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A LAWYER'S GUIDE TO THE
FEDERAL RULES OF APPELLATE
PROCEDURE — A PRACTICAL HANDBOOK

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INTRODUCTION

The Federal Rules of Appellate Procedure became effective July 1, 1968. They are largely the work of the Advisory Committee on Appellate Rules. This Advisory Committee, composed of prominent members of the federal bench and bar, was an offspring of the Standing Committee on Rules of the Judicial Conference of the United States, which commissioned it to formulate a set of rules "to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.” The Advisory Committee developed the set of forty-eight rules now known as the Federal Rules of Appellate Procedure. The Supreme Court, pursuant to its rule making power approved these Rules in December of 1967 and prescribed their adoption on July 1, 1968.

The following is an attempt to describe the Federal Rules of Appellate Procedure and to see how well they have met the challenge of unifying practice in the eleven courts of appeals. A lawyer today should be able to feel somewhat secure in his procedure whether he is proceeding before the First Circuit in Boston, the Fifth Circuit in New Orleans, or the Ninth Circuit in San Francisco. Rule 47 does allow each of the courts of appeals to formulate and adopt its own local rules but only insofar as they are "not inconsistent with these rules." Consequently, there is uniformity of practice in all major procedural steps. Any lawyer who practices in the federal court system will be well repaid for the time it takes him to study these rules.

The most logical way to approach an exposition of the Federal Rules of Appellate Procedure is an orderly rule-by-rule discussion. In this way anyone particularly interested

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in one rule or any number of rules may turn directly to the relevant section or sections.

There are seven "Titles" and forty-eight "Rules." In outline form, they are set out below:

Title I. Applicability of Rules
Rule 1. Scope of Rules
Rule 2. Suspension of Rules

Title II. Appeals from Judgments and Orders of District Courts
Rule 3. Appeal as of Right — How Taken
Rule 4. Appeal as of Right — When Taken
Rule 5. Appeals by Permission under 28 U.S.C. Sec. 1292(b)
Rule 6. Appeals by Allowance in Bankruptcy Proceedings
Rule 7. Bond for Costs on Appeal in Civil Cases
Rule 8. Stay of Injunction Pending Appeal
Rule 9. Release in Criminal Cases
Rule 10. The Record on Appeal
Rule 11. Transmission of the Record
Rule 12. Docketing the Appeal; Filing of the Record

Title III. Review of Decisions of the Tax Court of the United States
Rule 13. Review of Decisions of the Tax Court

Title IV. Review and Enforcement of Orders of Administrative Agencies, Boards, Commissions and Officers
Rule 15. Review of Enforcement of Agency Orders — How Obtained; Intervention
Rule 16. The Record on Review or Enforcement
Rule 17. Filing of the Record
Rule 18. Stay Pending Review
Rule 19. Settlement of Judgments Enforcing Orders
Rule 20. Applicability of Other Rules to Review or Enforcement of Agency Orders

Title V. Extraordinary Writs
Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

Title VI. Habeas Corpus; Proceedings in Forma Pauperis
Rule 22. Habeas Corpus Proceedings
Rule 23. Custody of Prisoners in Habeas Corpus Proceedings
Rule 24. Proceedings in Forma Pauperis
From this outline it can be seen that only the second half of the Rules has general application. Most of the first half deals with specialized types of cases. Rules 1 and 2 are only introductory; Rules 3 through 12 deal with appeals from judgments and orders of district courts; Rules 13 and 14 deal with appeals from decisions of the Tax Court of the United States; Rules 15 through 20 deal with proceedings for review or enforcement of orders of administrative agencies, boards, commissions and officers; Rule 21 deals with petitions for writs of mandamus and prohibition; and Rules 22 through 24 deal with habeas corpus proceedings and appeals in forma pauperis. From Rule 25 forward the provisions are of general application.

TITLE I. APPLICABILITY OF RULES

Rule 1. **Scope of Rules**

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

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

Rule 1 dictates that the rules shall govern procedure in all types of matters brought before the courts of appeals. The four major sources of appeals are: (1) appeals from district court decisions (including civil, criminal and bankruptcy cases); (2) appeals (formerly called petitions for review) from the Tax Court of the United States; (3) petitions for enforcement or review from administrative bodies; and (4) petitions for Writs of Mandamus, Prohibition or other relief.

Rule 2. Suspension of Rules

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

The primary purpose of Rule 2 is to clarify the point that the court of appeals has power to expedite the determination of cases of pressing concern to the public or to the litigants by setting and following a time schedule other than that provided by the rules. Rule 2 may be used as authority for deviation from the ordinary course whenever the just, speedy and economical determination of the cause will be served thereby. As the Court of Appeals for the Fifth Circuit said in Groendyke Transport, Incorporated v. Davis.

In these days of exploding and exploded dockets every proper effort must be made to allow courts to hear and decide more cases more expeditiously. . . . When a case is frivolous or its outcome so certain as a practical matter the appellate court is not compelled to sacrifice either the rights of other waiting suitors, its own irreplaceable judge-time, or administrative efficiency in judicial output by a traditional submission with all the trappings.⁴

TITLE II. APPEALS FROM JUDGMENTS AND ORDERS OF DISTRICT COURTS

Rule 3. Appeal as of Right — How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the

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⁴ 406 F.2d 1158, 1162 (5th Cir. 1969).
district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U. S. C. §1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6, respectively.

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

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

(d) Service of the Notice of Appeal. The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address; and in criminal cases, habeas corpus proceedings, or proceedings under 28 U. S. C. §2255, the clerk shall mail a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon him, either by personal service or by mail addressed to him. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

There is no change from the former practice in Rule 3. It merely restates, in modified form, provisions previously found in the civil and criminal rules. It indicates that nothing more is required to take an appeal than the filing of a simple notice

\[\text{FED. R. CIV. P. 5(e), 73 (a)-(b), } 74; \text{ FED. R. CRIM. P. 37.}\]
of appeal. This notice is filed with the clerk of the district court. Typically the court of appeals does not even know of such filing until the appeal is later docketed.

Even if the appellant fails to do anything other than file his notice of appeal, the validity of his appeal is still protected. He has completed the one major jurisdictional step. However, further inaction may lead to dismissal of his appeal. Rule 12(c) is a guide to an appellee as to the steps necessary to have such an appeal docketed and dismissed in the court of appeals.

Rule 3(b) allows joint or consolidated appeals, and it provides that two or more parties with like interests in the litigation may file a joint notice of appeal. In such instances their matter will be docketed as one appeal. This may result in a saving of time and money for appellants. If separate notices of appeal are filed, separate appeals will be docketed (unless the district court by order consolidates the causes for appeal prior to the time for transmission of the record to the court of appeals and its docketing there). Two or more docket fees would have to be paid, and a motion for consolidation would have to be made by the parties in the court of appeals. Such motions, particularly if not objected to by the appellee, are usually granted by courts of appeals, which ordinarily encourage consolidation of appeals whenever feasible. The result may be the same; but docket fees will be saved and time consuming motions avoided if counsel for parties with similar interests can decide to file a joint notice of appeal.

Rule 3(c) prescribes the contents of the notice of appeal. Form 1 in the Appendix of Forms accompanying the rules is illustrative of the proper form of notice of appeal. Its use is not mandatory. (None of the Forms in the Appendix of Forms are.) The notice of appeal may only be a few lines long. It must be properly captioned in the district court and need include as little as the names of the party or parties taking the appeal, the judgment or order appealed from, and the name of the circuit court to which the appeal is being taken. Counsel seem to feel that so important a document ought to be longer and more involved; and they frequently add nonessential bits of information to it. There is no harm in this, so long as essentials are not thereby overlooked. The chances are, at least in the case of a proper notice of appeal, timely filed, that no one will ever look at it again after service.

Rule 3(d) retains the practice of making the district court clerk responsible for service of a copy of the notice of appeal on counsel for each party other than the appellant. One new requirement is that the date of filing is to be stamped on these
copies before service is made. Since the time for filing the record and docketing the appeal begins to run from the filing date of the notice of appeal, the parties are forewarned to plan ahead for the schedule of this particular appeal. Service by the district court clerk is almost always by mail. The clerk must enter both the filing and the mailing on the docket of the case with the appropriate dates.

One other relatively minor change is evident in Rule 3(d). The clerk of the district court had previously been obliged to send a copy of a notice of appeal in a criminal case to the clerk of the court of appeals along with a copy of the docket entries in that case. The idea behind this was that if the defendant wished to make a motion in the court of appeals (usually for bail or similar relief) prior to the transmittal of the complete record, the court of appeals would have at least some information upon which to base a decision. This procedure is now extended to include habeas corpus proceedings and section 2255 motions.\(^6\) It would seem the Advisory Committee anticipated more frequent requests for predocketing relief from prisoners, both state and federal.

**Rule 4. Appeal as of Right — When Taken**

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

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

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\(^6\) 28 U.S.C. §2255 (1964). This proceeding is analogous to the habeas corpus proceeding of the state court prisoner. It generally takes the form of a petition to vacate or reduce sentence of a federal prisoner for alleged violation of the right to a fair trial.
made upon a timely motion under such rules: (1) granting or
denying a motion for judgment under Rule 50(b); (2) granting
or denying a motion under Rule 52(b) to amend or make addi-
tional findings of fact, whether or not an alteration of the judg-
ment would be required if the motion is granted; (3) granting
or denying a motion under Rule 59 to alter or amend the judg-
ment; (4) denying a motion for a new trial under Rule 59. A
judgment or order is entered within the meaning of this sub-
division when it is entered in the civil docket.

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

(b) Appeals in Criminal Cases. In a criminal case the
notice of appeal by a defendant shall be filed in the district
court within 10 days after the entry of the judgment or order
appealed from. A notice of appeal filed after the announcement
of a decision, sentence or order but before entry of the judg-
ment or order shall be treated as filed after such entry and on
the day thereof. If a timely motion in arrest of judgment or
for a new trial on any ground other than newly discovered evi-
dence has been made, an appeal from a judgment of conviction
may be taken within 10 days after the entry of an order deny-
ing the motion. A motion for a new trial based on the ground
of newly discovered evidence will similarly extend the time for
appeal from a judgment of conviction if the motion is made
before or within 10 days after entry of the judgment. When
an appeal by the government is authorized by statute, the no-
tice of appeal shall be filed in the district court within 30 days
after the entry of the judgment or order appealed from. A
judgment or order is entered within the meaning of this sub-
division when it is entered in the criminal docket. Upon a
showing of excusable neglect the district court may, before or
after the time has expired, with or without motion and notice,
extend the time for filing a notice of appeal for a period not to
exceed 30 days from the expiration of the time otherwise pre-
scribed by this subdivision.

Rule 4 sets forth the time limits for filing notices of appeal
in both civil and criminal cases. Since timely filing of the notice
of appeal is mandatory and jurisdictional, the importance of com-
pliance with the rule must be emphasized. If a party fails in
this respect, compliance with all the other appellate rules will be of no avail; he will not have an appeal on which to use them. Without leave of the district court a late notice of appeal is not authorized. Jurisdiction cannot be waived, consented to or conferred upon the court by the parties. Where a clerk files a notice of appeal late, the appeal may be dismissed. Conversely, a timely and properly filed notice of appeal cannot be stricken by the court. Its filing operates to transfer jurisdiction to the court of appeals, and thereafter the district court has no jurisdiction to act except in aid of the appeal as authorized by the rules.

Rule 4(a) provides for the familiar 30 day time limit in civil cases. This means that the notice of appeal must be filed within 30 days of the date of the entry of the judgment or order appealed from. This time limit is doubled to 60 days if the United States or an officer or agency thereof is a party. This 60 day limit applies not only to the government, but to any other party as long as the government is directly involved in the suit. Note that this part of Rule 4 expressly extends its provisions to all civil matters including bankruptcy and admiralty or maritime claims. Under section 25 of the Bankruptcy Act there was some confusion as to the time within which an appeal must be taken. Now the time is uniform. This is an improvement over the prior practice insofar as there appears to be no good reason why the time for appeal in bankruptcy or admiralty matters should differ from civil cases generally.

It is significant that after the filing of a notice of appeal any other party may file such a notice within 14 days. Two or more appeals often result from the same judgment or order. They may or may not be considered cross appeals. Previously all notices of appeal had to be on file within 30 days. This new provision protects the party who does not want to appeal unless his opponent does. In *Kurdziel v. Pittsburgh Tube Co.*, the court said that the purpose of the rule permitting a party to file a notice of appeal within 14 days of the date on which the other party files is to give subsidiary parties an opportunity to know an appeal is being taken in the principal case before they are required to make their decision as to whether to appeal. Previously such a party had either to file a notice of appeal protectively or to play a waiting game to see what his opponent did. If such a would-be cross appellant were late with his notice of appeal, he could not attack the judgment or order of the district court on appeal. He would have to assume the role of its defender. In the absence of a

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7 Lindsey v. Perini, 409 F.2d 1341 (6th Cir. 1969).
8 Hogg v. United States, 411 F.2d 578 (6th Cir. 1969).
10 416 F.2d 882 (6th Cir. 1969).
cross appeal, an appellee is without standing to contest on appeal a judgment entered in the district court. 11

Rule 4 (a) indicates that a notice of appeal may also be filed within 30 days of the district court's order disposing of any of the following motions: a motion under Rule 50 (b) for judgment notwithstanding the verdict; a motion under Rule 52 (b) to amend or make additional findings of fact; a motion under Rule 59 (e) to alter or amend the judgment; or a motion under Rule 59 for a new trial. Each of these motions must be made within 10 days after entry of the judgment. The length of time it takes the trial court to act upon them varies from case to case and from district to district. However, the 30 day period within which to appeal does not begin to run until after the district court has ruled on the aforementioned motions.

Rule 4 (b) retains the prior time limitation of 10 days within which a defendant in a criminal proceeding may file his notice of appeal after the entry of the order of judgment appealed from. The government, if it is authorized to appeal at all (as in the case of a quashed indictment), has 30 days after the judgment or order within which to file a notice of appeal.

Frequently a defendant will direct his counsel to file a notice of appeal immediately after verdict or sentencing, but before formal entry of a judgment. Often a defendant, although represented by counsel, will file such a notice of appeal on his own. In each instance, the defendant does not want to take any chances. Rule 4 (b) specifically provides that such a notice of appeal shall be treated as filed after the entry of the judgment and on the day thereof.

A provision similar to that in Rule 4 (a) provides that in criminal cases as well, the running of the time for filing a notice of appeal will be terminated by the timely filing of a motion under Rule 34 of the Federal Rules of Criminal Procedure for arrest of judgment or under Rule 33 for a new trial on any ground other than newly discovered evidence. Each of these motions must be filed in the District Court within 7 days after verdict or finding of guilty, or within such further time as the court may fix during the 7 day period. The defendant may thus file his notice of appeal within 10 days after denial of the motion. He may also file a timely notice of appeal after a denial of a motion for a new trial on grounds of newly discovered evidence, but only if such motion is made within 10 days after entry of the judgment of conviction. Rule 33 of the Federal Rules of Criminal Procedure gives a defendant 2 years within which to file a motion for a new trial on the grounds of newly discovered evidence, but a defendant may

not wait more than 10 days to file it if he wants also to appeal his conviction in case his motion is denied.\textsuperscript{12}

Finally, both rules 4(a) and 4(b) have provisions regarding the allowance by the district court of 30 additional days within which to file notice of appeal. In each case the wording is "Upon a showing of excusable neglect . . . ." This provision is broader than its predecessor which also said that 30 extra days were allowable but only in the case of "excusable neglect, based on the failure of a party to learn of the entry of judgment." This new rule still calls for a showing — such extensions are not routinely granted — but also covers situations such as illness of a party or counsel and poor mail service. Note that such applications can be made after the original time for filing has expired. Yet this rule is to be strictly construed and administered.\textsuperscript{13}

\section*{Rule 5. Appeals by Permission Under 28 U. S. C. \$1292(b)}

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

(b) Content of Petition; Answer. The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. The petition shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact,

\textsuperscript{12} In United States v. Williams, 415 F.2d 232 (4th Cir. 1969), a motion for a new trial was made on the basis of newly discovered evidence, but not within ten days of the judgment of conviction. The court of appeals ruled that the notice of appeal, filed within ten days after the denial of the motion for a new trial, was, in effect, not timely; and, therefore, the court did not have jurisdiction to treat the issues sought to be raised on the appeal.

\textsuperscript{13} As a member of the Advisory Committee reported:

"The Committee intended that the standard of excusable neglect remain a strict one, however, we did not want lawyers to be taking advantage of this extra 30 days as a matter of course; it is not meant to cover the usual excuse that the lawyer is too busy, which can be used, perhaps truthfully, in almost every case. It is hoped that the bar will invoke and the courts will give effect to this less stringent standard in the spirit in which it was written — that is, to take care of emergency situations only."

conclusions of law and opinion relating thereto. Within 7 days after service of the petition an adverse party may file an answer in opposition. The application and answer shall be submitted without oral argument unless otherwise ordered.

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

(d) Grant of Permission; Cost Bond; Filing of Record. If permission to appeal is granted the appellant shall file a bond for costs as required by Rule 7, within 10 days after entry of the order granting permission to appeal, and the record shall be transmitted and filed and the appeal docketed in accordance with Rules 11 and 12. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of the entry of the order granting permission to appeal. A notice of appeal need not be filed.

Rule 5 prescribes the procedure to be followed in seeking to appeal from an interlocutory order of the district court by permission of the court of appeals under the authority of section 1292(b) of the Judiciary Act. In accordance with that section a party may seek leave of the court of appeals to appeal from an order otherwise not appealable if the district judge will state in writing in such order that it “[i]nvolves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” Within 10 days after entry of such an order the aggrieved party may file a petition in the court of appeals along with a proof of service on all other parties to the action in the district court. If the petition is in proper form the clerk of the court of appeals, without the necessity of payment of a docket fee, will place the matter on the “Miscellaneous Docket.” It will not be presented to the court or a judge thereof for any action at this time. The clerk will hold the petition until an answer arrives from opposing counsel or until the expiration of 7 days, whichever occurs first. At that time the petition, with or without answer, will go to the court for determination. Generally, there is no oral argument, and the court of appeals either grants or denies leave to appeal from the interlocutory order in question.

Pursuant to Rule 5(b) the petition must include: a statement of facts necessary to an understanding of the issue involved; a statement of the question of law to be determined; and a statement of the reasons why an immediate appeal is desirable. It is important that such petition have annexed thereto (usually as an

exhibit) the interlocutory order from which appeal is sought together with any findings of fact, conclusions of law or opinion relating thereto.

Rule 5(c) provides that all the papers, both petition and answer, may be typewritten, and that an original and three copies must be filed. The court may require additional copies but seldom does.

If the petition is denied, that is temporarily the end of the matter in the court of appeals. The matter will go back to the district court and will continue from the point at which it left off. But if the petition for leave to appeal is granted, then a new appeal is on its way. A certified copy of the order allowing appeal is sent to the clerk of the district court and serves a purpose somewhat similar to the notice of appeal in cases where there is a right to appeal. The new appellant must file a bond for costs as required by Rule 7 within 10 days after entry of the order of allowance and the record on appeal must be transmitted to the court of appeals within 40 days from the date of such order, unless an extension of time is granted pursuant to Rule 11(d). At that time the docket fee is paid and the appeal duly docketed. It is of some significance that no notice of appeal is necessary. Previously a majority of the circuits required such a filing following the granting of permission to appeal. The new practice eliminates a needless procedural step.

Rule 5 does not make any great changes in the established practice; but it serves the important function of clearing up a matter of serious intercircuit conflict. The question had often arisen as to whether, if a district court renders an order that does not contain the statement that a “controlling question of law” was involved, the order might be subsequently amended by adding the statement with the result that leave to appeal may be sought within 10 days after the amendment of the order. The Third Circuit answered the question negatively in Milbert v. Bison Laboratories. In spite of this precedent the Second, Fifth and Tenth Circuits ruled that the 10 days commenced to run from the date of the order as amended. The latter view is the

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15 Note that the Federal Rules of Appellate Procedure call for the filing of an original and three copies of each type of petition and motion it is possible to file in a court of appeals. The only exceptions are the instance in which a party desires a motion or petition to be given in banc consideration by the court (Rule 35), and the instance in which the clerk will be required to serve numerous respondents with a petition for review or enforcement of an order of an administrative agency (Rule 15(c)). At least one copy of a proof of service of the motion or petition on counsel for every other party is also required.

16 260 F.2d 491 (3d Cir. 1958).
19 Houston Fearless Corp. v. Teter, 313 F.2d 91 (10th Cir. 1962).
better reasoned as it greatly facilitates the filing of the petition for leave to appeal. Rule 5(a) makes it clear that this is the new rule: “An order may be amended to include the prescribed statement at any time and permission to appeal may be sought within ten days after entry of the order as amended.”

Rule 6. Appeals by Allowance in Bankruptcy Proceedings

(a) Petition for Allowance. Allowance of an appeal under section 24 of the Bankruptcy Act (11 U.S.C. §47) from orders, decrees, or judgments of a district court involving less than $500, or from an order making or refusing to make allowances of compensation or reimbursement under sections 250 or 498 thereof (11 U.S.C. §650, §898) shall be sought by filing a petition for allowance with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed.

(b) Content of Petition; Answer. The petition shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in the opinion of the petitioner the appeal should be allowed; and a copy of the order, decree or judgment complained of and of any opinion or memorandum relating thereto. Within 7 days after service of the petition an adverse party may file an answer in opposition. The petition and answer shall be submitted without oral argument unless otherwise ordered.

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

(d) Allowance of the Appeal; Cost Bond; Filing of Record. — If the appeal is allowed the appellant shall file a bond for costs as required by Rule 7, within 10 days of the entry of the order granting permission to appeal, and the record shall be transmitted and filed and the appeal docketed in accordance with Rules 11 and 12. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of the entry of the order allowing the appeal. A notice of appeal need not be filed.

The Bankruptcy Act provides that an appeal from a judgment involving less than $500 or from an order making or refusing to make allowances of compensation or reimbursement under sections 250 or 498 of the Act may be taken only with the allowance of the court of appeals. The difference between this type

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of petition and the petition for leave to appeal from an interlocutory order is that in a bankruptcy matter the time allowed for filing the petition in the court of appeals is longer. It is set by Rule 6(a) as "the time provided by Rule 4(a) for filing a notice of appeal." That means the would-be appellant has 30 days from the date of the order, decree or judgment complained of to file his petition in the court of appeals. Except for that one point the procedure is substantially identical with that for obtaining leave to appeal under section 1292(b). The same number of copies must be filed which must include a statement of the facts, the question to be resolved, and the reasons for allowance. Copies of the order complained of, along with any opinion or memorandum relating thereto must be included. Opposing counsel has 7 days to answer. There is ordinarily no oral argument. If the petition is granted, a certified copy of the order so granting is sent to the district court. The appellant must then file his cost bond therein. The district court clerk has 40 days to prepare the record and send it on to the court of appeals. There, upon payment of the docket fee, the appeal will be docketed. Once again, no notice of appeal need be filed.

Note that appeals as to two or more claims each for less than $500 but totaling more than $500 in the aggregate may not be taken as a matter of right. In re Cummings held that where amounts claimed by appellants were $211.77 and $338.11 allowance of appeal by the court of appeals was necessary even though the district court disposed of the actions by one opinion and one order, and only one notice of appeal was filed. The petition for allowance procedure had to be followed.

Rule 7. Bond for Costs on Appeal in Civil Cases

Unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal, in civil cases a bond for costs on appeal or equivalent security shall be filed by the appellant in the district court with the notice of appeal; but security shall not be required of an appellant who is not subject to costs. The bond or equivalent security shall be in the sum or value of $250 unless the district court fixes a different amount. A bond for costs on appeal shall have sufficient surety, and it or any equivalent security shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed, or of such costs as the court of appeals may direct if the judg-

22 In the author's seven years with the Court of Appeals for the Seventh Circuit no such petition has ever been filed.
23 413 F.2d 1281 (10th Cir. 1969).
ment is modified. If a bond or equivalent security in the sum or value of $250 is given, no approval thereof is necessary. After a bond for costs on appeal is filed, an appellee may raise for determination by the clerk of the district court objections to the form of the bond or to the sufficiency of the surety. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

Rule 7 adopts totally the provisions of Rule 73(c) of the Federal Rules of Civil Procedure. At the time of filing the notice of appeal the appellant, unless he is exempted by law or is not subject to costs, or has already filed a supersedeas bond, must post a bond for costs on appeal or equivalent security in the sum of $250 unless the district court fixes a different amount. No approval thereof is necessary at the time of filing. But the appellee, if he has reason to fear that he might not be able to recover his appellate costs on the basis of this security, may raise objections to the form of the bond or the sufficiency of the surety. Determination as to these objections is made by the clerk of the district court. Occasionally, additional security or a different form of bond is required. This does not detract from the efficacy of the timely filing of the notice of appeal.

Rule 8. Stay or Injunction Pending Appeal

(a) Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals. Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.
(b) Stay May Be Conditioned Upon Giving of Bond; Proceedings Against Sureties. Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion in the district court without the necessity of an independent action. The motion and such notice of the motion as the district court prescribes may be served on the clerk of the district court, who shall forthwith mail copies to the sureties if their addresses are known.

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

While the power of a court of appeals to stay proceedings in the district court during the pendency of an appeal is not explicitly conferred by statute, it exists by virtue of the All Writs Statute. In keeping therewith, Rule 8(a) points out that the court of appeals has authority to rule on such a motion; but the application for stay of the judgment or order of the district court, or for approval of a supersedeas bond, or for an order granting, suspending, modifying or restraining an injunction pending appeal, "must ordinarily be made in the first instance in the district court." This has long been the case law rule, but it marks a minor change in the permission practice as set out in Rule 73(e) of the Federal Rules of Civil Procedure. By that rule, once the appeal is docketed, application for leave to file a bond may be made only in the appellate court. However, no reason appears why, in the ordinary case, all questions related either to supersedeas or the bond for costs on appeal should not be presented in the first instance to the district court. The motion for such relief in the court of appeals must be in the usual form pursuant to Rules 27(d) and 32(b). Thus an original and three copies must be filed along with proof of service on all other parties. The motion must state the facts relied upon and also show that the district court either has denied the motion, or that application to the district court for the relief sought is not practicable. It must also tell the reasons given by the district court for its action. This last requirement impliedly imposes on the district court the obligation to state reasons for refusing

stays and injunctions. If the motion is labelled "emergency" the clerk will take it to the court immediately. The court may grant the motion outright, deny it, or call for an answer within a prescribed period of time. This last alternative is the one most commonly followed unless time is so much of the essence as to render the question moot if postponed. If it is not labelled "emergency," typically a week can be allotted to the other parties to answer, as set forth in Rule 27(a).

The Rule says that normally such a motion will be considered by a panel or division of the court, but it expressly authorizes a single judge of a court of appeals to grant a stay or injunction pending appeal in "exceptional cases." Rule 62(g) of the Federal Rules of Civil Procedure had previously adverted to the grant of a stay by a single judge of the court of appeals. And the power of a single judge of the court of appeals to grant a stay pending appeal was recognized as early as 1901 in In re McKenzie. By virtue of Rule 27(c) a stay or injunction granted by a single judge may be reviewed by the court.

Rule 8(b) is based upon Rule 65.1 of the Federal Rules of Civil Procedure and merely states that relief available under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. Note that although the court of appeals might set the bond, it is to be filed in the district court. Since courts of appeal do not have the registry account facilities available in district courts, the growing practice is to have the district courts handle all bond and security matters.

Rule 8(c) states that stays in criminal cases shall be had in accordance with the provisions of Rule 38(a) of the Federal Rules of Criminal Procedure. Stay of a death sentence is automatic with the taking of an appeal. So also is an order placing a defendant on probation. A sentence involving imprisonment shall be stayed if an appeal is taken and defendant is admitted to bail. If an appeal is taken from a sentence to pay a fine, the sentence may be stayed by the district court or the court of appeals on such terms as the court deems proper.

Rule 9. Release in Criminal Cases

(a) Appeals from Orders Respecting Release Entered Prior to a Judgment of Conviction. An appeal authorized by law from an order refusing or imposing conditions of release shall be determined promptly. Upon entry of an order refusing or imposing conditions of release, the district court shall state in writing the reasons for the action taken. The appeal shall be heard without the necessity of briefs after reasonable no-
tice to the appellee upon such papers, affidavits, and portions of the record as the parties shall present. The court of appeals or a judge thereof may order the release of the appellant pending the appeal.

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

Two distinct and separate situations are covered by Rule 9. In both instances the motion for bail must first be made in the district court. The first half of the rule governs appeals from district court orders denying bail. The second half deals with motions for bail made in pending appeals from criminal convictions. In the latter instance no separate notice of appeal has to be filed in regard to bail questions.

Rule 9(a) provides that if a defendant, prior to a judgment of conviction, is refused release or has conditions imposed upon his release, he may appeal by the normal method of filing a timely notice of appeal from the order by which he is aggrieved. In such instance the regular record on appeal need not go to the court of appeals. The very nature of the appeal is one of urgency, and time is lacking for preparation and certification of a full record. The rule says that the appeal shall be heard upon such portions of the record as the parties shall present, and without the necessity of filing briefs. In practice a minimal record, referred to as a "short record," is sent to the court of appeals. This should include the order complained of, the reasons (in writing) for the action of the district judge and the notice of appeal. A certified copy of the docket entries usually accompanies these items. Upon payment of the docket fee, unless the defendant has been granted leave to proceed in forma pauperis, the appeal will be docketed. Usually simultaneously therewith a motion in the usual form and number of copies, with proof of service upon opposing counsel (generally the United States Attorney of the district in which the trial is being held), is filed. Such motion,

26 See text at note 57 infra.
together with the "short record," goes immediately to the court for its action. Such action may be an outright denial or granting of the motion. In many instances the court will order opposing counsel to file an answer within a designated period. Before this last procedure is followed, the clerk is usually asked to informally contact government counsel to see if they wish to oppose the motion. In most circuits there is no oral argument on such a motion. It is decided, it is said, "on the papers". The rule specifically states that a single judge of the court of appeals may act on such a motion. In most such instances, an appeal is taken, docketed, and decided in a matter of a few days at most.

Rule 9(b) regulates the more common situation of review of an order denying release pending appeal. The district judge shall state in writing the reasons for the action he has taken in refusing release pending appeal or imposing conditions. An appeal from the actual order regarding release is not necessary. A defendant may, and sometimes will, wait for his appeal to be docketed in the normal course before filing his motion for bail or modification thereof. Because personal freedom is involved, however, the appeal is usually docketed early by the filing of a "short record" similar to that discussed as to Rule 9(a) above. In this instance, regardless of the outcome of the bail motion, the remainder of the record as called for in Rule 10 is to be transmitted to the court of appeals in the usual course. The motion for release is treated in a similar fashion to the motion in the appeal previously discussed: the motion is filed; it goes to the court; an answer is filed, if the court so directs; there is seldom oral argument; and a single judge may grant, deny or modify the relief sought in the motion. The major difference is that the appeal on the merits of the criminal conviction continues irrespective of the outcome of the bail motion.

The concept that the district court has an obligation to set forth in writing its reasons for its action on the release issue is relatively new. In effect it affirms the principle that the district court is the finder of fact. As the District of Columbia Circuit said: "Allegations concerning defendant's supposed dangerousness to the community were inappropriate for the court of appeals to pass on and, if defendant applied for bail pending appeal, the allegations would be for the district judge."27

It is clear that it is possible for a defendant in a criminal proceeding to have two appeals in the court of appeals within a relatively short period of time. If he is denied release by the district court prior to his conviction, he may take an appeal pursuant to Rule 9(a). Whether or not he is successful in that

appeal, he must still stand trial in the district court. If he is convicted, he may appeal from that conviction; and, if he is once again denied release or has conditions placed thereon by the district court, he may make a motion for appropriate relief in the court of appeals to which he has taken his substantive appeal.

Rule 10. The Record on Appeal

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

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript Is Ordered. Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the district court for an order requiring the appellant to do so. At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

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

(d) Agreed Statement as the Record on Appeal. In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the court of appeals as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 11. Copies of the agreed statement may be filed as the appendix required by Rule 30.

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

The terminology "certified copy of the record on appeal" is frequently used by lawyer and non-lawyer alike. There is no such document. Rule 10(a) explicitly states that the original papers and exhibits, the transcript of proceedings, if any, and a certified copy of the docket entries shall constitute the record on appeal. The language used, in light of the fact that not everything filed in the district court must go to the court of appeals, implies that the entire record, whether transmitted to the court of appeals or not, is the "record on appeal." The recent case of *Chapman v. Rudd Paint & Varnish Co.*, held that the failure of an appellant to include as part of the record brought before the court of appeals certain depositions considered by the district court in acting on a motion for summary judgment was not automatically fatal to the appeal since all the original papers and

\[28 \text{ See text at note } 34 \text{ infra.}\]
\[29 \text{ 409 F.2d } 635 \text{ (9th Cir. 1969).}\]
exhibits filed in the district court proceeding were actually part of the record on appeal whether or not they were physically brought before the court of appeals. The court in that case allowed the filing, after oral argument, of a supplemental transcript containing the missing depositions. Counsel's oversight was thus remedied.

The remainder of Rule 10 incorporates the prior practice under Rules 75 and 76 of the Federal Rules of Civil Procedure without any real change in substance. Rule 10(b) sets out the procedure to be followed in ordering from the court reporter the transcript necessary to a fair presentation of the issues on appeal. Within 10 days of the filing of the notice of appeal the appellant shall order what he deems necessary, make arrangements for payment of the cost thereof and, unless he orders the entire transcript, file with the clerk and serve upon the appellee a description of the parts he intends to take up on appeal. The appellee then has 10 days to do likewise as to any additional parts of the transcript he deems essential to a full presentation of the issues on appeal. When the transcript is completed it is filed with the district court clerk who incorporates it into the record on appeal.

Rule 10(c) covers the relatively rare occurrence in which a report of the evidence of proceedings at hearing or trial is unavailable. Since almost every motion hearing is transcribed by a court reporter, this rule applies to the situation in which stenographic notes are lost or undecipherable. The appellant may prepare a statement of the evidence from his notes and recollection. The appellee may then, within 10 days, compile objections and/or amendments thereto. The statement, along with objections and amendments is then submitted to the district judge for settlement and approval. This version of the evidence is then filed in the office of the district court clerk and may be included in the record on appeal.³⁰

Rule 10(d) is infrequently used in most circuits. By its provisions the parties may agree on a statement showing how the appeal issues arose and how they were decided by the district court. If approved by the district court, it may be transmitted to the court of appeals in lieu of the original papers. It is implied

³⁰This situation has, to the author's recollection, presented itself only twice to the Seventh Circuit. In the first case, a court reporter died before he began to prepare the transcript and no one else could interpret his shorthand notes. Counsel agreed on what the evidence was, and their statements were approved by the district judge and then filed as part of the record on appeal. In the second case, the court reporter's stenotype machine was somehow defective and he failed to get any transcript at all of a multiple-day trial. This appears to be negligence on his part, and it seems the court does not want to make any party suffer for such neglect; the matter is still being worked out by counsel.
that, should any problem arise on appeal, the original papers, transcripts, and exhibits could then be sent up to the court of appeals.

Rule 10(e) reaffirms the power of the district court to correct a record to make it "conform to the truth," either before or after the matter is docketed in the court of appeals. In cases of omission, a supplemental record may be transmitted to the court of appeals.

Rule 11. Transmission of the Record

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

(b) Duty of Clerk to Transmit the Record. When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of the documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

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

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

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

(e) Retention of the Record in the District Court by Order of Court. The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

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

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

(g) Record for Preliminary Hearing in the Court of Appeals. If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the court of appeals such parts of the original record as any party shall designate.

The record on appeal is to be transmitted to the court of appeals within 40 days after the filing of the notice of appeal. Rule 11(a) specifies that, if more than one appeal is taken, as in the case of a cross appeal, the prescribed 40 days begins to run from the date of filing of the final, not the first, notice of appeal.

Rule 11(b) sets forth some of the duties of the district court clerk. He must prepare the record in accordance with the wishes of the parties. Unless the parties stipulate that less than the entire record should be transmitted,1 everything must be part of the record for transmittal. However, documents of unusual bulk, such as large physical exhibits, need not be transmitted if the parties agree. The reason for this provision is the logistic and storage problem involved. Often counsel will agree that each retain such large items in his own office or that of his client. Then, pursuant to Rule 34(g), these items may be brought to the court of appeals for the oral argument if their presence there is required.

One significant change in the prior practice is worked by Rule 11(b). Transmission of the record “is effected when the clerk of the district court mails or otherwise forwards the record to the clerk of the court of appeals.” Previously the record had to arrive within the 40 day period or any extension thereof pursuant to Rule 11(d). Now the clerk of the court of appeals need only look for a postmark or the endorsement of the district court clerk as to the date of shipment. This affords appellants in districts distant from the court of appeals the same time period for

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1 See text at note 34 infra.
actual preparation of the record as are afforded appellants in districts in the same city as the court of appeals.

Rule 11(c) adds a new feature, at least to the practice in most circuits. It provides that the record, if fully prepared within the time allotted for transmission, may be retained in the district court until after the filing of the appellee's brief. Instead of sending up the record in the first instance, the clerk of the district court sends a certified copy of the docket entries along with the certificate of counsel for appellant (or the appellant pro se if he is without counsel) reciting that the entire record necessary for appeal is complete and ready for timely transmission. The appeal may then be docketed upon payment of the docket fee. The reason that the record is not sent at that time is that, by its retention in the district court, it may be more readily available to counsel for use in preparation of their briefs and the appendix. This alleviates the necessity, under the previous rules, of shipping a record hundreds of miles to a distant court of appeals and then making counsel travel after it to cull out the information necessary. Some circuits would (and still do) ship the record back to counsel upon his signing a receipt for it, but this rule still saves time and solves the back-and-forth transmittal problem. Note that the record is still shipped to the court of appeals eventually, at least by the time appellee's brief is filed, or at any earlier date agreed on by the parties or ordered by either court. Occasionally the court of appeals may need the record sooner in order to dispose of some motion. If it does, it will direct the district court clerk to ship the record at a date earlier than that provided for by this rule.

Rule 11(d) regulates the extent to which the time for transmittal of the record may be extended by the district court. The appellant, for cause shown, could always get up to 90 days from the date of filing the notice of appeal in civil cases. Now the same holds true in criminal cases. This works a change in the previous practice under Rule 39(c) of the Federal Rules of Criminal Procedure which permitted the district court to extend the time for filing and docketing without restriction. No good reason appeared for the difference between civil and criminal practice in this regard. This 90 day limitation means that a maximum of 50 additional days over and above the 40 days ordinarily allowed is available to the appellant. The request for extension in the district court must be made within the original 40 days or within the time allotted by a previous extension. If it is not, it

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52 In one series of eleven appeals by separate defendants from a large joint trial, the district judge extended the time to docket the appeal for nearly two years. This could not be done today.
will not be entertained by the district court. In such a case, or in a case where an extension beyond 90 days is necessary, the appellant must apply to the court of appeals. In such a situation, the appellant must cause a "short record" to be filed in the court of appeals and his appeal docketed. Then he may make a motion, in the usual form, for an extension of time within which to file the remainder of the record. If such motion is granted, a certified copy is sent by the clerk to the district court so that the clerk there will continue preparation of such record. Ordinarily a time limit is set by such an order. Note that the court of appeals has unlimited power to extend the time for transmission, and may permit the record to be filed after the expiration of the time as prescribed, or as previously extended.

Rule 11(e) provides that if a court of appeals would formulate a rule to this effect, an appeal might be heard on a certified list of docket entries in lieu of the regular record. In this instance it is the intention that the record, unlike that in Rule 11(c), never be transmitted to the court of appeals. Nevertheless, the court of appeals can always request that the record be transmitted to it. And either party might designate portions necessary for consideration by the court of appeals. Apparently, no circuit has such a rule at present. In the absence of such a rule, however, a court may allow this practice to be followed, by order, in any specific appeal.

Rule 11(f) works no change in the prior practice. In most cases, not everything on file in the district court is essential to the appeal. Thus, to simplify the task of all involved, the parties may agree by written stipulation that certain parts of the record shall be retained in the district court. It is stated specifically that they are, nonetheless, a part of the record on appeal for all purposes, and that either party or the court of appeals may request that they be transmitted at a later date.

Rule 11(g) specifically requires that at least the "short record" be available in the court of appeals before the appeal can be docketed and a preliminary hearing had on any motion for intermediate order. When the "short record" has been filed, the docket fee paid, and an appeal number assigned, a motion for the type of relief mentioned in this subparagraph may be made. This "short record" shall consist of "such parts of the original record as any party shall designate." In practice, the minimum is a certified copy of the docket entries, the order appealed from, and the notice of appeal. Other documents, such as transcripts, motions, responses to motions, and affidavits, often accompany

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83 See text at note 67 infra.
the minimum essentials in this record for a preliminary hearing.

Rule 12. Docketing the Appeal; Filing of the Record

(a) Docketing the Appeal. Within the time allowed or fixed for transmission of the record, the appellant shall pay to the clerk of the court of appeals the docket fee fixed by the Judicial Conference of the United States pursuant to 28 U. S. C. §1913, and the clerk shall thereupon enter the appeal upon the docket. If an appellant is authorized to prosecute the appeal without prepayment of fees, the clerk shall enter the appeal upon the docket at the request of a party or at the time of filing the record. The court of appeals may upon motion for cause shown enlarge the time for docketing the appeal or permit the appeal to be docketed out of time. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, his name, identified as appellant, shall be added to the title.

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

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

Pursuant to the Judiciary Act, the Judicial Conference of the United States shall from time to time set uniform fees and costs for all circuits. The current docket fee is twenty-five dol-

This must be paid by the appellant, unless he is allowed to proceed in forma pauperis, within the time allowed. That is, it must be paid within the 40 day period unless an extension of time has been granted by the district court or the court of appeals.

Rule 12(a) states that the appeal shall be docketed under the title it had in the district court, with the addition of the appellant’s name if it does not appear in the district court title. This happens occasionally, most frequently in bankruptcy appeals where the names of creditors and trustees do not generally appear in the lower court title.

Rule 12(b) directs the clerk of the court of appeals to file the record if it has been timely transmitted and the docket fee paid. Appeals are numbered consecutively in all circuits, and each appeal is given a number at the time of its docketing. That number is placed on all parts of the record; and the file stamp, indicating the date of the filing, is affixed to each item also. A receipt is given to the party who paid the docket fee, and an appearance form is sent to all counsel of record in the district court or to the parties themselves if they are not represented by counsel. These forms bear the docket number and the date of docketing. The appearance form is to be signed and returned to the clerk of the court of appeals. A party neglecting to do this will not be “of record” in the appeal. Copies of all appellate papers are later sent to every interested party who has filed an appearance.

Rule 12(c) initiates a practice that had been explicit in the rules of only four circuits previously. If an appellant has filed a notice of appeal, but has failed to cause timely transmission of the record, the appellee may make a motion in the court of appeals to dismiss the appeal. As in the case of all motions it must be served upon all parties of record. Such motion has to be accompanied by a certificate of the clerk of the district court setting forth the substance of the judgment or order appealed from, its date of entry, the date on which the notice of appeal was filed, and the expiration date of any order extending time to transmit the record. The appeal will then be docketed without payment of a docket fee in order to allow the court to act on appellee’s motion. No action will be taken for two weeks, however, because the rule provides that appellant shall have that long within which to answer the motion to dismiss.

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36 See text at note 57 infra.
37 But this admonition cannot always be followed. For example, in the hypothetical case entitled United States v. Smith, Jones & Brown, if only Jones appeals, the title in the court of appeals will be United States, plaintiff-appellee v. Jones, defendant-appellant.
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lant’s answer or response will be filed only if accompanied by the docket fee, unless he is exempt therefrom for some reason. The court will then rule on the motion and either dismiss the appeal or grant the appellant a certain amount of time within which to file the record and proceed on appeal.38

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

Rule 13. Review of Decisions of the Tax Court39
(a) How Obtained; Time for Filing Notice of Appeal. Review of a decision of the Tax Court of the United States shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.

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

(b) Notice of Appeal — How Filed. The notice of appeal may be filed by deposit in the office of the clerk of the Tax Court in the District of Columbia or by mail addressed to the clerk. If a notice is delivered to the clerk by mail and is received after expiration of the last day allowed for filing, the postmark date shall be deemed to be the date of delivery, subject to the provisions of §7502 of the Internal Revenue Code of 1954, as amended, and the regulations promulgated pursuant thereto.

(c) Content of the Notice of Appeal; Service of the No-

38 In a recent decision encompassing a number of the provisions of Rule 12, the Court of Appeals for the Fifth Circuit said it would overlook irregularities in perfecting appeals in a meritorious cause. Olympic Ins. Co. v. H.D. Harrison, Inc., 413 F.2d 973 (5th Cir. 1969). In Olympic the record was transmitted to the court of appeals in a timely fashion by the district court clerk, but the docket fee was not paid by the date on which the appeal was due to be docketed. The court specifically said that failure to follow proper procedure does not deprive the reviewing court of jurisdiction, but is only grounds for such action as the court deems appropriate. Here, however, the “appropriate” action was the granting of the appellee’s motion to dismiss the appeal under the provisions of Rule 12(c). The reason for this was that the court examined the record and found no merit to the appeal, and not just the fact that the docket fee was not timely received.

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

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

This rule, in effect, does away with formal distinctions between review of decisions of the Tax Court and appeal from decisions of the district courts. Now only the time for filing the notice of appeal is different. The usual time limit for filing a notice of appeal in a district court case is 30 days; Rule 13(a) allows a longer, 90 day, time period within which to file the notice of appeal from a decision of the Tax Court. Actually, this subdivision works two changes in the prior practice respecting review of Tax Court decisions. Previously such review was initiated by filing a "petition for review" with the Tax Court.\(^4\) Now the simple and familiar "notice of appeal" form is used. Secondly, the prior practice was that the petition for review was to be filed within three months after the Tax Court's decision. Any other party could then file such a petition within four months of that decision. Now, in the interest of fixing the time for appeal with precision, Rule 13(a) substitutes "90 days" and "120 days" for the statutory "three months" and "four months," respectively.\(^4\)

As in the case of post-trial motions in the district court the time for filing an appeal does not run during the pendency of a timely motion to vacate or review a decision of the Tax Court. The appellant has the full time to appeal after entry of the order

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\(^4\) INT. REV. CODE of 1954, §7483.
disposing of such motion. This rule is only a codification of the case law on the point. 4

Rule 13(b) provides that a notice of appeal may be filed personally with the clerk of the Tax Court, or mailed to him, and that timely mailing is to be treated as timely filing. The form of the notice of appeal is similar to that of the notice of appeal from a district court decision. It is shorter than the former style of the petition for review of Tax Court decisions. An illustrative example may be found in Form 2 of the Appendix of Forms.

All the provisions of Rules 10, 11 and 12 respecting the record and time and manner of its transmission apply to appeals from the Tax Court. The composition of the record should be the same; the same time limits and extension limits apply; and, the same docketing fee and procedures are applicable. The only difference is that appeals can be taken to more than one court of appeals from one Tax Court decision. If this should happen the original record shall be transmitted to the court of appeals named in the first notice of appeal. The other(s) would get copies certified by the clerk of the Tax Court.


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

This rule states that all provisions of these rules are applicable to review of a decision of the Tax Court except those with specifically diverse purposes.

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

Rule 15. Review or Enforcement of Agency Orders — How Obtained, Intervention

(a) Petition for Review of Order; Joint Petition. Review of an order of an administrative agency, board, commission or officer (hereinafter, the term “agency” shall include agency, board, commission or officer) shall be obtained by filing with the clerk of a court of appeals which is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term “petition for review” shall include a pe-

42 See Robert Louis Stevenson Apartments, Inc. v. Commissioner, 337 F.2d 681 (8th Cir. 1964).
petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal). The petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency shall be named respondent. The United States shall also be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

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

(c) Service of Petition or Application. A copy of a petition for review or of an application or cross-application for enforcement of an order shall be served by the clerk of the court of appeals on each respondent in the manner prescribed by Rule 3(d), unless a different manner of service is prescribed by an applicable statute. At the time of filing, the petitioner shall furnish the clerk with a copy of the petition or application for each respondent. At or before the time of filing a petition for review, the petitioner shall serve a copy thereof on all parties who shall have been admitted to participate in the proceedings before the agency other than respondents to be served by the clerk, and shall file with the clerk a list of those so served.

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

Primarily, the procedure for review or enforcement of agency decisions is left unchanged by the adoption of Rules 15 through 20. The most important change is that brought about by Rule 15(a). It supersedes section 2344 of the Judiciary Act and other statutory provisions prescribing the form of the petition for review, and permits review to be initiated by the filing of a simple petition similar in form to the notice of appeal used in appeals from judgments of district courts. The new short form of petition for review demands only that the petitioner specify the parties seeking review, name the respondent, and designate the order or part thereof to be reviewed. Note that there is no provision for the filing of an answer to such petition for review. The Immigration and Naturalization Service, Federal Trade Commission, Federal Aviation Commission, Securities and Exchange Commission, Federal Power Commission and most of the other agencies do not file answers. The sole agency that does, and then usually with a cross-application for enforcement, is the National Labor Relations Board, customarily the largest source of agency business at the court of appeals level.

Rule 15(b) regulates the procedure whereby an agency petitions or applies to the court of appeals for enforcement of its order or decision. Since agencies' orders are not self-enforcing, this step must be taken to give the agencies legal sanctions against those who fail to comply with their decisions. The petition or application for enforcement is usually quite a bit longer than that for review. It must contain a concise statement of the proceedings in which the order was entered, the facts upon which review is based, and the relief prayed. The respondent has 20 days within which to file an answer. Failure to so answer will result in a judgment awarding the relief prayed by the agency.

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44 An example of the new form appears as Form 3 in the Appendix of Forms that accompanies the new Rules. The more elaborate form of petition for review previously used was rarely useful either to the litigants or the courts. They were generally placed in a file drawer and never looked at again except as they appeared when printed in the appendix. There was, and still is, no effective, reasonable way of obliging petitioners to come to the real issues before those issues are formulated in the briefs.
45 However, within the last four years the number of petitions to review deportation orders of the Immigration and Naturalization Service has grown from fewer than ten per year to over one hundred and thirty annually in the Seventh Circuit. This is, it seems, only a local phenomenon, and the National Labor Relations Board remains the most active agency on a nationwide basis at the court of appeals level.
A respondent who needs more than 20 days to answer may request such an extension by motion, by following the usual motion procedure.\(^4\)

This section also allows the filing of a cross-application for enforcement where a petition for review has been filed. In practice, these matters are ultimately consolidated by the court of appeals for briefing, oral argument and decision.

Rule 15(c) imposes on the clerk the duty to serve a copy of the petition for review or application (or cross-application) for enforcement on each respondent. Such copy is sent with a covering letter which notes the date of the document's filing. The petitioner must furnish the clerk with sufficient copies for such service. Nowhere does the rule set out exactly how many copies of the petition or application are to be filed. The Seventh Circuit asks for an original and three copies, the same number which is required of any motion, unless service must be made on a greater number of respondents than three. At least one copy must be kept in the clerk's file at all times. Finally, a copy of the clerk's notice of service on respondents is filed and entered on the appeal docket of the cause.

Rule 15(d) specifies that a prospective intervenor must make a motion with the court of appeals for leave to intervene. Such motion should show the interest of the moving party and the grounds upon which intervention is sought, and must be served on all parties to the proceeding. If the administrative act itself permits intervention by the mere filing of a notice of intention to intervene, then that will suffice. But either the motion for leave to intervene or the notice of intention to intervene must be filed within 30 days of the filing of the petition for review. No such time limitation was previously fixed. Its inclusion should aid parties in the future because they will learn, quite early in the appellate proceedings, just how the parties will be aligned.

**Rule 16. The Record on Review or Enforcement**

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

(b) Omissions from or Misstatements in the Record. If anything material to any party is omitted from the record or is misstated therein, the parties may at any time supply the omission or correct the misstatement by stipulation, or the

\(^{46}\) See text at note 67 *infra.*
court may at any time direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.

By Rule 16 the record must include: (1) the order sought to be reviewed or enforced; (2) the findings or report on which it is based; and (3) the pleadings, evidence, and proceedings before the agency. By Rule 17(b) less than the whole record may be sent up, the same as in appeals from district courts. Rule 16(b) sets out the procedure for the correction of a misstatement in a record or the supplementation of a record from which something has been omitted.

Rule 17. Filing of the Record

(a) Agency to File; Time for Filing; Notice of Filing. The agency shall file the record with the clerk of the court of appeals within 40 days after service upon it of the petition for review unless a different time is provided by the statute authorizing review. In enforcement proceedings the agency shall file the record within 40 days after filing an application for enforcement, but the record need not be filed unless the respondent has filed an answer contesting enforcement of the order, or unless the court otherwise orders. The court may shorten or extend the time above prescribed. The clerk shall give notice to all parties of the date on which the record is filed.

(b) Filing — What Constitutes. The agency may file the entire record or such parts thereof as the parties may designate by stipulation filed with the agency. The original papers in the agency proceeding or certified copies thereof may be filed. Instead of filing the record or designated parts thereof, the agency may file a certified list of all documents, transcripts of testimony, exhibits and other material comprising the record, or a list of such parts thereof as the parties may designate, adequately describing each, and the filing of the certified list shall constitute filing of the record. The parties may stipulate that neither the record nor a certified list be filed with the court. The stipulation shall be filed with the clerk of the court of appeals and the date of its filing shall be deemed the date on which the record is filed. If a certified list is filed, or if the parties designate only parts of the record for filing or stipulate that neither the record nor a certified list be filed, the agency shall retain the record or parts thereof. Upon request of the court or the request of a party, the record or any part thereof thus retained shall be transmitted to the court notwithstanding any prior stipulation. All parts of the record retained by the agency shall be a part of the record on review for all purposes.

Unlike an appeal from a district court where the record (at
least a "short record") must be filed before the matter can be
docketed, the record in a petition for review or application for
enforcement is neither prepared nor at the court of appeals
when the matter is docketed. Rule 17(a) sets out that, in the case
of a petition for review, the record must be filed in the court of
appeals within 40 days after service upon it of the petition for
review. In the case of an application for enforcement, the 40
day period begins to run from the date of filing the application.
If the respondent to an application for enforcement has not filed
an answer within 20 days contesting the enforcement, the agency
need not file the record. Upon the filing of the record the clerk
must send notice to all parties informing them of the date of
such filing. This is important so that the parties may plan their
schedules for filing the appendix and briefs, time for which starts
to run, not from the date of docketing, but from the date of the
record's filing.

Rule 17(b) is based upon section 2112 of the Judiciary Act\textsuperscript{47}
and provides that although the record on review is basically the
record made before the agency below, not all of that record must
be transmitted to the court of appeals. To avoid needless ship-
ing of voluminous records, the agency may transmit in lieu of
the record itself a certified list of the documents comprising it.
If that procedure is not elected, the parties themselves may stipu-
late that the record or any parts thereof be retained by the
agency during the appellate procedure. In addition, the parties
subsequently have the right to request that the entire record or
any part of it be transmitted to the court of appeals. Even parts
of the record retained by the agency are considered to be parts
of the record on review or enforcement for all purposes.

Rule 18. Stay Pending Review

Application for a stay of a decision or order of an agency
pending direct review in the court of appeals shall ordinarily
be made in the first instance to the agency. A motion for such
relief may be made to the court of appeals or to a judge thereof,
but the motion shall show that application to the agency for
the relief sought is not practicable, or that application has been
made to the agency and denied, with the reasons given by it
for denial, or that the action of the agency did not afford the
relief which the applicant had requested. The motion shall
also show the reasons for the relief requested and the facts
relied upon, and if the facts are subject to dispute the motion
shall be supported by affidavits or other sworn statements or
copies thereof. With the motion shall be filed such parts of the

The same considerations which justify the requirement of an initial application to the district court for a stay pending appeal support the requirement of an initial application to the agency pending review. General authority is conferred by Congress on both agencies and review courts to stay agency action pending review. In most instances it seems the agency agrees not to proceed while the matter is before the court of appeals; but if it does not, a motion in the usual form must be filed in the appellate court, along with proof of service thereof. The motion shall, among other things, state the reasons given by the agency for denial. Parts of the record relevant to the relief sought must be filed with the motion. Usually this type of motion will be considered by a panel or division of the court, but a single judge is expressly authorized to rule thereon. If the requested stay is granted by the court of appeals it may require the filing of a bond or other appropriate security. Such bond or security is filed with the agency.

**Rule 19. Settlement of Judgments Enforcing Orders**

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

When, in a proceeding based upon a petition for review or enforcement of an order of a federal agency, that agency’s order is totally rejected by the court of appeals, the clerk enters a “judgment order” in the routine fashion. Such judgment recites how the matter came before the court and that enforcement of the

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order to be reviewed is denied. However, if the court decides that the agency decision is to be enforced, or if such enforcement is to be modified in some way, Rule 19 covers such procedure quite clearly and succinctly.

Because the private party is going to be ordered by the judgment to take some affirmative steps to abide by the provisions of the earlier decision of the agency, a new and more elaborate judgment order must be prepared. This was the custom under the prior practice, except that the document was referred to as a “decree” rather than as a “judgment.” Whatever terminology is used, this document generally reiterates, at least to some extent, the provisions of the original agency decision now to be given judicial sanction. Such judgments often order a party to cease and desist from a certain procedure, change certain business practices, or the like. They vary greatly, of course, depending upon whether the subject matter is a labor dispute, a trade regulation grievance, or a communications problem.

The agency has fourteen days from the date of the court’s opinion to tender a proposed judgment to the clerk of the court. Filed therewith must be a proof of service of such proposed judgment upon opposing counsel. Such proposed judgment should be in conformity with the court’s opinion. If it is not, or if its form is deemed improper, opposing counsel has seven days thereafter within which to file his own proposed judgment. If counsel for the private party feels that the agency’s proposed judgment suffices, he will note the fact thereon and return such copy and notation to the clerk. Upon the expiration of the time limits set forth in this rule, the matter goes to the panel of judges (usually three) who decided the cause and are responsible for the opinion therein. They will determine the form and content of the final judgment to be entered. If the respondent approves the agency version of the proposed judgment, the court will typically enter it in such form, as of the date of the court’s approval thereof. But if there is a dispute between the parties as to the form and content of the judgment, then the court might approve the proposed judgment of either; more often the court will modify such proposed judgments and draft one of its own.

Rule 20. Applicability of Other Rules to Review or Enforcement of Agency Orders

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

This rule, analogous to Rule 14 pertaining to appeals from the Tax Court, provides that all the provisions of these rules are applicable to proceedings for review or enforcement of agency orders, except those with specifically diverse purposes. It also states that the terms "appellant" and "appellee," as used in any applicable rule, also include the petitioner and respondent, respectively.

TITLE V. EXTRAORDINARY WRITS

Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

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

(b) Denial; Order Directing Answer. If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.

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

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

Sections (a) and (b) of Rule 21 regulate in detail the procedure surrounding the writs most commonly sought. They are based on Supreme Court Rule 31, with certain changes that reflect the uniform practice among the circuits.

An original and three copies of the petition, along with proof of service on the judge or judges and on all parties to the action in the trial court, must be tendered to the clerk of the court of appeals. When the docket fee is paid the matter will be docketed and given an appeal number just as any ordinary appeal. The petition must, of course, set out the facts necessary to an understanding of the issues, state the issues and request the specific relief sought. No record as such is required for determination of such a petition, but copies of any order or opinion or part of the record essential to an understanding of the issues must be affixed to the petition. The rule does not, as did some of the former circuit rules, require a preliminary motion for leave to file the petition.

Rule 21(b) provides that the court may summarily deny the petition, just as it could have denied leave to file it under the former practice. If the court decides that the petition is colorably meritorious it will require an answer. An order will then be entered fixing the time within which such answer must be filed. The judge or judges and all parties to the action below will be served with copies of this order by the clerk. The judge or judges whose conduct is drawn in issue by the petition continue to be respondents, but all parties other than the petitioners are also deemed respondents for all purposes. If the judge or judges named respondents do not desire to appear in the proceeding they may so advise the clerk and the other parties by letter and thereby avoid any further complications. Invariably counsel for the party favored by the order from which his opponent seeks mandamus or prohibition will act for the judge and file the required answer.

Once the answer is filed the court may do one of a number of things. It may grant the relief sought; it may deny the relief sought; it may order the filing of briefs on the issues within some prescribed time and rule on the petition thereafter; or it may
order briefs within a prescribed time and set a date for oral argument. Not very many petitions for mandamus or prohibition go to oral argument and opinion. Most are disposed of by prior order.

Rule 21(c) provides that petitions for other extraordinary writs shall be treated as those for mandamus or prohibition when feasible.

**TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS**

**Rule 22. Habeas Corpus Proceedings**

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

(b) Necessity of Certificate of Probable Cause for Appeal. In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.

There had previously been some confusion over the identity of the proper judge to whom to apply for a writ of habeas corpus. The source of this difficulty was section 2241 of the Judiciary Act. Circuit judges are authorized to issue the writ by section 49 28 U.S.C. §2241 (Supp. II, 1966), amending 28 U.S.C. §2241 (1964).
Section 2241(a) but section 2241(b) conversely authorizes a circuit judge to decline to entertain a petition and to transfer it to the appropriate district court judge. This latter procedure is the usual practice. Rule 22(a) makes this practice explicit. It provides that the petition or application should be made to the district court, and that if the application is made to a circuit judge it will ordinarily be transferred to the appropriate district court. Hopefully this rule will save the waste of time and effort that transfer involves. Section 2253 of the Judiciary Act seems clearly to contemplate that, once an application is presented to a district judge and is denied by him, the correct remedy is an appeal from the order of denial. But the language of section 2241 seems to authorize a second original application to a circuit judge following a denial by a district judge. A number of cases seem to acknowledge the availability of such a procedure. The last sentence of Rule 22(a) attempts to discourage such a practice, but does not expressly forbid it. Perhaps the unfolding case law will. The Eighth Circuit, in the only case in point since the inception of these rules, held that a petition for habeas corpus would be denied by the court of appeals pursuant to Rule 22(a) because the proper procedure was an appeal from the order of the district court denying the writ. The court added: “If, as it appears on the record, the time for appeal has expired, the petitioner may file a new petition in the United States District Court.”50

A court of appeals has no jurisdiction as a court to grant an original writ of habeas corpus and courts of appeals have dismissed applications so addressed to them. The fairer and more expeditious practice is for the court of appeals to regard an application to it as being addressed to one of its members and to transfer such application to the appropriate district court.51 Rule 22(b) now makes this a prescribed practice. Rule 22(b) also employs the regulations of section 2253 of the Judiciary Act52 and thereby provides that an appeal may not be taken in a habeas corpus proceeding where confinement is a result of a judgment of a state court unless the district judge who rendered the order in the habeas corpus proceeding, or a circuit judge, issues a certificate of probable cause. Such a certificate must state that in that judge’s opinion the appeal has some merit and is not wholly frivolous. In the interest of insuring that the matter of the certificate will not be overlooked and that, if the certificate is denied, the reasons for the denial in the first instance will be available on any subsequent application, the rule requires the dis-

50 Leggett v. Erickson, 412 F.2d 330 (8th Cir. 1969).
51 In re Burwell, 350 U.S. 521 (1956).
district judge to either issue the certificate or to state the reasons for its denial. Even the district court file of the proceedings must now be sent to the appellate court.\textsuperscript{53}

If no explicit request for certificate of probable cause is made, the notice of appeal is deemed to constitute such a request directed to the judges of the court of appeals. Obviously in such instance there would be no statement by the district judge setting forth reasons for not granting the request for such certificate.\textsuperscript{54}

Although section 2253 of the Judiciary Act\textsuperscript{55} appears to require a certificate of probable cause even when an appeal is taken by the state or its representative, the legislative history strongly suggests that the intention of Congress was to require a certificate only when an appeal is taken by the applicant for the writ of habeas corpus himself.\textsuperscript{56} The final sentence of Rule 22(b) makes it abundantly clear that a certificate of probable cause is not required of a state or its representative.

Rule 23. Custody of Prisoners in Habeas Corpus Proceedings

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

(b) Detention or Release of Prisoner Pending Review of Decision Failing to Release. Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the

\textsuperscript{53} Liles v. South Carolina Dept. of Corrections, 414 F.2d 612 (4th Cir. 1969), held that a district court must, after refusing to grant a certificate of probable cause, transmit to the court of appeals the notice of appeal and the file of the district court, so that the court of appeals may independently determine whether a certificate of probable cause should issue. The court's rationale was that, where an indigent prisoner seeks to appeal any final decision of the district court, justice requires that the records of the case be transmitted to the court of appeals for review. The district court should not, in effect, be given power to deny review in a case in which an appeal as of right is assured. In any event, issuance of the certificate of probable cause does not indicate that the district court's decision as to the merits will be reversed or that the writ of habeas corpus will issue.

It is to be noted that many of the problems involved in this type of litigation arise because a majority of such applications are drafted and filed by the prisoners acting pro se without the aid and benefit of counsel. Pink papers (prison stationery) pour into clerks' offices at an ever increasing rate it seems.

\textsuperscript{54} Foster v. Field, 413 F.2d 1050 (9th Cir. 1969).


prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon his recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

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

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

This Rule is based on Supreme Court Rule 49 and sets guidelines that are relatively discretionary with the court. Basically, if the appeal is by the applicant or petitioner from denial of the writ he should remain in custody; if the appeal is by the state or its representative from an order allowing the writ, the prisoner should be released on his own recognizance, with or without surety.

Rule 24. Proceedings in Forma Pauperis

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

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action
in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.

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

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

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

The procedure for proceeding in forma pauperis was not specifically covered by rule in most circuits previously. It has been regulated exclusively by section 1915 of the Judiciary Act and local customs. Rule 24 now attempts to make the prior unwritten practice uniform. However, numerous and significant changes flow from this codification.

The case law has always required that the initial application to proceed in forma pauperis be made in the district court. But

under Rule 24 (a) the procedures vary depending on the circumstances of the case. By paragraph 1 of Rule 24(a) the procedure is set out whereby a party may make application for leave to appeal in forma pauperis. This applies where such party had not previously been proceeding as an indigent. He must apply to the district court by a motion generally entitled “Motion for Leave To Appeal in Forma Pauperis.” This motion must be accompanied by an affidavit setting out his financial status. Form 4 in the Appendix of Forms is offered as a suitable model. The movant must also state that he feels he is entitled to relief and set forth the issues he will present on appeal. If the district judge grants this motion the party may proceed as an indigent without the necessity of applying to the court of appeals for leave to proceed in forma pauperis there. Such a party will not be obliged to pay the district court fee ($5.00) for filing the notice of appeal or the charges of the district court clerk for preparation of the record on appeal. Moreover, he will not be charged the docketing fee ($25.00) in the court of appeals. A copy of the district judge’s order granting leave to appeal in forma pauperis should be included in the record; otherwise the court of appeals clerk will not know to docket the appeal in forma pauperis and will write to the party requesting payment of the docket fee.

An obligation is placed upon the district judge to state in writing the reasons for his denial of such a motion if he does not grant it. This is a new requirement and has been slow to catch on. In Davis v. Clark,58 the Court of Appeals for the District of Columbia held in abeyance a motion made in the court of appeals for leave to appeal in forma pauperis until the district court should comply with the provisions of Rule 24(a). The district court had previously denied the petitioner such leave, but gave no reasons. At the close of their decision the court of appeals added: “The Clerk of the District Court is further directed to distribute copies of this order and opinion to all District Court Judges.”59

The second paragraph of Rule 24(a) concerns itself with those parties who had earlier been authorized by the district court to proceed throughout the trial court proceedings as indigents. It permits one whose indigency has been previously affirmatively determined by the district court to proceed on appeal in forma pauperis without the necessity of a redetermination of indigency, while still reserving to the district court its statutory authority to certify that the appeal is not being taken in good faith.60 It also permits an inquiry, should the district court judge deem it

58 404 F.2d 1356 (D.C. Cir. 1968).
59 Id. at 1357.
relevant, into the possibility of a change in the financial status of the party since the inception of the lawsuit. If the trial judge finds that the appeal is not taken in good faith or that the party's situation has changed so as to warrant revocation of the permission to proceed in forma pauperis, he must state in writing the reasons for such certification or finding. In the absence of a statement of reasons for its finding that the appeal is not in good faith, the district court cannot deny a defendant the right to appeal in forma pauperis on that ground.\textsuperscript{61}

Paragraph 3 of Rule 24 (a) provides that if a party is denied leave to appeal in forma pauperis or, having been previously allowed to proceed as an indigent, is going to be denied the right to appeal as such because of a finding of lack of good faith or change in financial condition, he may make a subsequent motion in the court of appeals for such relief. Note that such party does not appeal from the order of denial or from the certification of lack of good faith or from the finding of change in financial status.\textsuperscript{62} The indigent is served with a notice of the district court's action by the district court clerk and then has 30 days after service of such notice to make his motion for the relief sought in the court of appeals. This simple and relatively expeditious procedure seems clearly preferable to an appeal. No record must be sent to the court of appeals unless the court itself asks for it. Generally, the motion, the affidavit in support thereof, and the district judge's statement of reasons for his actions are the basis for docketing the matter in the "Miscellaneous Docket" of the court of appeals. If the district court's action was clearly proper the motion is promptly denied. If the court of appeals wants more information it will direct opposing counsel to file an answer to the motion. If even more clarification is needed the record is requested from the clerk of the district court. If the party's motion is then granted, the appeal is placed on the court's regular docket. Typically all this transpires in a rather short period of time — a month or less.

Rule 24 (b) provides that a party who desires to proceed on appeal or review in a proceeding commenced before the Tax Court or a federal agency must make a motion for that purpose directly to the court of appeals. This is based on section 1915 (a) of the Judiciary Act\textsuperscript{63} which grants authority to allow prosecution in forma pauperis only to a "court of the United States."

Rule 24 (c) states that a party properly before the court of

\textsuperscript{61} Christian v. United States, 404 F.2d 328 (8th Cir. 1968).
\textsuperscript{62} Only an order of the district court refusing leave to initiate an action therein in forma pauperis is reviewable by the normal appeal method. Roberts v. United States Dist. Court, 339 U.S. 844 (1950).
appeals in forma pauperis may file typewritten briefs, appendices
and other documents. Rule 31(b) allows the filing of an original
and three copies of briefs if they may be in typewritten form.
Many circuits have local rules altering the number actually re-
quired.64

It would be well to note at this point that indigent defendants
in federal criminal prosecutions are almost always given the
benefit of court-appointed counsel in the prosecution of their ap-
peals. Prisoners making collateral attacks upon federal or state
convictions may, upon motion, be afforded similar representation;
but, generally, attorneys are not appointed to represent parties
who have been granted leave to proceed on appeal in forma pau-
peris in civil cases. Such attorneys are volunteers taken from a
list compiled by the clerk of all those who generously offer their
services.

Rule 25. Filing and Service65

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

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

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

(d) Proof of Service. Papers presented for filing shall

64 By administrative order, the Seventh Circuit now requires twelve
typed (or reproduced) copies of briefs in appeals by indigents. Circuit
Rule 9, however, specifically waives the requirement of the filing of an
appendix in all indigents' appeals.

65 This is the first of the Federal Rules of Appellate Procedure that has
general application to all proceedings before the court of appeals whatever
their derivation. In the interest of simplicity, hereinafter any proceeding
properly before the court of appeals shall be termed an 'appeal' whether
it is a true appeal or a proceeding for review or enforcement.
contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the person served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment or proof of service but shall require such to be filed promptly thereafter.

Rule 25(a) makes the clerk the proper repository for all filings. It further provides that a motion requesting relief which can be granted by a single judge may be filed with a judge who must then transmit it to the clerk with the date of filing noted thereon. Most circuits try to discourage such practice as it greatly complicates the record-keeping processes of the office. Such items are not immediately transferred to the docket sheet of the appeal and thus no one can be sure of the current status of a given appeal at a particular time.

The rule states that filing is not timely unless the papers are received within the time allowed for filing. This has been the familiar practice in all circuits. But the rule provides a new twist by exempting briefs and appendices in an attempt to afford the parties the maximum time for their preparation. Such briefs and appendices are deemed filed on the day of their mailing. Special delivery need not be used, but air mail is required if it is the most expeditious manner of delivery.

Rule 25(b) requires service of copies of all papers on "all other parties." The former practice in most circuits called for service only on "adverse parties." Now, unless they are joining in the motion, fellow appellants must be served with even a simple motion for extension of time within which to file the movant's brief.

Rule 25(c) specifies that service may be "personal or by mail." In almost all circuits the majority of such service is by mail, and such service is complete on mailing. Thus, an original and three copies of a motion may be sent to the clerk of the court of appeals66 in the same outgoing mail as the copies sent to counsel for each other party to the appeal. Personal service, if the movant elects to use it, may be made on a clerk, receptionist or switchboard operator at the office of counsel.

Most papers filed have a separate page usually entitled "Proof of Service," "Affidavit of Mailing," "Certificate of Service by Mail," or some such heading. There is no magic wording or method of showing such required service. Rule 25(d) merely calls for some type of a statement indicating who was served (the practice is to give both the name and address of

each party or counsel served) and the date and manner of service. Such statement is to be certified by the person who made the service; usually it takes the form of a notarized statement by the secretary for the attorney filing the motion. Personal service may be certified to in the same fashion, or the recipient may acknowledge service on one of the copies of the paper which is going to be filed with the clerk. This rule further provides that a clerk may file papers without such a proof of service, but shall “require such to be filed promptly thereafter.” As a practical matter, however, the clerk generally will not file documents without proof of service. This practice assures all parties of being appraised of the filing of all documents.

Rule 26. Computation and Extension of Time

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

(b) Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.
(c) Additional Time after Service by Mail. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period.

Rule 6 of the Federal Rules of Civil Procedure and Rule 45 of the Federal Rules of Criminal Procedure form the basis for Rule 26(a). It provides that the day from which a prescribed period of time begins to run is not included in the computation of time, but that the last day is to be included. However, if this last day falls on a Saturday, Sunday or legal holiday, the time limitation does not expire until the next regular business day. The term “legal holiday” includes the eight current national holidays and any holiday so appointed by the state in which the district court that rendered the judgment is located or in which the principal office of the clerk of the court of appeals is located. Otherwise Saturday, Sunday and holidays are included in the number of days allowed for the doing of any act or the filing of any document, unless the number of days allowed is less than seven. For example, if the court of appeals directs that an answer to a particular motion be filed in five days, the weekend would not be included in those five days. But in the case of a brief due 30 days after service of that of the opponent, all the intervening weekends and holidays are included, unless, as has been pointed out, the final day falls on a Saturday, Sunday or holiday.

Rule 26(b) provides that enlargement or extension of time may be obtained only by motion and only for good cause shown. Reading this rule in conjunction with Rule 27 it is clear that they combine to require that every request for an extension of time be made by formal written motion with proof of service on all other parties. This is distinctly different from the district court practice in which ex parte motions are often the rule. This procedure keeps everyone advised of developments and affords all parties an opportunity to better arrange their own scheduling. The phrase “for good cause shown” has been construed in some circuits to mean that an affidavit should support each motion. Nowhere in the rules is such an affidavit specifically required however. Most experienced counsel do support their motions, even the simplest request for an extension of time, with a statement of the situation which necessitated the motion. It is the author’s experience that most circuit judges will not grant an extension of time unless they know why it is necessary.

Note that the court may, by this rule, allow an act to be done after the expiration of the allotted time. Thus, for exam-
ple, a motion for leave to file a brief "instanter" may be granted although such brief may be a few days or even weeks late. To wait and file such a motion, however, is less than prudent. It is always the better practice to prospectively apply for an extension of time. By the same subdivision the court of appeals is also specifically prohibited from enlarging the time to do certain acts that result in a vesting of jurisdiction.

Rule 26(c) allows three additional days within which to do an act if the rules require or permit a party to do something within a certain period of time after service of something on him by mail. For example, since service is effective upon mailing an appellee's brief would otherwise be due 30 days after the mailing of appellant's brief to him. Realistically, counsel for appellee may not see the appellant's brief for a number of days thereafter. So the granting of three additional days is an eminently fair provision. But it does somewhat confuse record keeping in the clerk's office. Briefs may be delivered by messenger for a local printer to the clerk's office, and mailed to out of town counsel on the same day. Other times filing and service are both by mail. Sometimes filing and service are both accomplished in person. Still other times filing is by mail and service is made personally. Nevertheless, seldom has a party been denied a hearing of his substantive rights on appeal because of a technicality such as the filing of a brief two or three days late.

Rule 27. Motions

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

(b) Determination of Motions for Procedural Orders.

67 Id. 25(c).
Notwithstanding the provisions of the preceding paragraph as to motions generally, motions for procedural orders, including any motion under Rule 26(b) may be acted upon at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.

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

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

Rule 27(a) provides that the motion is the method for seeking any relief for which no other method is prescribed by the rules. In form, a motion should include a caption, the title of the appeal, its docket number and a brief title descriptive of the relief sought by the motion. It must be accompanied by any matter required by a specific provision of the rules. Every such motion must, of course, be served on all other parties. If the motion is supported by briefs, memos, affidavits, exhibits or any other papers, they must also be filed and served.

If the motion filed is one of substance, one that is not ordinarily unopposed and is not routinely granted, any party may file an answer to it within 7 days after service. A motion to dismiss or otherwise determine the appeal is clearly a motion of such substance that affected parties should be given an opportunity to file an answer. Motions authorized by Rule 8 (Stay or Injunction Pending Appeal), Rule 9 (Release in Criminal Cases) and Rule 18 (Stay Pending Review) are likewise motions of substance. But the nature of the relief sought is such

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68 For example, a motion under Rule 24 for leave to appeal in forma pauperis must be accompanied by the requisite affidavit of indigency as illustrated in Form 4 of the Appendix of Forms.

69 Note that service is effective upon mailing (Rule 25(c)); three extra days are allowed to reply to any document served by mail (Rule 26(c)); filing is not timely unless the papers are actually received by the clerk on the due date (Rule 25(a)); and, Saturdays, Sundays and legal holidays count in the computation of time unless the prescribed period is less than seven days (Rule 26(a)).
that to allow an adversary an automatic 7 days delay is undesirable. Thus the court may set, by order, a lesser time within which an answer may be filed, if any such answer is allowed at all. This rule mentions a motion under Rule 41 for a stay of mandate pending petition to the Supreme Court of the United States for a writ of certiorari as one of the types of motions in which a lesser time for answer will be allowed. In practice such motions are generally acted upon immediately if the motion itself, or affidavit in support thereof, states that such petition for certiorari is being prepared.

Rule 27(b) initiates a practice that is new to some circuits. It provides that motions for procedural orders may be acted upon at any time without waiting for an answer thereto. The most common motion, (for an extension of time within which to file a brief and/or appendix), may thus be summarily acted upon by the court. Any party adversely affected by such an order may file a motion for reconsideration. Note that the clerk, in practice, sends copies of all orders to counsel of record in each case. In this way everyone is kept apprised of the progress, or lack thereof, in any appeal.

Rule 27(c) states explicitly what has long been the practice in all circuits. It authorizes a single judge to entertain and grant or deny any motion for intermediate relief. However, he can not act individually upon a motion to dismiss or otherwise determine an appeal. Moreover, a single judge may not rule on a motion for leave to appeal from an interlocutory order under section 1292(b) of the Judiciary Act; nor is he authorized to act on a petition for writ of mandamus, prohibition or other extraordinary writ.

Some of the motions which are within the power of a single judge are: Motion to extend time to transmit the record and docket the appeal; motion for intervention in an agency case; motion to permit an appeal in forma pauperis; motion to extend time to file brief, motion, answer to motion, or the like; motion to permit filing of additional or oversized briefs; motion for leave to file a brief as amicus curiae; motion to dispense with filing of an appendix in a specific case; motion for leave to file typed copies of briefs and appendices; motion

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72 Id. 15(d).
73 Id. 24.
74 Id. 26(b).
75 Id. 28.
76 Id. 29.
77 Id. 30(f).
78 Id. 32(a).
to postpone or grant additional time for oral argument;\footnote{34} and, motion to permit substitution of parties.\footnote{43}

Note that the action of a single judge may be reviewed by the court. When such a motion for reconsideration of an order of a single judge is filed there must be sufficient copies so that each active judge may be provided with a copy. This procedure is somewhat analogous to that where there is a suggestion that a rehearing en banc is appropriate. If no judge requests that a vote be taken on the motion for reconsideration within a given period of time (usually 5 or 10 days) the motion is deemed automatically denied and an order is entered to that effect. Such motions for reconsideration are not common, probably because no order that can be entered by a single circuit judge is ever determinative of the substance of an appeal.

Rule 27(d) is so often not complied with by counsel that it is obvious it is overlooked for its sheer simplicity. It provides that at least an original and three copies of every motion and accompanying papers must be filed. Some circuits have instituted a form letter for returning a motion if fewer than four copies (total) are tendered to the clerk for filing. Occasionally motions are overdue because they had to be sent back and forth through the mail a number of times. About the only time the requirement of this rule is overlooked by the court is in the case of an indigent representing himself; even then an attempt is made to obtain compliance.

Rule 28. Briefs

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

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

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

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

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

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

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

(c) Reply Brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. No further briefs may be filed except with leave of court.

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

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

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

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

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

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

This rule does not greatly change the briefing practice of most circuits. For the most part, since briefs serve the same purpose as before, their form is familiar. Pursuant to Rule 28(a) they must contain: (1) a table of contents; (2) a list of statutes and authorities cited; (3) a statement of the issues on appeal; (4) a statement of the case, including its nature, its preceding legal history and the facts relevant to an understanding of it; (5) the argument, which may be prefaced with a summary thereof; and (6) a conclusion setting forth the relief sought. This conclusion is new to the rules of most circuits. It is somewhat similar in substance to the prayer for relief that is typically the final part of a motion. Although it is important to follow Rule 28(a) in setting up a brief, seldom is failure to do so determinative of the appeal. Most courts are reluctant to deprive a party of his rights on appeal because of a "technicality." However, the Court of Appeals for the Fourth Circuit recently held: "The appeal is dismissed for failure of the appellant to comply with Rule 28 of the Federal Rules of Appellate Procedure which requires the appellant to include in his brief a statement of the case and a statement of the facts relevant to the issues presented for review . . ."81

The bulk of most briefs, of course, is the argument. This is

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the reason for the appeal. Someone is dissatisfied with a decision of the trial court or agency. Soon after a cause is scheduled for oral argument a set of the briefs is distributed to the panel of three judges who will hear the appeal. These are read in advance of the hearing and great reliance is placed upon them by the court. Therefore great care should be taken in the preparation of the briefs, especially as to the “heart” of any brief, the argument. A well-presented oral argument can seldom save a case that has been badly briefed.

The appellee’s brief should follow the same form required for that of the appellant, except that the statement of the issues and of the case may be omitted. However, if the appellee does not agree with those statements as set out in the appellant’s brief, or thinks they are incomplete, he may include such statement in his own brief.

Reply briefs have always been customary. They are not mandatory however. Any appellant who wishes to answer an argument made in an appellee’s brief may do so by means of such a reply brief. This subparagraph also provides that in the case of a cross-appeal, the appellee may file a fourth brief, to answer the reply brief of the appellant. In a cross-appeal, where both sides are appealing, the plaintiff in the trial court is considered the “appellant” for procedural purposes (such as the obligation of filing the first brief, preparing the appendix and leading off the oral argument) in the court of appeals.\textsuperscript{82} If the defendant in the lower court is the truly aggrieved party and the plaintiff is only cross-appealing, the parties may stipulate that the provisions of Rule 28 (g) be waived and that the defendant be treated procedurally as the “appellant” on appeal. Such stipulation, by custom, is filed with the court for approval, which is quite routine. But the court does want to know in advance if the parties agree that the plaintiff should not be considered the appellant, in variance of this rule.

Rule 28 (e) takes up a subject that has become rather confused since the inception of these new Federal Rules of Appellate Procedure. Page references in the briefs have always been to the appendix. Now, Rule 30 provides methods whereby a party may proceed without the necessity of filing the familiar appendix required by the former rules (in all but one of the circuits). This rule provides basically that, if an appendix is filed at the time the brief is filed, the page references in the brief shall be to the page numbers in that appendix. This is in conformity with the former practice. But if no appendix, as such, is to be filed

\textsuperscript{82} \textit{Fed. R. App. P.} 28 (h).
or if the appendix is to be filed later than the brief, \textsuperscript{83} then the references in the brief must be to the pages of the items referred to in the original record on appeal.

Rule 28(g) provides that printed briefs may not exceed 50 pages in length. Briefs prepared by means of any other process may not exceed 70 pages. Note however, that Rule 32, which sets out requirements regarding page sizes and the like, provides that briefs produced by other than the standard typographic printing process must be double-spaced. It has been calculated that 50 pages of standard typographic printing is the approximate equivalent of 70 pages of typewritten text, double-spaced. The limits as to reply briefs are 25 printed pages and 35 pages by other means. These limitations may be waived by the court in a specific case upon motion, properly filed, showing why a greater number of pages is necessary to present an adequate legal argument. Any addendum to the brief setting out statutes, rules, regulations or parts thereof, pursuant to Rule 28(f), is not included in counting the number of brief pages toward this limitation.

Rule 28(i) gently urges multiple parties to join in a single brief or at least to adopt by reference parts of briefs filed by co-appellants or co-appellees. Reading all the weighty, literally and figuratively, briefs before the oral argument is quite a large job and consumes a goodly portion of an appellate judge's typical day. This is precisely the reason for limiting the size of briefs.

\textbf{Rule 29. Brief of an Amicus Curiae}

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

\textsuperscript{83} Id. 30(c). Examples are given in the body of this rule.
Most circuits previously allowed the filing of a brief as amicus curiae only upon written order of the court. Now such a brief may be filed by a governmental agency without leave of court or consent of the parties. And anyone may file such a brief if it is accompanied by the written consent of all the parties to the appeal. Nevertheless, most amicus curiae briefs still are tendered under the old method. That is, the brief is tendered to the court along with a motion for leave to file. Such motion must be served on all the parties, and they may file answers thereto. The motion, answer(s) and briefs are all submitted to the court for determination of the motion. If the motion for leave to file an amicus curiae brief is not accompanied by the brief, answers may still be filed; then, the court must determine the motion on the basis of only the motion and answer(s). If leave is granted to file an amicus curiae brief under such circumstances, the brief then becomes due at the same time as the brief of the party whose position as to affirmance or reversal the amicus curiae brief will advocate. The motion may, of course, ask for a specific due date. Generally, amicus curiae are not allowed to take part in the oral argument of the appeal. Someone granted leave to intervene, however, will be allowed to participate in oral argument.

Rule 30. Appendix to the Briefs

(a) Duty of appellant to prepare and file; content of appendix; time for filing; number of copies. The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

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

84 In an order dated March 30, 1970, the Supreme Court amended subdivisions (a) and (c) of Rule 30 and subdivision (a) of Rule 31. These amendments are to take effect on July 1, 1970, and will govern actions then pending unless the particular court of appeals thinks an injustice would thereby result, in which case the former procedure would apply.

by rule or order direct the filing or service of a lesser number.

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

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

(c) Alternative method of designating contents of the appendix; how references to the record may be made in the briefs when alternative method is used. If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply, except that the designations referred to therein shall be made by each party at the time his brief is served, and a statement of the issues presented shall be unnecessary.

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

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

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

(f) Hearing of Appeals on the Original Record without the Necessity of an Appendix. A court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

Rule 30 has wrought what is probably the biggest procedural change of any of the new rules in the Federal Rules of Appellate Procedure. It has changed: the time for filing the appendix; the number of copies thereof that are required; the
established method of determining what the contents of such appendix are to be; and even whose obligation it is to file the appendix. It has also provided an alternative time schedule for filing the appendix and has finally made allowance for the waiver of an appendix altogether.

A brief summation of the history of the appendix procedure might be helpful at this juncture. Originally the entire record from the fact finding tribunal was printed. This printed version of the record was then considered the actual record on appeal. A number of copies were made so that each judge, and possibly his law clerk, would be able to give the record simultaneous study and not have to wait for the actual record itself to get around to him. This was obviously very expensive. Besides being expensive this method was cumbersome. Judges simply did not have the time to look through such printed records. Nor was it important that they do so, because certainly not everything in the printed record was relevant to the issues presented on appeal. So variations to the printed record system were introduced in almost every circuit. Each party could file a designation listing the portions of the record he wanted printed with the clerk. Sometimes the clerk would even supervise the printing, usually with a contract printer who had a virtual monopoly in that circuit. In some instances the testimony was reduced to narrative form in an attempt to cut down the size of the printed record. But this took so many hours of lawyers’ time that the printing saving was more than offset by the time expended. It also led to sometimes biased interpretations of the witnesses’ testimony.

Somewhere in the late 1930’s or early 1940’s the appendix system was originated. This lasted, in most circuits, right up to the adoption of the current Rule 30 in 1968. Under that system, the appellant would print an appendix which would contain what he thought were the pertinent portions of the record and file it, along with the brief, thirty days after the docketing of the appeal. The appellee could then file a separate appendix containing additional material he deemed relevant at the time of filing his brief. This use of separate appendices sometimes resulted in fragmentary appendices that were often inconvenient to use. Parts of the testimony of a witness, even parts of the testimony from the same page of the record, might appear in different appendices. The judges would have to turn from one appendix to the other in order to follow the flow of

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85 Before the Court of Appeals for the Seventh Circuit moved its offices a few years ago, there was neatly stacked on a shelf in its oldest file room such a printed record consisting of over thirty-five hard-bound volumes which had the formidable appearance of an encyclopedia.
the record. Now there is a new single appendix system. The appendix is just what its name implies. It is an addendum to the brief, supplied for the convenience of the judges of the court of appeals. It is not the record and does not purport to be.

Rule 30(a) states, *inter alia*, what must be included in the appendix. It must contain any relevant docket entries; relevant portions of the pleadings, instructions and findings or opinion; the judgment, order or decision appealed from; and, “any other parts of the record to which the parties wish to direct the particular attention of the court.” It can be seen from this language that wide latitude is given the parties in determining what they want in the appendix. Depending on what the issues are on appeal, a large portion of most appendices is made up of transcript of testimony and exhibits, neither of which are even mentioned among the essentials set out in this rule. Almost every appendix also includes the notice of appeal. The determination of any additions to the material required by rule is left up to the parties.

Rule 30(a) further states that, unless Rule 30(c) regarding the filing of a deferred appendix is followed, the single appendix is due with the appellant’s brief. Extensions may, of course, be obtained to this time limitation by following the usual motion procedure. Ten copies of the appendix must be filed, together with proof of service of at least one copy on counsel for each party separately represented. There is obviously no size limitation on an appendix as there is on a brief. Some still run into multiple volumes, even though this rule specifically cautions: “The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.”

Rule 30(b) encourages the parties to agree as to the contents of the appendix. This is generally done informally, through personal meetings, telephone conversations, or correspondence. The parties need never inform the court as to what they are planning to include. If they cannot agree on what must be included in the appendix the parties must serve designations on one another. The appellant must serve the appellee within ten days after docketing the appeal; then, the appellee must serve the appellant within ten days thereafter. Note that the appellant’s designation must include a statement of the issues he intends to present on appeal. Once again, these contacts are still basically informal. The designations must be served, but not filed with the court. If such designations are sent to the court, the clerk will generally file them, then just put them away. The court does not need to be pre-informed as
to what will be included in the appendix. It will have time enough later on to go over the appendix.

Virtually the only time the court is involved in determining the contents of the appendix at this stage of the proceedings is when an appellant refuses to agree upon printing the items designated by the appellee in his appendix. This rule calls for the appellant to pay for the entire appendix, portions designated both by himself and by his appellee-opponent. However, if an appellant feels that the items counter designated by the appellee are totally unnecessary he may refuse to include them unless the appellee advances the cost. This is similar to the old separate appendix system except that the appendix is now under one cover. Although it seldom happens, an appellee could argue that his designation does not include frivolous or extraneous material, and refuse to advance the cost. In such infrequent cases the appellant generally files a motion to compel the appellee to prepay the cost of printing his portion of the single appendix. This forces the court to examine the record and judge what the contents of the appendix should be earlier than it would like to. It would therefore be extremely helpful if the parties could agree as to what is essential. Even under the former separate appendix rule there were frequent complaints by appellees concerning the tendency on the part of some appellants to reproduce less in the appendix than was necessary for a determination of the issues presented. 66

The triumphant party on appeal can recover the cost of printing his share of the appendix from the opposing party under Rule 39(c). But this general provision will not be applicable if he has indulged in what the court may consider to be unnecessary printing. Thus, it is clearly important to heed this rule: “In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.”

Subdivisions (a) and (b) of Rule 30 conjunctively make for a more orderly appendix procedure as far as the court is concerned, although some counsel have complained that it makes their job more difficult. The single appendix certainly does make a more readable document. However, the time that counsel must spend on its preparation is now probably greater than it was in the past.

The Court of Appeals for the Second Circuit recently chastised counsel for failure to comply with this single appendix

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66 See, e.g., Morrison v. Texas Co., 289 F.2d 382 (7th Cir. 1961).
provision. In Braniff, Inc. v. Curtis-Wright the court stated:

We wish to record our disapproval of the parties' disregard of the provisions of the Federal Rules of Appellate Procedure. Although Rule 30 does not require that the parties agree on the contents of an appendix, it explicitly requires the filing of a single appendix. The parties chose instead to file an appellants' appendix and an appellee's appendix. Thus, in order to consider a given witness' testimony in this highly technical case it was necessary for us to jump from one appendix to the other. The rule requiring a single appendix was adopted to facilitate our task of judicial review. Appellants also failed to reproduce in their appendix the two pamphlets, exhibits 5 and 15A, on which they rely to establish a cause of action for breach of express warranty. Litigants are advised to consider these remarks as a warning of the possibility of more drastic action by the court in the future.

Rule 30(c) provides for the deferred filing of the appendix if the court so permits by rule or order. Under this method the appendix is due to be filed 21 days after service of the appellee's brief. Unless the parties agree informally on the contents of such an appendix, the appellant shall serve his designation on appellee at the time his brief is filed and served. Then the appellee must serve its designation on appellant at the time of filing and service of its brief. As in the case of the appendix filed at the regular time, neither designation need be filed with the court. And now the appellant's designation need not state the issues to be presented on appeal. They will already be set out in the brief. The general rules as to the number of copies to be filed, the contents of the appendix and service thereof apply in the same manner as though the appendix were being filed with the appellant's brief.

The purpose and advantage of filing a deferred appendix is that it permits the parties to determine what parts of the record need to be reproduced in light of the issues actually presented by the briefs. Often neither side is in a position to say precisely what is essential until the briefs are completed. Once the arguments on both sides are known, it should be possible to confine the matter reproduced in the appendix to that which is truly relevant. This system was devised and originally used by Federal Power Commission attorneys, and has proved quite valuable in reducing the volume required to be included in the appendix. The economics of this system are accentuated to an even greater degree when the record is a long one. There is one major difficulty inherent in the deferred appendix however. It makes reference in the briefs to matter found in

87 411 F.2d 451 (2d Cir. 1969).
88 Id. at 455.
the appendix more troublesome than if the brief writer had the appendix before him while he was writing. To alleviate this problem, Rule 30(c) allows the substitution of briefs by the parties. That is, both appellant and appellee may file typed copies of their briefs, or page proofs thereof, in the first instance. Page references in such briefs are to be made to the page of the part of the record being referred to. Next, the deferred appendix may be filed 21 days after the filing and service of the appellee's brief. Then, within 14 days after the appendix is filed, both appellant and appellee must substitute printed briefs for the typed copies they previously had filed within the time provided by Rule 31(a). Often both appellant's and appellee's printed briefs are filed on the same day with the clerk. These briefs may not vary from those typed ones previously filed except that they shall contain references to the pages of the appendix instead of references to the pages of the parts of the record involved. Typographical errors may, of course, be corrected.

Rule 30(d) explains the order in which documents are to appear in the appendix. A list or table of contents should be placed first, followed by a list of the relevant docket entries. Any other parts of the record to be included should follow in chronological order. Captions, subscriptions, acknowledgments and the like should be omitted for the sake of brevity. This type of omission need not be noted, but any other omission that creates a break in the continuity of the original record must be indicated by asterisks. Thus, if a motion and order appear in the original record between the complaint and answer, but are to be left out of the appendix, a line of asterisks must appear between the complaint and the answer. Typically, this string of asterisks takes up only the equivalent of one line of type.

Rule 30(e) allows a method of reproducing exhibits that is again calculated to save the litigants money. Exhibits, including administrative records used at the district court level, may be bound in separate volumes and filed at the time of the appendix but with fewer copies. Only 4 copies of such a "book of exhibits" need be filed. No leave of court is necessary to avail oneself of this privilege. Usually, by their very nature, exhibits must be photocopied rather than printed, and this process is roughly twice as expensive as standard typographic printing. The monetary difference between filing 10 copies of such exhibits in the regular appendix or only 4 such copies pursuant to this rule might be significant. One copy of such reproduced exhibits must be served on opposing counsel, the same as if it were an appendix.
Rule 30(f) could become a very important rule. It permits each court of appeals to dispense with the necessity for an appendix altogether and to hear appeals on the original record with such copies of the relevant parts thereof as the judges may require for their use. A court might employ this rule for all cases, for particular types of cases, or by order in a specific case. In most circuits this is being done only by order in certain cases after a showing has been made of some hardship. The Ninth Circuit originated the practice of not requiring a printed appendix, and apparently is continuing in that practice. It requires only two reproduced copies of the record, excluding exhibits, in addition to the original record.90 Thus, since three judges hear almost all appeals, each would have one set for his personal use. This might be helpful, but it seems that in appeals with large records an appendix would be better.

Rule 31. Filing and Service of Briefs

(a) Time for Serving and Filing Briefs. The appellant shall serve and file his brief within 40 days after the date on which the record is filed. The appellee shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

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

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

The briefing schedule set down by this rule is as follows:

(1) the brief for the appellant is due 40 days after the filing of the record on appeal; (2) the brief for the appellee is due 30 days after service of the appellant's brief; and (3) the appellant's reply brief is due 14 days after service of the appellee's brief. The rule does not specifically so state, but if a fourth brief is allowed, as in the case of an appeal and cross appeal, it has been construed to be due 14 days after service of the appellant's reply brief. Note that this rule does not permit a precise calculation of the exact due date of any brief except that of the appellant. Since service by mail is complete upon mailing, if a brief is both served and filed by mail, service is accomplished before filing. This is true even though Rule 25(a) states that "briefs and appendices shall be deemed filed on the day of mailing." No circuit I have consulted on this point has ever back filed any brief or appendix arriving by mail. They are merely filed on the day of their arrival. Most clerk's offices will not refuse to file a brief that may be a few days overdue. A majority of circuits previously allowed only 30 days for the filing of the appellant's brief. The extra 10 days provided by Rule 31(a) is ostensibly to allow for the service of designations regarding the content of the appendix, which is generally to be filed with the brief. A party who avails himself of the deferred appendix provision of Rule 30(c) still has the full 40 days within which to file his brief however.

Unlike the procedure in many state court systems, the early filing of one party's brief accelerates the remainder of the briefing schedule. An appellee's brief, for example, is not due 30 days after the due date of the appellant's brief, but 30 days after service of the appellant's brief. If an appellant serves and files his brief two weeks early, the whole time table is moved forward by two weeks.

Rule 31(b) calls for the filing of 25 copies of all briefs, along with proof of service of at least two copies on counsel for each party separately represented. Some parties continue to file their brief and appendix in one booklet. This was a very common custom under the former practice when equal numbers of the brief and appendix were usually required. There is nothing wrong with continuing this practice so long as 25 copies of the booklet "Appendix and Appellant's Brief" are filed, and not just the ten copies that are required in the case of the appendix alone. It is not feasible to bind the brief and appendix together where the resulting volume is quite large or bulky. Judges usually read the parties' briefs thoroughly prior to oral argu-

92 Id. 25(c).
ment, but they generally only refer to the appendix occasionally. Thus a large volume is less easily held for reading purposes than one that is, as Rule 28(g) provides, 50 pages or less.

Counsel often question why so many copies of a brief are necessary. Each judge and his law clerk or clerks (circuit judges are authorized two law clerks each, although not all avail themselves of this "luxury") receive a copy. A number of copies are kept by the clerk and later sent to the archives where they are preserved. Often an attorney will want to study the briefs in a case years after it has been decided if he discovers that it contains an issue similar to one in a case on which he is currently working. The clerk can, in a matter of days, retrieve a copy from the archives for the use of that attorney. Furthermore, certain law libraries and bar associations desire copies of all briefs in particular types of cases. The same is true of various law schools and interested law firms. Briefs are not given out too freely during the pendency of an appeal for fear that the court might need more copies itself, but upon the matter's determination they will be distributed free of charge as long as the supply lasts. Ultimately many requests for briefs, especially those in cases of public concern or relative to landmark issues, must be turned down.

Rule 31(b) provides for the filing of an original and three copies of any brief that may be filed in typewritten form. In the instance of paupers' appeals, most circuits have passed local rules calling for the filing of a greater number than this rule provides. To do otherwise would be to tie up a deputy clerk for most of every day reproducing such briefs. Four copies is just not a sufficient number. Service of one copy on opposing counsel meets the requirements of the rule.

Rule 31(c) sets forth the possible consequences of a failure to file briefs. If an appellant fails to file his brief within 40 days after the filing of the record, or within any extension thereof granted by the court, the appellee may make a motion to dismiss the appeal. Most courts, disliking such summary disposition of an appeal, will give the appellant one last chance by entering an order setting an absolute deadline for the filing; if nothing is done within that time, (often 30 days), the appeal will be dismissed. The Court of Appeals for the Fifth Circuit, however, plagued by an exceptionally overcrowded docket, re-

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83 Attorneys who have practiced for a number of years at the federal appellate level do not, in fact, consider that twenty-five copies are so many. The Seventh Circuit, for example, previously demanded thirty copies both of the briefs and of the appendix.
cently terminated eleven appeals for failure of the appellants to comply with Rule 31.84

An appellee who fails to file his brief will not be allowed to orally argue the matter except by special order of the court. This circumstance does not present itself very frequently since, it seems, appellees are sometimes more anxious than appellants to have appeals heard and determined.

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

(a) Form of Briefs and the Appendix. Briefs and appendices may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper. Carbon copies of briefs and appendices may not be submitted without permission of the court, except in behalf of parties allowed to proceed in forma pauperis. All printed matter must appear in at least 11 point type on opaque, unglazed paper. Briefs and appendices produced by the standard typographic process shall be bound in volumes having pages 6½ by 9½ inches and type matter 4¾ by 7¾ inches. Those produced by an other process shall be bound in volumes having pages not exceeding 8½ by 11 inches and type matter not exceeding 6½ by 9½ inches, with double spacing between each line of text. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents. Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available, the cover of the brief of the appellant should be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix, if separately printed, should be white. The front covers of the briefs and of appendices, if separately printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 12(a)); (3) the nature of the proceeding in the court (e.g., Appeal; Petition for Review) and the name of the court, agency, or board below; (4) the title of the document (e.g., Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.

(b) Form of Other Papers. Petitions for rehearing

84 Each opinion cited the case of Stout v. Broom, 406 F.2d 758 (5th Cir. 1969), as precedent.
shall be produced in a manner prescribed by subdivision (a). Motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8 1/2 by 11 inches in sizes. Lines of typewritten text shall be double spaced. Consecutive sheets shall be attached at the left margin. Carbon copies may be used for filing and service if they are legible.

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

The Committee that drafted these rules felt that recent and impending advances in the arts of duplicating and copying warranted experimentation with less costly forms of reproduction than those previously generally authorized. Rule 32 permits, in effect, the use of any process (other than the carbon copy process) which produces a clean, readable page. What constitutes such is left in the first instance to the parties and ultimately to the court to determine. Carbon copies of briefs and appendices, however, may not be submitted without special order of the court in any appeal except one that is being allowed to proceed in forma pauperis.

In practice, the great majority of briefs and appendices are still being submitted in the standard typographic printing form. Big law firms with large clients feel that the printed brief and appendix always will be the best and most dignified method of presenting their case to the court. From a clerk’s pragmatic point of view, they are correct. Printed briefs and appendices are easier to handle, store and read. But this should not deter counsel from heeding his client’s financial situation and possibly filing non-printed briefs and appendices. They will receive equal consideration from the court.

Rule 32(a) sets out the authorized page sizes and the amount of each page that may contain printed or typed matter. Counsel should refer to the rule before filing a brief or appendix; legal printers have it memorized. Except in patent cases, no brief page size should exceed 8 1/2 by 11 inches, commonly referred to as “letter size.”

Unless colored covers are unavailable in an area, and they are not in any of the cities that house a court of appeals, specific colors should appear on the covers of the various briefs and appendices. The appendix should be white; the appellant’s brief blue; the appellee’s brief red, the reply brief, gray; the brief of an intervenor or amicus curiae, green. If the appendix is in-

cluded in the same booklet as the appellant's brief the color of the cover may be blue.

Each cover must also include the following information: (1) The name of the court and the number of the case; (2) the correct title of the case; (3) the nature of the proceeding and the court or agency whose decision is being reviewed on appeal; (4) the descriptive title of the document; and, (5) the names and addresses of counsel representing the party for whom the brief or appendix is being filed.

Rule 32(b) provides that motions and, presumably, petitions and applications allowed by these rules may be typewritten. They should be on letter size paper, double spaced and bound on the left. Larger, legal size papers are still being accepted, but are discouraged. Uniform filing practices dictate that documents should be filed on unglazed paper 8 1/2 by 11 inches in size. The three copies required of all motions and petitions, in addition to the original, may be carbon copies if they are legible. Such documents must contain a caption including the name of the court, the title of the case, its docket number, and a brief description of the document's purpose. This subdivision also provides that petitions for rehearing should be reproduced in the manner prescribed by Rule 32(a), not by the form applicable to motions under Rule 32(b). Thus 25 copies must usually be filed, with proof of service of two copies upon counsel for each party separately represented. The color of the cover on a petition for rehearing is by custom that of the party's main brief. Thus, it is either blue for appellant or red for appellee. The same applies to an answer to a petition for rehearing, should one be requested by the court.

Rule 33. Prehearing Conference

The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding

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Culled from various rules, the following table may prove helpful to counsel regarding certain technical points relating to the filing of briefs, appendices, etc.:

<table>
<thead>
<tr>
<th>Document</th>
<th>Cover</th>
<th>Copies</th>
<th>Time</th>
<th>Size</th>
<th>Service</th>
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</thead>
<tbody>
<tr>
<td>Appendix</td>
<td>White</td>
<td>10</td>
<td>40 days**</td>
<td>No limit</td>
<td>1 copy</td>
</tr>
<tr>
<td>Appellant's Brief</td>
<td>Blue</td>
<td>25</td>
<td>40 days</td>
<td>50/75 pages</td>
<td>2 copies</td>
</tr>
<tr>
<td>Appellee's Brief</td>
<td>Red</td>
<td>25</td>
<td>30 days</td>
<td>50/75 pages</td>
<td>2 copies</td>
</tr>
<tr>
<td>Reply Brief</td>
<td>Grey</td>
<td>25</td>
<td>14 days</td>
<td>25/35 pages</td>
<td>2 copies</td>
</tr>
<tr>
<td>Petition for Rehearing</td>
<td>*</td>
<td>25</td>
<td>14 days</td>
<td>10/15 pages</td>
<td>2 copies</td>
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</tbody>
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* Should be the same color as that party's main brief.
** Or 21 days after appellee's brief, if the court so permits.

See Fed. R. App. P. 40(a) for the procedure regarding such answers.
by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

This rule is similar to, and based on, Rule 16 of the Federal Rules of Civil Procedure. It did not explicitly appear in the rules of most courts of appeals previously. Indeed some circuits may have occasionally conducted such hearings informally, but such practice was not widespread. Section 2345 of the Judiciary Act\textsuperscript{98} formerly provided for such prehearing conference in petitions for review or enforcement of federal administrative agencies only. Apparently, this is still a seldom used device. Since the fact finding has already been done in the district court or agency, it does seem, however, that the prehearing conference will never become as valuable a tool for the court of appeals as it has been for the trial courts. The language of the rule is flexible enough, though, so that such conferences may some day be adopted to meritorious service.

**Rule 34. Oral Argument**

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

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

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

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

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

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

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

Attorneys accustomed to appellate practice in the state courts often ask the clerk of the court of appeals how to request permission to present oral argument of their appeals before the court. But oral argument is an automatic thing in the federal appellate system; no request need be made. Rule 34(a) directs the clerk to send out notice of the time and place of each oral argument to all parties to the matter. This means that counsel will be sent such notice; the only actual parties who receive such notice are those proceeding without benefit of counsel. Such notices are always written, usually on a printed form into which are typed the number and title of the case, the place and date of hearing and the names of the parties or counsel served. Although the practice is not exactly uniform, such notices are mailed roughly a month before the date on which the oral argument is scheduled. In some circuits oral arguments are heard shortly after the filing of the reply brief. In others there is a waiting period of a number of months. These times even fluctuate within the same circuit depending on how many other appeals may be “ready” at any given time.
Rule 34 (b) provides that, in every class of case, “each side will be allowed thirty minutes” for oral argument. The Advisory Committee that drafted these rules felt that the term “side” was used to indicate that the time allowed by the rule is afforded to opposing interests rather than to individual parties.\textsuperscript{99} Thus, if multiple appellants or appellees have a common interest, they constitute only a single side. If counsel for multiple parties who constitute a single side feel that additional time is necessary they must request it. Such requests should be made, by letter, to the clerk reasonably in advance of the scheduled date of oral argument. In fact, any request for additional time, multiple parties or not, should be made in accordance with this provision. Generally, such a request should be made before the matter is set for oral argument.\textsuperscript{100} Action on such requests is discretionary with the court. Although the court generally does not cut short oral argument, the last sentence of this paragraph authorizes it to do so. It also makes it clear that a party need not feel he must use his full time. Mere loquaciousness at oral argument is not looked upon with favor by courts with crowded dockets.

Rule 34 (c) prescribes that the appellant may open and close the oral argument; saving as much of his allotted time as he wishes for rebuttal. The appellee gets to approach the rostrum only once, but is entitled to as much total time as the appellant. Furthermore, the practice of reading at length from briefs, records, and such, which was previously frowned upon, is now specifically prohibited. The court will have read the briefs, the record, and authorities cited in the briefs. Of course, authorities newly discovered since the filing of the briefs may be mentioned; but usually the court will want to look them up itself and will not want to have the authority read to it.

Rule 34 (d) is to oral argument as Rule 28 (h) is to briefs. Both provide that, in the case of cross appeal, the plaintiff in the action below shall be deemed the appellant for procedural purposes unless the parties stipulate to the contrary and the court so orders. And a cross appeal is to be argued with the main appeal in a single oral argument. The rule further dictates that duplication of argument should be avoided. Some circuits have gone so far in this area as to allow only one counsel to speak per “side.”\textsuperscript{101}

Rule 34 (e) sets out the consequences for failure to appear for oral argument. A distinction is made between the failure


\textsuperscript{100} Note that Circuit Rule 11 (b) states that such request must be made within ten days after the filing of the appellant’s or petitioner’s brief. 7TH Cir. R. 11 (b).

\textsuperscript{101} See, e.g., 7TH Cir. R. 11 (a).
of an appellant to appear and the failure of an appellee to do so. The rule states that "[i]f the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present." However, "[i]f the appellant fails to appear, the court may hear argument on behalf of the appellee, if his counsel is present." It, therefore, seems that an appellant has a right to argue his appeal if his opponent fails to appear; but that an appellee must abide by the court's discretion if his opponent fails to appear for oral argument. If neither side shows up on the date set for oral argument, the court will take the matter under advisement on the basis of the record and briefs before it, without oral argument. In practice it very seldom happens that any party fails to appear for oral argument. If for some reason counsel cannot be present on the date set, a motion for postponement should be made as far in advance of the appointment day as circumstances will permit. Such motions, in fact, are not favorably received unless the reason is one of rather grave importance. Mere continuances are not granted. However, counsel who knows he is going to be unavailable at a certain period in the future should write to the clerk prior to the scheduling of the appeal for oral argument. The clerk will convey these matters to the court, which will generally honor any good faith request that oral argument not be set during a specified period of time. Once again, these requests cannot be merely for purposes of delay; but they do have a better chance of succeeding than a motion to reset an oral argument once notices have been sent out.

Most courts, unless the briefs in a particular appeal have raised points the court wants specifically answered at oral argument, are willing to take certain cases under advisement without oral argument. If the parties agree on this manner of submission, they should file a joint motion or a stipulation so requesting. If the court agrees, it will enter an order that the appeal be decided without oral argument, on a consideration of the record and briefs in the matter. However, if the court deems oral argument essential to a proper presentation of the issues to be determined on appeal, the joint motion or stipulation will be denied.103

Rule 34(g) allows for a procedure whereby physical exhibits that have previously been retained by counsel may be set up in the courtroom for reference at the time of oral argument. These physical exhibits should be removed by counsel after the arguments have been heard, unless the court directs that such ex-

103 Id. 34(g).
hibits remain. Generally, they are left for the court to refer to during their deliberations on the issues to be decided. If so, counsel are later notified, usually at the time of the issuance of the mandate, to reclaim their physical exhibits. Some reasonable time period is set for such reclamation. Exhibits not claimed are destroyed or disposed of. Storage space is simply not available for bulky materials. Patent appeals are particularly notorious for their unwieldy exhibits. Everything from hospital beds to automobiles have appeared in courtrooms from time to time. Note that the provisions of Rule 34(g) do not apply to documentary exhibits. Such papers usually come to the court of appeals from the trial court or agency at the same time as the remainder of the record (pleadings, transcripts, depositions, etc.) and are returned to the same district court or agency by the clerk at the completion of the appellate process.

Rule 35. Determination of Causes by the Court in Banc

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

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

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

An "in banc" hearing or rehearing is one heard by all the
judges currently in regular active service on the court allowing such “in banc” hearing or rehearing. “In banc” proceedings are infrequent. The rule itself indicates that such hearings are “not favored.” However, if a majority of the circuit judges who are on active status in a circuit so determine, the court as a whole will decide a matter on appeal. They may do this on their own initiative if they deem the matter to be one in which consideration by the full court is necessary to assure uniformity of its decisions, or one which involves a legal question of exceptional importance.

Rule 35 (b) speaks of the suggestion of a party for a hearing or rehearing in banc. They are infrequently suggested and nearly always denied as to the original hearing of a matter on appeal. But it is not too uncommon for a party, disgruntled by an adverse decision by a panel of three judges, to make suggestions as to the appropriateness of a rehearing in banc. The percentage of allowances of the routine petition for rehearing is low; the allowance of the in banc rehearing is even less. But they are granted occasionally if the prerequisites set forth in Rule 35 (a) are deemed present in the appeal.

Most counsel mislabel such petitions for rehearing as “Petitions for Rehearing in Banc.” They are not quite that. They are merely petitions for rehearing by the panel with suggestions that the circumstances are appropriate for allowance of an in banc rehearing. Procedurally, they are distributed to each judge in regular active service, including the panel who originally heard and decided the case. The panel may include a senior circuit judge, or a district judge sitting on the court of appeals by designation for a certain period of time. Unless a judge in regular active service or a judge who was a member of the initial panel requests that a vote be taken on the suggestion, none will be taken. This provision is intended to make it clear that such a suggestion of a party does not require any action by the court. All courts have their own internal procedures whereby the suggestions will be treated as denied unless some eligible judge requests, within a certain number of days, that a vote be taken. If no judge so requests, generally the panel’s order acting on the basic petition for rehearing will bear the notation that no member of the court in regular active service requested a vote be taken on the suggestions as to a rehearing in banc. Thus the suggestion will not be accepted.\footnote{Where no member of the three judge panel nor any judge in regular service requested that the court be polled on rehearing in banc, the appellant was not entitled to have his petition for rehearing in banc granted. General Ins. Co. v. United States, 409 F.2d 1326 (5th Cir. 1969); Travelers Ins. Co. v. Davis, 411 F.2d 244 (5th Cir. 1969).}
Rule 35 (c) states that a suggestion for rehearing in banc must be made within 14 days after entry of the judgment.\textsuperscript{105} This is true whether the suggestion is made in the regular petition for rehearing, as it usually is, or otherwise. The judgment, of course, remains final pending the outcome of any such suggestion.

If the court of appeals should allow a hearing or rehearing in banc it may provide for its orderly disposition as it sees fit. Statutory authority for such hearings is found in section 46(c) of the Judiciary Act.\textsuperscript{106} In most instances some variation of the normal briefing and hearing provisions will be followed, as ordered by the court.

Rule 36. Entry of Judgment

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

This rule requires that the clerk prepare and enter a judgment order upon receipt of the court's opinion. In the great majority of cases this judgment is dated the very same day as is the opinion. The exception occurs when the opinion, in granting enforcement or denying review of the order of a federal agency, directs subsequent settlement of the precise terms of the judgment. The agency then tenders a proposed judgment; it is either approved or objected to by the opposition; and, finally, it is approved or altered by the court before judgment is formally entered. Such judgments go beyond the mere statement of the law; they ordinarily set forth cease and desist orders, or list what practices must be changed by the company or union involved. Often they even include provisions regarding the posting of notices and penalties for failure to comply.

Since an aggrieved party has 90 days within which to file his petition for writ of certiorari in the Supreme Court in a civil case and 30 days to do so in a criminal case, it is important to know from what date this time is computed. Where

\textsuperscript{105} \textit{See} Fed. R. App. P. 40(a).

\textsuperscript{106} 28 U.S.C. §46(c) (1964).
the court's opinion and judgment are dated the same day, there is never any problem. But there was uncertainty in the agency case judgment set forth. The principle of finality suggested that, in such cases, the time for filing certiorari should not begin to run until approval of the judgment in final form, but no one wanted to take a chance that it did not begin to run on the date of the court's opinion. The Supreme Court, in *Scofield v. NLRB*,107 held that where the opinion of the court of appeals concluded that "upon presentation, an appropriate decree will be entered," and thereafter a decree was entered, the 90 day period for filing application for certiorari began to run on the date of entry of the decree and not on the date of the opinion. Rule 36 explicitly embodies that decision: "The notation of a judgment in the docket constitutes entry of the judgment."

A copy of each opinion must be sent to the parties involved. If the appeal is disposed of without formal opinion, then copies of the judgment or final order must be sent to all parties.

**Rule 37. Interest on Judgments**

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

When a court of appeal's decision affirms a money judgment in a civil case, the interest which attaches thereto by force of law upon its initial entry is payable as if no appeal had been taken. Section 1961 of the Judiciary Act108 states that such interest is calculated from the date of the district court judgment, at the rate allowed by state law in that particular district. This is true whether or not the mandate of the court of appeals makes mention of interest.

However, if a district court decision is modified or reversed with a direction that a money judgment be entered therein, the mandate must specifically state whether interest is to be allowed, and from what date. Otherwise a party who feels he is entitled to interest from a date other than that of the entry of the judgment in accordance with the mandate would have to make a motion in the court of appeals to recall the mandate

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for a determination of the question of interest. Since appeals often last more than a year, a year's interest on a sizable judgment is not something to be regarded lightly.

Rule 38. Damages for Delay

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

By this rule a court of appeals may allow for damages, attorney's fees and other expenses incurred by an appellee if the court determines the appeal is frivolous. As a penalty, these damages may even be assessed in double their actual amount. Such damages were previously governed by section 1912 of the Judiciary Act, which stated that the court might award "damages for delay." No longer is any showing required that the appeal resulted in delay.

It is noteworthy that the subjects of interest and damages are considered separately by these rules, to make it clear that the awards are distinct and independent. Interest is provided for by law; damages may be awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant. This discretion may or may not be exercised to allow double costs.

Rule 39. Costs

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

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

(c) Costs of Briefs, Appendices, and Copies of Records. The cost of printing or otherwise producing necessary copies of briefs, appendices, or copies of records authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than

\[\text{Id. } \S 1912.\]

\[\text{See, e.g., Local 2, Int'l Bhd. of Tel. Workers v. Brotherhood of Tel. Workers, 416 F.2d 414 (1st Cir. 1969); Felder v. Harnett County Bd. of Educ., 409 F.2d 1070 (4th Cir. 1969).}\]
than those generally charged for such work in the area where the clerk’s office is located. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment.

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

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

In accordance with section 1920 of the Judiciary Act the court of appeals may tax certain items as costs. Rule 39(c) sets forth these items. Rule 39(a) states by whom they are recoverable and against whom they are assessed. If a judgment is affirmed, costs shall be taxed against the appellant, and in favor of the appellee, unless otherwise ordered. The exact opposite is true if a judgment is reversed. However, if a judgment is affirmed in part and reversed in part or is vacated, costs are allowed only if the court specifically so orders. If an appeal is dismissed, generally costs shall be taxed against the appellant; but sometimes such costs are a consideration as part of an agreement between the parties regarding dismissal. In such instances the court will usually accede to the parties’ wishes and not assess costs against anyone.

Rule 39(b) is novel in that it provides for recovery of costs by and against the United States. Previously each court of appeals had a rule making the government invulnerable to an award of costs against it. Conversely, it could not recover costs if it won an appeal either. However, section 2412 of the Judiciary Act\(^1\) which formerly provided a bar to the award of costs against the United States was amended in 1966 to generally place the government on the same footing as private parties with respect to the award of costs in civil cases.\(^2\) Now

costs are recoverable by and against the United States in certain cases if “authorized by law.” Such awards have thus far been made in matters concerning review or enforcement of agency orders; civil tax cases from either the Tax Court or district courts; and tort and contract matters on appeal from district courts. No authorization exists for such recovery in any criminal matters. In all cases where the government enjoys immunity from costs it would otherwise suffer as a losing party, it is prevented from recovering costs as a prevailing party.

Rule 39(c) prescribes that the costs of printing, or otherwise producing, the briefs and appendices is a cost recoverable by the successful party on appeal. So also is the cost of reproducing parts of the record pursuant to Rule 30(f). Although not explicitly stated in the rule, it seems that the cost of reproducing exhibits pursuant to Rule 30(e) should also be generally recoverable. An affidavit itemizing such costs must be filed, with proof of service on opposing counsel, within 14 days after entry of the judgment. The required affidavit may be that of party or counsel, but often is the printer's affidavit evidencing payment of his bill for a specific brief or the like. The costs so listed in any such affidavit are taken as the reasonable cost of such work in the area, unless the opposing party filed objections thereto. In such case the court will have to determine the reasonableness of such charges.

Previously only about half the circuits allowed recovery of the cost of printing briefs. All allowed taxation of the cost of the appendix, but this new rule makes the practice uniform and is in keeping with the principle that all cost items expended in the prosecution of a proceeding should be born by the unsuccessful party.

Rule 39(d) provides that the clerk prepare an itemized statement of costs for insertion in the mandate. This is sent with the mandate to the district court and the money actually changes hands there. The only costs generally taxable in the court of appeals are the docket fee in the case of a reversal, and the above-mentioned printing or reproduction costs of briefs and appendices. Although “taxable” in the court of appeals, these costs are recovered in the district court after issuance of the mandate with its attached “Bill of Costs.” In almost every instance the matter of costs will have been settled before issuance of the mandate, but if not, the clerk may send a supplemental “Bill of Costs” to the district court for inclusion in the mandate at a later date.

Rule 39(e) lists various costs incidental to appeal that
must be paid at the district court level. These items are made taxable in the district court for convenience. Among such items are the cost of the reporter's transcript, the premiums paid for any required appeal bond, the clerk's fee for preparation and transmittal of the record, and the fee for filing the notice of appeal. Application for recovery of these costs by the successful party on appeal must be made in the district court after it has received the mandate of the court of appeals. Such items will be disallowed if application for recovery thereof is made to the appellate court. But such denial is without prejudice to the right to reapply and make a proper showing in the district court.\textsuperscript{113}

Rule 40. Petition for Rehearing.

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

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

Rule 40(a) states that a party may file a petition for rehearing within 14 days after entry of the judgment. A party desiring to file such a petition, but unable to get it ready within 14 days must make a motion for extension of time. The panel of judges who heard and decided the appeal, or the one who authored the opinion, will rule on the motion.

The petition for rehearing must be concise and must

\textsuperscript{113} Volkswagenwerk Aktiengesellschaft v. Church, 413 F.2d 1126 (9th Cir. 1969).
clearly identify the points of law or fact as to which the petitioner feels the court has erred. After filing, this petition is circulated to the same panel of three judges and they take a vote on it. A majority rules in this voting. There is no oral argument in conjunction with a petition for rehearing. The previous practice in at least eight circuits was that the successful party on appeal had a number of days within which to file an answer to the petition for rehearing. Rule 40(a) has changed the former practice in this respect. It follows Supreme Court Rule 58(3) now. No longer may an answer to a petition for rehearing be filed. Actually this is not a detriment, but a benefit, to the successful party. It saves him time, money and expense. He need only be alarmed if he is directed to file a reply; this would indicate that there is something meritorious to the argument of his opponent in support of the petition for rehearing. However, petitions for rehearing are rarely granted. The rule explicitly states that “a petition for rehearing will ordinarily not be granted in the absence of such a request.” Since petitions for rehearing are so infrequently granted there is very little basis upon which to draw a conclusion as to the typical procedure followed when one is allowed. It depends, it seems, on the nature of the case. The procedure is entirely discretionary with the court. If the petition is granted, the order so stating could even make the final disposition of the matter. More often, however, an argument is scheduled; sometimes it is ordered that new briefs be filed. Possibly this rebriefing and reargument may be limited on rehearing to a specific issue that was the basis for the allowance of the petition for rehearing.

Rule 40(b) requires the form of the petition for rehearing to be similar to that of the brief as set forth in Rule 32(a). It further calls for the filing of 25 copies, with proof of service of at least 2 copies on every other party, unless the party so filing has been allowed to proceed in forma pauperis. A printed petition for rehearing should not exceed 10 pages; if it is produced by any other process, it may not exceed 15 pages. A motion for leave to file an oversized petition for rehearing must be made, by custom, within the 14 day period after the judgment or any extension thereof duly granted.

Rule 41. Issuance of Mandate; Stay of Mandate

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

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

Rule 41(a) governs the date on which the mandate of the court of appeals should issue to the district court or agency. Such mandate is to issue 21 days after entry of the judgment. Either party may make a motion to accelerate the mandate if there is some rush to revest jurisdiction in the lower court. If a petition for rehearing is filed, however, the mandate will not issue until 7 days after entry of the order denying such petition. Once again, any party may make a motion to accelerate the issuance. The judge who wrote the opinion generally rules on such a motion. Some circuits are getting away from the formal mandate with its incumbent gold seal and the like. This rule authorizes substitution of a certified copy of the judgment and a copy of the court's opinion in lieu of the printed form of mandate that has been used for so many years. It saves a little time to do away with the form, but other circuits feel the formal mandate adds an air of distinction to their directives to the lower court. Mandates are not generally issued to administrative agencies. In agency cases certified copies of the opinion and judgment are sent as soon as they are ready, without regard to the 21 day general waiting period, or the 7 day waiting period after denial of a petition for rehearing. Mandates cannot always be issued on the exact date prescribed by the rules. Clerks' offices are sometimes too rushed to get them out exactly on time. Occasionally there is a purposeful delay of a week before issuing a mandate. It is surprising how many motions for stay of man-
date arrive just after the date on which the mandate was to have issued. Consequently, a good deal of time is saved by the practice of slightly delaying the mandate because far fewer have to be recalled and subsequently reissued. By custom in most circuits the record on appeal is returned to the district court when the mandate is issued. The same is true of agency records when the certified copies of the opinion and judgment are sent to such agency.

Rule 41(b) requires that a party desiring to petition the Supreme Court for a writ of certiorari may file a motion for stay of mandate in the court of appeals. Such motion must be in the usual form and include a proof of service upon all other parties. Generally the judge who wrote the opinion will rule on the motion. If he is unavailable, another member of the panel may do so. Such motions are rather freely granted, but the stays do not usually exceed 30 days. Since section 2101(c) of the Judiciary Act\(^\text{114}\) permits a writ of certiorari to be filed in the Supreme Court within 90 days after entry of judgment in a civil case (or within 90 days after date of order denying rehearing if a petition for rehearing was filed), it is possible that a party may apply for more than one stay of mandate. The purpose of limiting any one stay of mandate to 30 days seems to be motivated by a desire to keep the petitioner moving. The full 90 days should not be allowed to him as a final delaying tactic. The court may require the filing of a bond or the giving of security as a condition to the granting or continuance of a stay of mandate. This is rarely done and then only when the opposing party shows that there is a danger of some harm unless such bond or security is given. This showing is properly made by filing an answer to the motion for stay of mandate. If a petition for certiorari is filed in the Supreme Court during the pendency of the stay of mandate, the stay shall continue automatically until final disposition by that Court. The clerk of the Supreme Court, upon docketing a petition for writ of certiorari sends a notice to the clerk of the court of appeals. This is filed and noted on the court of appeals' docket. If no such notice is received, it is assumed that the would-be petitioner decided against filing for certiorari, and the mandate will issue upon expiration of the stay.

When the Supreme Court denies a petition for writ of certiorari, a certified copy of such order is transmitted to the appropriate court of appeals. Thereupon the mandate of the court of appeals should issue forthwith. Of course, if the petition for writ of certiorari is granted (as it is in possibly 3 to 5

\(\text{114} 28 \text{ U.S.C. } \S 2101 (c) \text{ (1964).} \)
percent of the petitions) then the mandate is automatically further stayed until the matter has been disposed of by the Supreme Court. A certified copy of the Supreme Court judgment or opinion is sent to the appropriate court of appeals, where it is duly noted on the docket of the case.

Rule 42. Voluntary Dismissal

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

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

Rule 42(a) is derived from the last sentence of Rule 73(a) of the Federal Rules of Civil Procedure. It provides that at any time after the filing of the notice of appeal, but before the docketing of the appeal, the appeal may be dismissed in the district court by either of two methods. First of these is the situation in which all the parties agree that the appeal should be dismissed and file a stipulation to that effect. The second situation is where the appellant for some reason decides not to proceed and makes a motion to dismiss his own appeal. Both such dismissals must be approved by the district court, but such approval is routine and orders are regularly entered granting such stipulations and motions.

Rule 42(b) sets out a similar procedure that may be followed once the appeal has been docketed. Once again there are two basic modes of voluntary dismissal; the difference is that now the stipulation to dismiss or the appellant's motion to dismiss must be filed in the court of appeals. As to an agreement or stipulation to dismiss, the terms may be agreed upon by the parties but the court must still approve them. The wording of the rule may give an erroneous impression that the clerk enters the order of dismissal. He does not. Three judges must approve any final order. Furthermore, a mandate issues for every case disposed of, even if it is voluntarily dismissed. However, a certified copy of the order of dismissal suffices in some circuits.
Motions or stipulations for voluntary dismissals, often made in light of a settlement agreement between the parties, are seldom gone into deeply by the clerk or court.

**Rule 43. Substitution of Parties**

(a) **Death of a Party.** If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by his personal representative, or if he has no personal representative, by his attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.

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

(c) **Public Officers; Death or Separation From Office.**

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

(2) When a public officer is a party to an appeal or other proceeding in his official capacity he may be described as a party by his official title rather than by name; but the court may require his name to be added.
Rule 43 (a) catalogues the possibilities that might be occasioned by the death of a party either before or after the filing of the notice of appeal. If a party dies after a notice of appeal is timely filed, whether before or after the appeal is actually docketed, the court of appeals is the proper tribunal to order the substitution. This is true whether the deceased party is an appellant or an appellee. The motion for substitution in the court of appeals may be made either by the personal representative of the decedent, or by any other party. The motion must be served upon all other parties. If the motion is made by a party other than the representative, that representative must be served. However, if the deceased party has no personal representative, custom dictates that the attorney for the deceased party should still be served. Generally the court will have the clerk check with the parties to informally ascertain the situation of the case before acting on the motion for substitution. If the motion is granted the appeal proceeds with a new party taking the place of the decedent. That is exactly what happens in most cases; but sometimes the death of a party changes the whole course of the litigation. If, for example, the representative is not interested in proceeding with the appeal, or if the adversary does not care to proceed against the representative, they may reach such agreement as they wish, and then file a stipulation regarding the dismissal of the appeal.

When a party dies before the notice of appeal is timely filed, one of two situations will occur, depending upon whether the district court judgment was favorable or unfavorable to the deceased party. If it was favorable, his opponent may file a notice of appeal as though no death had occurred. Then substitution shall be effected in the court of appeals in the same fashion as if the death had taken place after the filing of the notice of appeal. If the judgment was unfavorable to the decedent, the notice of appeal may be filed by his personal representative in his place. If there is not such a representative, then his attorney of record may file the notice of appeal. Such notice must be filed within the time allowed by the rules, however. Allowing the attorney to file the notice of appeal is a new procedure; previously only the personal representative could elect to proceed with an appeal. This sensible new provision takes into account the fact that it is usually the attorney who decides whether or not to appeal.

Rule 43 (b) provides that substitution for any reason other than death shall be handled in the same fashion as substitution made necessary by death. A motion, with proof of service, must

similarly be made in the court of appeals.

Rule 43 (c) sets out an easy standard for substitution in the case of a change in the person of a public officer proceeding in his official capacity. Whether he dies, resigns, or is succeeded in office for any reason whatever, "the action does not abate, and his successor is automatically substituted as a party." Although an order evidencing the substitution may be entered at any time, failure to enter such an order does not in any way affect the substitution. The most frequent example of this procedure is in petitions for habeas corpus filed by state court prisoners. The respondent (and usually appellee) is nominally the prison warden. If he is replaced, resigns, retires or dies, the action goes forward, typically with no formal order as to the substitution. Usually the attorney general of the state will send the clerk a letter telling him the name of the successor. Rule 43 (c) (2) makes it clear that the names of such officials proceeding in their official capacities are not even necessary. Many cases proceed with the parties merely referred to as "Director of the Immigration & Naturalization Service;" "Attorney General of the United States;" "Warden of the Illinois State Penitentiary;" "Secretary of Health, Education and Welfare;" "District Director of Internal Revenue." The regular turnover of official personnel at the local, state and federal level, should not upset the orderly progress of litigation.

Rule 44. Cases Involving Constitutional Questions Where United States Is Not a Party

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

In any action wherein the constitutionality of any act of Congress affecting the public interest is drawn in question, section 2403 of the Judiciary Act\footnote{28 U.S.C. §2403 (1964).} provides that the court certify such part to the Attorney General so that he shall be permitted to intervene. Unfortunately, the clerk does not know the nature of every appeal he dockets. Therefore, Rule 44 helps him meet this responsibility by imposing a duty on the party challenging the constitutionality of such act to give notice of the
nature of the action to the court clerk in writing immediately upon the filing of the record on appeal. If the question has not been raised at that time, this written notice must be given as soon as it is. (But rarely will a constitutional issue be raised for the first time on appeal.) The clerk then certifies such fact to the Attorney General.

Rule 45. Duties of Clerks

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

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

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

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

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

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

The provisions of this rule are not generally of any great
interest to the parties or their attorneys, as long as the court
procedure continues to function smoothly. Therefore, they
shall be summarily dealt with here.

Briefly, neither the clerk nor his deputies may practice
law. The clerk’s office is always open on weekdays, except for
legal holidays, Saturdays and Sundays. Courts may by local
rule provide that the office of its clerk shall be open for speci-
fied hours on Saturdays or on particular legal holidays other
than the eight national legal holidays enumerated in the Rule.117

Rule 45 (b) directs that a docket be kept listing the chrono-
logical history of each case, along with an index thereto. The
docket sheet of a case bears the number under which the ap-
peal is docketed and the title of the case. Further, a calendar
of cases awaiting oral argument is to be kept. Criminal cases
are to be given preference thereon. Allowance is made for the
keeping of other books and records. Records are kept in great
detail and usually are cross-referenced. Precision is quite im-
portant in the functioning of a clerk’s office.

Notice of every order, judgment and opinion in a proceed-
ing is given to each party thereto by mail. Service is made on
counsel if a party is represented by counsel. Such notice is
usually given by mailing copies of each document to the party
or his attorney.

Rule 45 (d) states that the clerk shall be in custody of all
records and papers filed with the court. No original record or

117 Currently the clerk’s office of the Seventh Circuit is open on Saturdays
from 9 a.m. until 12 noon.
paper may be taken from his custody except with authorization of the court. Among the clerk's duties is that of returning, upon disposition of the case, the records on appeal or review to the court or agency from which they were received. Copies of briefs, appendices and papers are saved for possible future reference.

This rule merely sets out a few minimal standards of performance for a clerk to follow. There are actually many more duties, too numerous to set out here, that must be performed by the staff of the clerk's office. Not the least of these duties, many of which involve varieties of record-keeping, is that of answering procedural questions for parties and attorneys who are unsure of certain points. Clerks are generally not qualified, nor are they allowed, to answer questions pertaining to substantive issues of law. But counsel who are puzzled by procedure should not hesitate to contact the clerk's office. Its personnel are there to be of help, if possible.

**Rule 46. Attorneys**

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

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

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

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

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118 Circuit Rule 5(c) of the Seventh Circuit provides that the original record on appeal may be withdrawn by counsel for use in preparing the appendix, briefs and petition for rehearing. It must be returned no later than the date of filing of the particular document for use in the preparation of which it was withdrawn.
An applicant shall upon admission pay to the clerk the fee prescribed by rule or order of the court.

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

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

An attorney, by custom, may perform many functions in the court of appeals without being a member of the bar of that court. He may cause an appeal to be docketed, file his appearance, file motions and answers thereto and even file an appendix and briefs. But, before he may orally argue an appeal he must be admitted to the bar of the court. The basic requirement is that he be a lawyer in good standing. He must be admitted to practice before the highest court of some state. This comes automatically with the license to practice law in most states. Although the rule states that the applicant may be admitted before the Supreme Court of the United States, any other court of appeals or any United States district court, he need not be.

An applicant must have one sponsor who is willing to move his admission and vouch for the truthfulness of the statements made in his application form. This sponsor must himself be a member of the bar of the particular court of appeals before he moves the admission of his applicant. A number of circuits previously required that application for admission be made only by oral motion of a sponsor in open court. Rule 46(a) initiates a new practice by allowing two methods of application. By the first method, the applicant and sponsor must personally appear before the court on a day it is normally in session. A short application form must be filled out. The sponsor and applicant are called to the rostrum together, and the sponsor
orally moves the admission of the applicant. Such applicant, together with others so admitted on the same day, is then sworn by the clerk in open court. Before departing he must sign the “Roll of Attorneys” and pay the fee prescribed by rule or order of the court. He may, if he so desires, receive a certificate evidencing his admission. The basic benefit of this procedure is that it permits the court to see who is being admitted to practice before it, and the applicant also gains some familiarity with the court and its procedures. By the newly originated second method, a somewhat longer application form, along with a separate form of sponsor’s motion, will be sent to an applicant upon request. These forms are then filled out, duly notarized, and returned to the clerk with the admission fee (which is the same whether the attorney is admitted in person or in absentia). The application form itself contains the oath or affirmation and must be signed by the applicant. Therefore, he need not appear to take such oath in open court. If the application is granted, a notice thereof is sent to the new member of the bar. Apparently, the signing of the roll book is waived. The advantage of this procedure is that the sponsor is not inconvenienced by having to travel to the court of appeals. The applicant, if he is to orally argue a case, will have to appear personally anyway. Many out-of-town counsel are personally admitted to practice on the very morning of the oral argument of their appeals.

Paragraphs (b) and (c) of Rule 46 deal with suspension, disbarment or discipline of an attorney who is a member of the bar of a court of appeal.110 If it is shown that any member of the bar has been disbarred or suspended by any other court, or has been guilty of any unbecoming conduct, he will be subject to similar action by the court of appeals. Such attorney will be given an opportunity to show cause why he should not be disbarred, suspended or disciplined. Note that Rule 46(c) provides that an attorney may be subject to disciplinary action “for failure to comply with these rules.”

Rule 47. Rules by Courts of Appeals

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

110 In the author’s nearly eight years of association with the Court of Appeals for the Seventh Circuit, he has not known any attorney to be the subject of such proceeding in that court.
a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.

This rule continues the authority previously vested in the individual courts of appeals by section 2701 of the Judiciary Act\(^{120}\) to make rules not inconsistent with the rules promulgated by the Supreme Court. The Administrative Office of the United States Courts must be notified of any local rules adopted by the respective courts of appeals. Each such court has availed itself of this rule by formulating a body of "circuit rules." The circuit rules do not in any way alter the basic rights of the parties as set forth in the Federal Rules of Appellate Procedure.

Rule 48. Title

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

The ever increasing importance of the entire federal court system in our national life is evident. Thus, practice in those courts has become national, not local. The Federal Rules of Appellate Procedure, to meet the needs of the eleven courts of appeals, have standardized the rules of federal appellate practice. As a result, attorneys whose experience has been confined to a single circuit may find much in the Federal Rules of Appellate Procedure that is unfamiliar. But counsel who previously handled appeals in a number of circuits will find only a few innovations and little that is absolutely novel in these new rules. As time goes on and experience in their usage grows, the Federal Rules of Appellate Procedure should refine procedural practice greatly and offer help, not hindrance, to attorneys involved in the federal appellate practice.

APPENDIX

FORM 1. NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

United States District Court for the ............... District of ........................................ File Number ............... Notice of Appeal

A. B., Plaintiff

v.

C. D., Defendant

Notice is hereby given that C. D., defendant above named, hereby appeals to the United States Court of Appeals for the

FORM 2. NOTICE OF APPEAL TO A COURT OF APPEALS
FROM A DECISION OF THE TAX COURT

Tax Court of the United States
Washington, D.C.
Docket No. .............

A. B., Petitioner,
v.
Commissioner of Internal Revenue, Respondent

Notice of Appeal

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

(S) ................................
(Address)
Counsel for A. B.

FORM 3. PETITION FOR REVIEW OF ORDER OF AN
AGENCY, BOARD, COMMISSION OR OFFICER

United States Court of Appeals for the ............. Circuit.

Petition for Review

A. B., Petitioner,
v.
XYZ Commission, Respondent

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

................................................
Attorney for Petitioner:
Address:
FORM 4. AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

United States District Court for the ............. District of .........................

No. ..................

United States of America

v.

A. B.

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

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

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

1. Are you presently employed?
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment or in the form of rent payments, interest, dividends, or other source?
   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?
   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
   a. If the answer is yes, describe the property and state its approximate value.
5. List the persons who are dependent upon you for support and state your relationship to those persons.

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

Subscribed and sworn to before me this ... day of ....
........ 19 ....

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

District Judge
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