review is substantially turned into a mere notice of appeal. This is subject to the qualification that, where a statute expressly requires more, the petition is to conform with the statute. Thus, those review proceedings that come directly within the Hobbs Act authorization would still require the broader petition. But review proceedings taken under statutes that do not now require the broader petition would be subject only to notice pleading.

Although one may agree with the Advisory Committee that "there is no effective, reasonable way of obliging petitioners to come to the real issues before those issues are formulated in the brief," this does not eliminate the desirability of some specification of error in the appeal process. Such specification can serve, as it does now, as an aid in determining what portion of the voluminous records often involved in administrative proceedings should be printed. Early spe-

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cification also enables respondents to begin work on their briefs at an early stage and on occasion provides a basis for the agency and the parties to resolve the controversy without the necessity for completion of the review process. The petition should also contain allegations with respect to venue and jurisdiction so that challenges on these grounds may be resolved expeditiously on motion, rather than after the entire briefing process has been completed.

The fallacy in assimilating administrative review proceedings to appeals from the district court is that, while in the district court battle lines have been drawn and issues clarified, this often does not exist in administrative proceedings. An appeal from a multi-party, multi-issue comparative or rulemaking proceeding, where the record could run many volumes, is a quite different affair. And even in those appeals from the district court where the appellant does not order the entire transcript, proposed rule 10(b) would require a statement of the issues intended to be raised on appeal. In administrative proceedings the burden will probably fall on the prehearing conference provided by proposed rule 33 to clarify the issues so that the rest of the case might go on efficiently. Thus, the statement of issues is merely postponed and more court time is taken.

The petition for review does not call for an answer, but an answer is called for in response to an application for enforcement. The reason is that there is no purpose in preparing and forwarding a record in cases where the application for enforcement is not contested.\textsuperscript{188}

One of the knottiest problems in this area is the service to be made upon interested parties. Effort should be made to see that all who have a genuine interest in the proceedings receive notice. But in many administrative proceedings there may be hundreds of persons who have written letters or comments to the agency but have not participated in any meaningful way. The proposed rule solves the problem by requiring that service be made upon all “who shall have been admitted to participate in the proceedings before the agency.”\textsuperscript{189} This seems somewhat restrictive since a person, believing that another party at the agency level would sufficiently represent his interests, may have filed formal comments without participating. Perhaps the best answer is to require a simple notice to be sent to all parties who filed formal comments or appeared at the administrative hearing.

\textsuperscript{188} See Advisory Committee Note to proposed rule 17(a).
\textsuperscript{189} Proposed rule 15(c).
The record, which can either by filed with the court or retained by the agency during the review proceedings, is to consist of the original papers before the agency. The rule gives a sufficient amount of flexibility in the handling of the record to permit needed administrative proceedings to continue during the review process.

**REVIEW OF DECISIONS OF THE TAX COURT—PROPOSED RULES 13, 14**

Review of Tax Court decisions are to be taken by filing a petition for review, as is required by 26 U.S.C. § 7483. But proposed rule 13(a) would require that the petition be “in the form of a notice of appeal.” This constitutes a change from current practice. As with administrative review generally, this writer believes that the alteration in form is a mistake. The petition for review should include a statement of facts necessary to establish venue and a brief statement of the issues and the taxable periods with respect to which review is sought. Tax Court cases are subject to special venue requirements which do not apply to court of appeals' review of district court matters. It is only by the pleading of the facts necessary to establish venue that a court and government counsel can ascertain at the beginning whether a case has been brought in the correct court. If not, it would be to the benefit of all to have the case dismissed before counsel or the court invest much time in the matter.

The statement of issues is necessary in Tax Court appeals for the same reason that it is of significance in administrative appeals generally. There are often many issues before the Tax Court and, without the statement, it is not known until the appellant's brief is filed what issues are raised. Designations for an appendix, early brief preparation, and other matters will be disadvantaged. Moreover, before the Tax Court there are quite often various issues affecting various tax years. And where issues have been decided partially for and partially against the Commissioner, unless he knows which year or years are the subject of appeal, he is in no position to know what, if any, cross-petitions to file. The taxpayer is in the same position if the Commissioner petitions first.

The proposed rule further provides that the running of the time for appeal is tolled by a timely motion to vacate or revise a decision

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190 D.C. Cir. R. 36(a); 4TH Cir. R. 28(1); 7TH Cir. R. 13; 9TH Cir. R. 29.

191 INT. REV. CODE OF 1954, § 7482(b).
made pursuant to the Tax Court Rules. The Advisory Committee states that this incorporates "the settled teaching of the case law."\footnote{Citing Denholm & McKay Co. v. Commissioner, 132 F.2d 242 (1st Cir. 1942); Helvering v. Continental Oil Co., 63 App. D.C. 6, 68 F.2d 750 (1933); Burnet v. Lexington Ice & Coal Co., 62 F.2d 906 (4th Cir. 1933); Griffith v. Commissioner, 50 F.2d 782 (7th Cir. 1931).} The language, however, is not broad enough to cover motions not directly calling for the decision to be vacated or revised, such as motions to amend findings of fact. The Eighth Circuit has held,\footnote{Robert Louis Stevenson Apartments, Inc. v. Commissioner, 337 F.2d 681 (8th Cir. 1964).} for example, that a motion to revise Tax Court findings of fact tolls the running of the time for appeal on the ground that, if the motion were granted, it would necessarily require vacating the decision. It would seem advantageous to incorporate this ruling in the proposed rule. It would then be parallel with the rule, applicable to district court appeals,\footnote{Proposed rule 4(a).} which provides for the tolling of the appeal period by a timely motion to amend or make additional findings of fact, whether or not an alteration of judgment would be required if the motion were granted.

\section*{MISCELLANEOUS MATTERS}

The remaining provisions of the proposed rules with which litigants would be involved would regulate voluntary dismissal of appeals,\footnote{Proposed rule 42.} substitution of parties,\footnote{Proposed rule 43.} and a notification to the Attorney General of cases involving constitutional questions where the United States is not a party.\footnote{Proposed rule 44.} Further, there are provisions regulating the duties of clerks\footnote{Proposed rule 45.} and attorneys before the appellate courts.\footnote{Proposed rule 46.} The rules also permit the various courts of appeals to promulgate rules of practice not inconsistent with the uniform rules,\footnote{Proposed rule 47.} and, with one exception, to suspend the rules in the interest of expediting decision upon any matter before it, or for any good cause shown.\footnote{Proposed rule 2.}
there are formal provisions governing the scope of the rules and their title.

**CONCLUSION**

The Proposed Uniform Rules of Federal Appellate Procedure will work a tremendous advance over the present system which is comprised of eleven different sets of rules. The proposed rules should bring more certainty to those circuits where procedure is now to a great extent ad hoc. Hopefully, as an incidental benefit, the rules will also alleviate to some extent the problems of delay and expense that now plague the federal courts.

Once Congress has authorized uniform appellate rules the Judicial Conference, acting under present authority, can continue to study and improve the initial set of rules, as it has the civil, criminal, and admiralty rules. In this way appellate procedure will approach the ideal set forth by Congress: "simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."  

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202 Proposed rule 1.  
203 Proposed rule 48.  