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AN EXAMINATION OF THE FEDERAL RULES
OF APPELLATE PROCEDURE

HARVEY L. ZUCKMAN*

INTRODUCTION

To any lawyer who has had to engage in appellate practice in more than one United States Court of Appeals the new Federal Rules of Appellate Procedure ("F.R.A.P."), which went into effect July 1, 1968,1 should seem long overdue in coming.2 The individual rules of procedure of the eleven federal circuits varied widely in great matters as well as small, and often proved to be traps to unwary counsel. For instance, four different methods of reproducing the district court record or parts thereof for purposes of appeal were in vogue among the circuits until July 1, 1968.3 And, while ten of the circuits required only that the paper on which briefs and appendices were printed be opaque and unglazed, one circuit specified that the paper had to be India eggshell.4

Moreover, the old rules could cause difficulties for counsel because of incompleteness. Reference had to be made to Rules 73 through 76 of the Federal Rules of Civil Procedure or Rules 37 through 39 of the Federal Rules of Criminal Procedure or, if a tax case was involved, to the Internal Revenue Code before counsel could assure himself of all of the essential procedures to be followed. The new Federal Rules represent a definite step forward because, except for the existence of local rules (most of which are minor)5 in each of the circuits, they are essentially complete in their coverage of appel-

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2. The new rules came too late to be of much benefit to the author. During my tenure as an attorney in the Civil Division of the United States Department of Justice, I contended with the rules of nine of the circuits. Much time had to be taken from pressing matters of substance in order to learn and relearn the varying rules, a number of which were anachronistic or even unreasonable.


4. Former 10th Cir. R. 18(a) (1968). This special paper has a faint orange tint and is very restful to the eyes. But by another provision of the same rule (that multilith briefs be single spaced) much of the advantage to the eyes was lost.

5. A few of the local rules are of considerable importance to proper procedure in the individual circuits and represent local quirks which tend to destroy the aim of the new federal rules to promote uniformity of procedure among the circuits. See, e.g., 2d Cir. R. 28; 8th Cir. R. 9(a); 10th Cir. R. 9. These and other local quirks will be noted in the text and footnotes infra.
late procedure. Nonetheless, because local circuit rules do exist, they must also be referred to.

New convenience and protection for counsel are not the only reasons for greeting the Federal Rules of Appellate Procedure with pleasure. Besides possessing the virtues of greater uniformity and completeness, they represent a reasonably successful effort on the part of the drafters to choose the best procedures developed by the individual circuits over the years. While my predilections regarding appellate procedure cause me to disagree with the Advisory Committee's choices on occasion, I believe that both bench and bar will derive great benefit from the operation of the new rules as a whole.

My plan here is to note first major changes in appellate procedure wrought by the new federal rules generally and then to comment in some detail upon what I consider to be the most important rules. Where appropriate, I shall note changes in procedure in the individual circuits, particularly the Seventh, Eighth and Tenth Circuits.

**IMPORTANT GENERAL CHANGES IN APPELLATE PROCEDURE**

Perhaps the single most significant (and controversial) change in federal appellate procedure is the imposition of the joint appendix procedure for the reproduction of the portions of the record made in the trial court or before the administrative agency relevant to the appeal, review or agency enforcement proceeding. Until July 1, 1968, the joint appendix procedure was standard in only one circuit, the District of Columbia Circuit. Under the procedure of Rule 30 of the new rules, the appellant has the responsibility of filing an appendix containing the reproduced portions of the record desired by both sides within 40 days of the date on which the record is filed in the court of appeals. The contents of the joint appendix are determined either by stipulation between the parties or by designation and counter-designation. Under the rule the appellant has 10 days from

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8. Former D.C. Cir. R. 16 (1968). A majority of the circuits had utilized the fragmented appendix procedure by which the appellant reproduced and filed with his brief those portions of the record necessary to an understanding of his brief. The appellee, if he found it necessary, reproduced and filed with his brief additional portions of the record. On occasion, the appellant might reproduce further portions of the record in conjunction with his reply brief. See former 1st Cir. R. 23 (1); 2d Cir. R. 15(b); 3d Cir. R. 24(2) (5); 4th Cir. R. 10; 6th Cir. R. 16(2); 7th Cir. R. 16(a)(c); 8th Cir. R. 10, 11. While the Eighth Circuit rules spoke in terms of printing and filing the "record," the Eighth Circuit, in essence, utilized the fragmented appendix approach.
9. The *record* must be distinguished from the joint appendix. The record consists of 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. Fed. R. App. P. 10(a). The joint appendix is only the reproduction of the relevant portions of the record. See Fed. R. App. P. 30(a).
the date on which the record is filed to serve on the appellee a designation of the parts of the record which he intends to include in the appendix, together with a statement of the issues which he intends to present for review. The appellee then has ten days from the date of receipt of the appellant's designation and statement to designate those portions of the record he wishes reproduced.

While it is, of course, desirable that all portions of the record which are relevant to the appeal be included within the joint appendix, the failure to include relevant material is not a jurisdictional defect and does not prevent the parties or the court from relying directly on the record itself.

Although under the basic scheme of Rule 30, the appellant is required to file the joint appendix either before or at the same time as he files his brief, subsection (c) of the rule permits the appellant to elect or the court to order the filing of the appendix up to 21 days after service of the appellee's brief. The appellant must file and serve written notice of such election within 10 days after the date on which the record is filed. If deferred filing is elected or ordered by the court, the designations are also deferred and are filed at the time the parties file their respective briefs. The appellant's statement of issues is unnecessary under this procedure.

One procedure in lieu of the joint appendix is countenanced by the new rules. Subsection (f) of Rule 30 permits a court of appeals, by local rule or special order, to dispense with the appendix and to hear appeals on the original record and such copies of the record as the court requires. As the Advisory Committee notes, this permissive procedure was designed to allow the Ninth Circuit to continue to hear appeals on the original record and two photo copies thereof.

10. FED. R. APP. P. 30(b). The statement of issues serves to provide an orientation for the appellee permitting him to make a more intelligent count designation, if necessary.
11. FED. R. APP. P. 30(a). But see 1ST Ci. R. 3(c).
12. This is the necessary result of the operation of FED. R. APP. P. 30(a) and FED. R. APP. P. 31(a) requiring the filing of the appendix and the appellant's brief within 40 days after the date on which the record is filed.
13. Obviously, under the deferred appendix method, the page references in the briefs must be to the record itself, and FED. R. APP. P. 30(c) requires that the original pagination of the record be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where that page begins. Alternatively, a party may file and serve typewritten or page proof copies of his brief within the time required by FED. R. APP. P. 31(a), with page references to the record. Then, within 14 days after the appendix is filed he may file and serve the finished brief, substituting or adding references to the pages of the joint appendix.
14. Former 9th Cir. R. 10 (1967), as amended, June 2, 1967. By 9th Ci. R. 4, the Ninth Circuit has authorized the continuance of this procedure. Under its former rules, the Eighth Circuit permitted appeals in criminal cases and in habeas corpus and 28 U.S.C. § 2255 (1964) proceedings to be heard on the original record. 8TH Ci. R. 8(i), (j). This practice is continued by 8TH Ci. R. 8, and is extended to cover all appeals involving social security decisions of the Secretary of Health, Education and Welfare. The Tenth Circuit permitted appeals in all cases to be heard on the original record and four copies thereof whenever the record was 200 pages or less.
Rule 30, as noted earlier, is quite controversial. While the joint appendix has the virtues of eliminating fragmented reproduction of the record between two or more appendices and encouraging less partisanship in the selection of material for reproduction, a number of critics have voiced doubt that these advantages outweigh the disadvantages of cumbersomeness of procedure and costs of reproduction in excess of those incurred under the fragmented appendix system. Because my own experience indicated that the fragmented appendix system worked satisfactorily in all but the most complex cases involving vast records (which were few and far between) and because of my strong dislike for any procedure which may increase the cost of litigation, I side with the critics of the joint appendix approach. The choice has been made, however, and the bar must live with it unless and until the Advisory Committee on Appellate Rules and the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States can be persuaded to change it.

Rule 30 may cause an increase in litigation expense, but another major change wrought by the new rules should have the opposite tendency. With but few exceptions under the old individual rules, the reproduction of briefs and appendices was limited to standard typographic printing and the offset duplicating process (multilithography). New Rule 32 permits the production of briefs and joint

Former 10th Cir. R. 17(a) (1968). Under the new local rule of the Tenth Circuit this procedure is extended to cover records of 300 pages or less while the number of copies that must be filed has been reduced to three. 10th Cir. R. 12(a). Further, under this local rule, the appellant is required to prepare his own index to the record and insert it immediately following the front cover page. The Sixth Circuit now permits appeals in all cases involving records of 100 pages or less to be heard on the original and three copies of the record. 6th Cir. R. 10(a).

The Ninth Circuit procedure has resulted in substantial economies for litigants. During my service with the Department of Justice, the clerk of the Ninth Circuit had an arrangement with a San Francisco legal printer to Xerox original records at a cost to the appellant of $ .10 per page. On the other hand, the cost to a litigant of printing the record in the Fifth Circuit exceeded $1.00 per page. Thus, the expense born by the appellant with a 1000 page record would have been $200 in the Ninth Circuit (for two copies) and substantially more than $1000 in the Fifth Circuit.


17. Concededly, the use of the deferred joint appendix should aid in cutting the cost of reproduction because selection of material for reproduction is bound to be more discriminating after the briefs are filed than before. But counsel for the appellant must remember to elect the deferred procedure within 10 days after the record is filed. If he fails to do so and the court does not order deferral, the joint appendix will have to be filed with the appellant's brief.

18. E.g., 5th Cir. R. 28; 9th Cir. R. 10; 10th Cir. R. 17(a).
appendices by standard typography or "by any duplicating or copy-
ing process (except carbon copy) which produces a clear black image
on white paper." Thus, the mimeograph process and the photocopy
processes such as xerography may now be utilized by cost conscious
counsel.

While at least one outstanding appellate practitioner makes a
case for standard typographic printing, 19 I agree with Professor Cohn
that "printing costs have long been one of the great and largely
unnecessary costs of litigation", 20 I hope that the new rule will
hasten the demise of typographic printing as a factor in taking
appeals. Too often in the past printing costs have had the effect of
closing the doors of the appellate courts to the citizen with limited
means. 21

Another major change in appellate procedure, and one that prac-
titioners are likely to overlook, is the requirement of Rule 25(b)
that whenever a party files any papers which he himself must serve,
he must serve copies thereof on all other parties to the appeal or
agency review without regard to adversity. Thus, co-appellants
represented by separate counsel must serve each other even though
their interests are synonymous. The same scheme of service upon
all parties is carried forward in Rules 30 (a), 31 (b) and 40 (b) which
govern respectively the service of the joint appendix, the briefs of
the parties and petitions for rehearing. Under this new practice,
counsel are well advised to serve every party remotely involved in
the appeal. To mangle a venerable Army motto, "when in doubt,
serve."

Finally, a departure of potential significance is the provision for
prehearing conferences in appeals from judgments or orders of the
district courts. Rule 33, which authorizes such conferences, is de-

erived from subsection (k) of the old uniform rule adopted by the
courts to govern the review or enforcement of orders of adminis-

19. LEVY, HOW TO HANDLE AN APPEAL (1968) 523-26. Mr. Levy points
out that an experienced legal printer can be of great help in preventing
technical errors. He also points out that one cannot ignore the costs of office
overhead when secretaries are employed to type master mimeograph stencils
or multilith plates, the cost of additional pages necessitated by the fact that
fewer words may be included on the multilith or mimeograph page than on
the printed page, and the difficulty of recovering hidden reproduction costs
should your client prevail. Mr. Levy also states that for appearance's sake,
nothing surpasses the printed page.

20. Cohn, THE PROPOSED FEDERAL RULES OF APPELLATE PROCEDURE, 4 GEO.
L.J. 431, 464 (1966). While an assistant section chief in the appellate section
of the Civil Division of the Department of Justice, Professor Cohn was largely
instrumental in convincing several circuits to permit the Government to file
multilith briefs rather than the traditional printed ones. This court of appeals
experience with multilith briefs undoubtedly had some influence on the
drafters of the new rules.

21. In conformity with the Federal Rules of Appellate Procedure the
Supreme Court changed its rule requiring standard typographic printing in
1967 and now permits any process which will produce a clear black image on
white paper except carbon copying. SUP. CT. R. 39(4).
trative agencies. 22 While it is difficult to see what benefit a prehearing conference would have in eliminating, simplifying or clarifying issues in run of the mill appeals, the conference has apparently been of benefit in complex appellate proceedings involving complex administrative agency actions, and it might be of benefit in equally complex civil antitrust actions. In addition, the conference could be utilized in the "big civil case" to gain agreement among the parties as to the contents of the joint appendix where otherwise such agreement might not be obtained and excessive reproduction costs might be incurred.

The above represent the few major departures from generally accepted appellate procedures embodied in the new rules.

Practitioners in the various circuits will have to be on their guard for other changes of a less sweeping nature. I will now consider the general scheme of the new rules and comment upon certain of the rules and changes they have worked.

GENERAL COMMENTARY ON THE FEDERAL RULES
OF APPELLATE PROCEDURE

A. The General Scheme of the New Rules.

The Federal Rules of Appellate Procedure are divided into seven titles. Under Title I, the scope of the rules is delimited 23 and provision is made for the courts of appeal, in individual cases, to suspend the requirements or provisions of any rule except those of F.R. A.P. 26(b) which deals with the time for filing notices of appeal or petitions for review. 24 Title II concerns itself with rules peculiar to appeals from judgments and orders of the district courts. Titles III and IV include rules peculiar to appeals from the decision of the Tax Court and to the review and enforcement of administrative orders respectively. Titles V and VI are concerned with the procedures for the seeking of extraordinary writs and the writ of habeas corpus. And Title VII includes rules common to all proceedings in the courts of appeals. In addition, there is an Appendix of Forms which includes suggested notices of appeal and petition for review forms. Since the proper filing of a notice of appeal or petition for review is a jurisdictional matter, 25 it is advisable for counsel to familiarize themselves with these forms and to follow them.

Because appeals from the orders and judgments of the district

court are the most common, I will devote the bulk of this article to Titles II and VII. Following discussion of these titles, I will refer briefly to Titles III and IV.

B. Major Rules Relating Solely to Appeals From Judgments and Orders of the District Courts.

An appeal is commenced and jurisdiction is conferred upon the courts of appeals by the timely filing of a notice of appeal. Rule 3 recognizes the jurisdictional nature of the timely filing of such notice and lists the contents of a proper notice of appeal. A notice of appeal must include the specification of the party or parties taking the appeal, the designation of the judgment or order appealed from and the designation of the court to which the appeal is to be taken. Rule 4(a) establishes a 30 day period after the entry of the judgment or order in a civil case within which a private litigant may file his notice of appeal. If a timely notice of appeal is filed by any party the same rule provides, in a significant change of procedure, a 14 day period after such filing for the filing of notices of cross appeal by the other parties. Previously, each party had to file its notice of appeal prior to the expiration of the 30 day period. This requirement worked a hardship on the party who wished to take an appeal only if his adversary did. If the adversary filed his notice on the thirtieth day, the other party's right to appeal would likely be cut off.

In order to mitigate the stringency of the jurisdictional requirement of timely filing of the notice of appeal, Rule 4(a) provides that upon a showing of any excusable neglect, the district court may extend the time for filing the notice for a period not to exceed 30 days from the expiration of the period ordinarily prescribed. The extension may be granted before or after the expiration of the period originally prescribed.

Rule 4(b) governs the timely filing of notices of appeal in criminal cases and is roughly parallel to Rule 4(a) in its provisions. The important point to remember about a notice of appeal in a criminal case in the federal courts is that it must be filed within 10 days after the entry of judgment or within 10 days after the entry of an order denying a timely motion in arrest of judgment or for a new trial.

26. The United States is given 60 days by this rule to file its notices of appeal.

27. Actually, this change of procedure occurred when Rule 73(a) of the Federal Rules of Civil Procedure was amended in 1966. Rule 4(a) of the Federal Rules of Appellate Procedure is taken without substantial change from Rule 73(a) which is abrogated by section 4 of the Supreme Court order of Dec. 4, 1967, 389 U.S. 1065-66 (1967).

28. Prior to the 1966 amendment to Rule 73(a), of the Federal Rules of Civil Procedure the filing period could only be extended by a showing of excusable neglect in failing to learn of the entry of the judgment or order from which the appeal is desired. No other excusable neglect could be relied upon.

29. F.R. Crim. P. 34 requires that a motion in arrest of judgment or for a
Once the appellate process is commenced by the simple but vital step of filing a timely notice of appeal, the record on appeal must be compiled. Rule 10(a)\textsuperscript{30} states that the record shall be composed of the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries. While the clerk of the district court has the primary responsibility for physically compiling and paginating the record and transmitting it to the court of appeals, counsel for the appellant has the responsibility of seeing to it that the transcript of proceedings is prepared by the court reporter and for indicating to the clerk the parts of the record he wishes to have transmitted to the appellate court.

Rule 10(b) requires the appellant to order from the court reporter the transcript of proceedings or relevant portions thereof within 10 days after the filing of his notice of appeal. If less than the entire proceeding is to be transcribed, the appellant is required to file and serve upon the appellee a description of the parts of the transcript which he intends to include in the record together with a statement of the issues he intends to include in the record together with a statement of the issues he intends to present on the appeal. The appellee is then given 10 days to file and serve a designation of any additional portions of the proceedings to be transcribed and included in the record. The appellant must then order such additional portions to be transcribed, and, if he fails to do so, the appellee may order them directly or may apply to the district court for an order compelling the appellant to order them.

Subsection (c) of Rule 10 prescribes an alternative procedure when a transcript of the proceedings is unavailable. Subsection (d) permits the substitution of an agreed statement of the case in lieu of the record on appeal as defined in subsection (a). If such substitution is made, the court of appeals will hear the appeal on the agreed statement rather than on the original papers. Subsection (e) provides for the correction or supplementation of the record.

Once the record on appeal is compiled it is to be transmitted to the court of appeals. Rule 11(a) requires that the transmission be made within 40 days after the filing of the notice of appeal unless the district court shortens or extends the time.\textsuperscript{31} This rule is a departure from now abrogated Rule 73(g), which required that the record on appeal be filed with the court of appeals within 40 days from the date of filing the notice of appeal. This is a beneficial change since it eliminates the factor of mail delay in the timely filing of the record.


\textsuperscript{31} The district court's authority to extend or shorten the period for transmittal is prescribed by Fed. R. App. P. 11(d), discussed infra, p. 572.
and the docketing of the appeal and permits the clerk of the district court to determine with certainty when he must forward the record in order to effect timely filing. Under the old system, if there was mail delay or bad judgment on the part of the clerk, the appellant had to seek special leave in the court of appeals to file the record and docket the appeal out of time.

Rule 11(d) gives the district court power, for cause shown, to extend the time for transmitting the record to a date not more than 90 days from the date of the filing of the first notice of appeal. If the district court refuses to grant the extension, the court of appeals may, on motion for cause shown, grant the extension or permit a late filing of the record. While it is thus clear that the time for filing the record is not a jurisdictional requisite, nevertheless counsel should attempt to aid the clerk of the district court in expediting transmittal of the record and to keep himself informed as to the progress of the completion of the record. It is not unheard of for a court of appeals to refuse to permit a late filing and to order an appeal dismissed because of tardiness.

Rule 11(e) recognizes the Eighth Circuit's practice of requiring the transmittal to the court of appeals of a certified copy of the docket entries in lieu of the record on appeal, with the record retained in the office of the clerk of the district. Rule 11(e) authorizes the courts of appeal to provide for such alternate procedure by rule or order. However, if any party at any time during pendency of the appeal, requests transmittal of designated portions of the record, such transmittal must be made.

Even if a court of appeals does not adopt the alternative procedure embodied in Rule 11(e), the district court may order retention of the record or parts thereof or the parties may stipulate to such retention, subject to a request of the court of appeals for transmittal.

Rule 11(f) permits the parties, by written stipulation, to designate parts of the record for retention in the district court subject to the order of the court of appeals or the later request of any party to have the retained portions of the record transmitted. From my experience with predecessor Rules 750 and 75e of the Federal Rules of Civil Procedure, I am aware that the clerks of the district courts do not relish the idea of pulling apart the compiled record, and they tend to resist this procedure. Therefore, unless counsel has a very compelling reason for designating "out" portions of the record, the

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32. See Advisory Committee's Note to Rule 11.
33. E.g., Brennan v. United States Gypsum Co., 330 F.2d 729 (10th Cir. 1964); United States v. Tamotsu Fujisaki (9th Cir. 1952); Citizens' Protective League, Inc. v. Clark, 178 F.2d 703 (D.C. Cir. 1949).
34. Former 8th Cir. R. 8(c)(d) (1968). This practice continues under the Eighth Circuit's new local rules. See 8TH CIR. R. 7.
35. FED. R. APP. P. 11(e)-(f).
better part of valor would be to permit the entire record to be transmitted to the appellate court. The only expense incurred by sending up the entire record is the increased postage which, in most instances, will be nominal.

Assuming timely and proper transmittal of the record pursuant to Rule 11, the next step in the appeal is the filing of the record or substitute therefor and the docketing of the appeal.\(^{36}\) Unless an appeal is authorized without prepayment of fees (in forma pauperis appeal), the clerk of the court of appeals may neither docket the appeal nor file the record or papers thereof without the timely payment of the docket fee.\(^{37}\) Rule 12(a) specifies that the docket fee must be paid to the clerk of the court of appeals within the time fixed for transmittal of the record, i.e., normally within 40 days after the filing of the first notice of appeal.\(^{38}\) If it is not paid then the appellee may file a motion under Rule 12(c) to have the appeal dismissed. Such motion must be supported by a certificate of the clerk of the district court showing the date and substance of the judgment or order appealed from, the date on which the notice of appeal was filed, and the expiration date of any extension order, and by proof of service. Unless the appellant pays the docket fee within 14 days of service of the motion for dismissal, he will not even be permitted to respond thereto.\(^{39}\)

Rule 12(a) also specifies that an appeal is to be docketed under the title given to the action in the district court, with the appellant identified as such.\(^{40}\) This requirement should end the confusion of counsel as to whether they should change the caption on papers and briefs filed in the court of appeals when the plaintiff is the appellee.\(^{41}\) Under the new procedure the name of the plaintiff below will remain first in the caption in the court of appeals regardless of the plaintiff's status on appeal.

The one local rule that has any substantial effect on docketing procedures is Rule 9 of the Tenth Circuit. This unique and, I would suggest, unnecessary rule requires the appellant to file and serve a “docketing statement” at the time of docketing which is to contain: (1) a statement of the nature of the proceeding; (2) the

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36. Filing the record means simply that the record has been accepted by the clerk and stamped “filed.” Docketing the appeal involves only the noting of the appeal by the clerk on the court's docket.
37. FED. R. App. P. 12(a)-(b). The docket fee is presently $25.00.
38. See supra, p. 571.
39. Compare former 8th Cir. R. 7(d) (1967).
40. If the district court title does not contain the name of the appellant, his name is to be added to the title. FED. R. App. P. 12(a).
41. Compare former 8th Cir. R. 12(c) (1967) which reflected the Eighth Circuit's practice of docketing appeals with the appellant's name first, with former 4th Cir. R. 9(8) (1967) which reflected the Fourth Circuit's practice of docketing appeals under the title given the action in the district court. FED. R. App. P. 12(a) adopts the practice of the Fourth Circuit and rejects that of the Eighth.
date of the judgment or order sought to be reviewed, the date of the notice of appeal and the date of certain motions made below; (3) a concise statement of the case and relevant facts; (4) the questions presented by the appeal, and (5) a list of cases believed to support the appellant's contentions. In addition, copies of certain documents are to be attached to the statement. By this rule, the clerk is prohibited from docketing the appeal if a proper docketing statement is not submitted. The rule appears unnecessary because everything sought by the court is available in the docket entries or in the appellant's subsequent brief. The rule is designed to ease assignment to various court calendars, but in the process it plays havoc with the essential aim of the new federal rules, i.e., to achieve uniformity of procedure among the circuits. For this reason it must be condemned.

C. Major Rules Relating to Other Types of Appellate Proceedings
   As Well As To Appeals From Judgments and Orders Of the District Courts.

   Thus far, I have commented upon the new federal rules relating solely to appeals from district court orders or judgments. At this point the rules become general and relate as well to appeals from decisions of the tax court, review and enforcement of agency orders and extraordinary writ proceedings. However, I believe a more functional discussion can be achieved by referring to these general rules in the context of an appeal from a district court order or judgment. But bear in mind that the procedures encompassed by the following rules are more broadly applicable than the immediately preceding ones.

   At this point it is assumed that the appeal is in all respects properly before the court of appeals and the period within which to file the appellant's brief has commenced to run. However, as is often the case, counsel for the appellant (or appellee) may decide that he will need more time than the rules allow, as a matter of course, for briefing and preparation of the joint appendix. Therefore, he will, pursuant to Rule 26(b), have to file a motion for an extension of time.

   Rule 25 governs the filing and service of all papers in the court of appeals. Subsection (a) states that all papers except briefs and appendices are timely only if they are received by the clerk within the time prescribed for their filing. To give counsel more time for his preparation, briefs and appendices are considered as filed on the

42. Rule 26(b) states in pertinent part that "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 . . . ."

43. See Advisory Committee Note to Rule 25.
day of mailing if the most expeditious form of mail delivery (normally air mail) is utilized.

Subsection (b) requires that the filing party serve all other parties, whether or not adverse, with copies of the papers filed unless the rules specifically call for service to be made by the clerk. Service is to be made on counsel whenever another party is represented. As we noted previously, the requirement of service on all parties is new, and it changes the practice, for example, in the Seventh, Eighth, and Tenth Circuits, that only adverse parties need be served.

In conformity with prior practice, papers presented for filing must contain either an acknowledgment of service or proof of service in the form of a certificate. Service may, as in the past, be effected personally or by mail.

Under Rule 27(a), motions must state with particularity the grounds on which they are based and, of course, the order or relief sought. If the motion is for a procedural order, e.g., an extension of time, it may, under Rule 27(b), be acted upon ex parte. But any party adversely effected by the ex parte action may request reconsideration, vacation or modification of the action. If the motion is substantive in nature, e.g., a motion to dismiss the appeal, a response in opposition may be filed within 7 days after service of the motion unless time for response is shortened or extended by court order. Motions for injunctions or stays, however, may be acted upon by the court of appeals after such notice as is reasonable under the circumstances. Rule 27(c) makes it clear that unless a court of appeals provides otherwise, a single judge may entertain and act upon motions which do not determine the appellate proceeding. While Rule 27(c) is silent as to the authority of the clerks of the courts of appeals to enter consented to, unopposed or pro forma orders, the Eighth Circuit by its new local Rule 2(d) allows the clerk to enter such orders in all civil cases and in those criminal cases where final submission of the appeal will not be delayed. The Tenth Circuit by its local Rule 13 permits the clerk to act upon motions or applications for extensions of time. Should any question be raised concerning the Eighth and Tenth Circuit's authority in this regard, it is hoped that the Federal Rules of Appellate Procedure will be amended to

44. See former 7th Cir. R. 10(c) (1967).
45. See former 8th Cir. R. 18(a) (1967).
46. See former 10th Cir. R. 22(a) (1967).
47. FED. R. APP. P. 25(a).
48. FED. R. APP. P. 25(c).
49. FED. R. APP. P. 27(a).
50. In its Note to FED. R. APP. P. 27, the Advisory Committee states that motions for stays, and injunctions are of such nature that it is undesirable "to afford an adversary an automatic delay of at least 7 days."
51. This was Eighth Circuit practice under its old rules. Former 8th Cir. R. 4(d) (1967). Compare 4th Cir. R.5(a).
make explicit the authority for this practice.\textsuperscript{52} It is obvious that much precious time can be saved the judges of the courts of appeals by this procedure without prejudicing litigants' substantial rights.

Rule 27(d) states that motions and papers relating thereto may be typewritten and that the original and three copies of all papers be filed with the court unless the court requires the filing of additional copies.

Having complied with Rules 25, 26(b) and 27, counsel may ordinarily expect his motion for an extension of time to be granted. But eventually he will have to file his brief and, if he represents the appellant, the joint appendix as well. The rules governing the contents, form and method of filing and serving these papers are quite explicit. Rule 28(a) covers the contents of the appellant's brief and requires, in the following order: (1) a table of contents and a table of cases (alphabetically arranged), statutes and other authorities; (2) a statement of the issues presented for review; (3) a statement of the case, including a statement of the relevant facts; (4) the argument; and (5) a short conclusion stating the relief sought. In addition, in the Second and Eighth Circuits, the appellant is also required to add a preliminary statement including the name of the judge who rendered the decision appealed from and the citation of the decision or supporting opinion if it is reported.\textsuperscript{53} The appellee's brief must conform in order and content to that of the appellant's brief, except that statements of the issues and of the case and facts may be eliminated.\textsuperscript{54}

Rules 28(a) and (b) will have the effect of streamlining the briefs and eliminating certain cumbersome features of doubtful value required under the old rules. Eliminated from the Seventh Circuit brief is the "summary of argument" and the "propositions of law relied upon" together with a list of principal authorities supporting the propositions relied upon.\textsuperscript{55} These features often added several pages to the length of the brief. Eliminated from the Eighth Circuit brief is the statement of the points to be argued together with a complete list of all cases and statutes thereunder.\textsuperscript{56}

Under Rule 28(d), counsel are expected to avoid constant reference to the parties as "appellant" and "appellee." Rather, for pur-

\textsuperscript{52} \textit{Fed. R. App. P.} 47 does authorize each court of appeals, by vote of a majority of the circuit judges in regular active service, to "make and amend rules governing its practice not inconsistent with these rules." The question here, of course, is whether the Eighth Circuit's local rule is inconsistent with \textit{Fed. R. App. P.} 27 which on its face appears to prescribe a complete procedure for the disposition of motions and which confers no authority on the clerk to enter orders.

\textsuperscript{53} 2D CIR. R. 28; 8TH CIR. R. 9(a). By 8TH CIR. R. 9(b), the Eighth Circuit disapproves of the practice of counsel of incorporating in one brief by reference the contents of another brief filed elsewhere. If such reference is made, the Eighth Circuit will disregard it.

\textsuperscript{54} \textit{Fed. R. App. P.} 28(b).

\textsuperscript{55} See former 7th Cir. R. 17(a) (1967).

\textsuperscript{56} See former 8th Cir. R. 11(b) (1967).
poses of clarity, the rule encourages counsel to refer to the parties by their actual names or in descriptive terms. Page references under Rule 28(e) are normally to be to the page or pages in the joint appendix wherein the relevant portions of the record are reproduced. But if the joint appendix is deferred, then the references in the brief will, of necessity, be to the pages of the original record unless a revised brief is subsequently filed.\(^{57}\) Rule 28(g) governs the length of the principal and reply briefs. Unless leave of court is obtained to file longer briefs, no principal brief shall exceed 50 printed pages or 70 duplicated pages. Reply briefs are limited to 25 printed pages or 35 duplicated pages.\(^{58}\) Apparently the drafters believe that a brief should be what its name implies. It is my experience that almost any legal problem can be reduced to 50 or less printed pages with a little effort on the part of counsel. This effort will often result in a welcome by-product of greater clarity of presentation.

The joint appendix, under Rule 30(d) must include, in the following order: (1) an index to the parts of the record reproduced therein; (2) the relevant docket entries; and (3) the other relevant portions of the record set out in chronological order, including the judgment, order or decision appealed from.

Rule 32(a) governs the form of briefs and appendices. As we noted previously,\(^ {59}\) according to this rule briefs and appendices may be produced by standard typographic printing or by any duplicating or copying process other than carbon copying which produces a clear black image on white paper. The rule also contains specifications for type size,\(^ {60}\) type of paper used,\(^ {61}\) page size,\(^ {62}\) page coverage,\(^ {63}\) cover color\(^ {64}\) and cover content.\(^ {65}\)

Unless, as in our hypothetical case, an extension of time is granted,

\(^{57}\) See supra, p. 568 and Fed. R. App. P. 30(c).

\(^{58}\) Under the former Seventh, Eighth and Tenth Circuit rules, the page limitations were, without special leave, respectively 75 pages (principal) and 20 pages (reply); 85 pages (appellant's principal), 80 pages (appellee's principal) and 15 pages (reply); 50 pages (principal) and 15 pages (reply). 7TH CiR. R. 17(d) (e); 8TH CiR. R. 11(c); 10TH CiR. R. 16(g).

\(^{59}\) See supra, p. 568.

\(^{60}\) At least 11 point type.

\(^{61}\) Opaque, unglazed paper.

\(^{62}\) 6% x 9% inches for the standard typographic printed page; 8% x 11 inches for the reproduced or copied page.

\(^{63}\) 4% x 7% inches for the standard typographic printed page; 6% x 9% inches (with double spacing) for the reproduced or copied page.

\(^{64}\) Blue for the appellant's brief; red for the appellee's brief; green for an intervenor or amicus brief; and gray for a reply brief. If the joint appendix is separately reproduced, its cover is to be white. The purpose of a uniform system of cover coloration is obvious: ease of identification, particularly during the course of oral argument.

\(^{65}\) The cover of briefs and appendices shall contain [in the order listed from top of the page to bottom]: "(1) the name of the court and the number of the case; (2) the title of the case...; (3) the nature of the proceeding... and the name of the court, agency or board below; (4) the title of the document...; and (5) the names and addresses of counsel representing the party on whose behalf the document is filed."
Rule 31(a) requires the appellant to file and serve his brief within 40 days after the date on which the record is filed. By Rule 30(a), the same length of time is granted the appellant to file and serve the joint appendix. The appellee is given 30 days after the date of service of the appellant's brief to file and serve his brief. The appellant then has 14 days after service of the appellee's brief within which to file a reply brief, but this provision is qualified by the requirement that except for good cause shown, reply briefs must be filed at least 3 days before the date on which oral argument is calendared.

The consequences of the failure to abide by the time limitations imposed for the filing of the main briefs may be harsh. Under Rule 31(c), if the appellant is out of time in filing his main brief, the court, on motion of the appellee, may dismiss the appeal. If it is the appellee who is in default, he will not be heard at oral argument except by special leave of the court.

By Rule 31(b), each party is required to file 25 copies of its brief and to serve two copies thereof on counsel for each party separately represented. By Rule 30(a), the appellant must file 10 copies of the appendix and serve one copy on counsel for each party separately represented.

Once the parties have filed and served their respective briefs and the appellant has filed and served the joint appendix, no further formal action need be taken by counsel concerning the appeal until oral argument unless the court directs the parties to appear for a pre-hearing conference pursuant to Rule 33. Under Rule 34(a) it is the clerk's responsibility to advise all parties of the time and place at which the oral argument will be heard. At the appointed time and place, counsel for each side will normally have up to 30 minutes to make his oral presentation, but the court is the ultimate arbiter as to time and may terminate the argument when it is satisfied that it understands the position of the parties. By agreement of the

66. In addition to the possibility of dismissal, the Ninth Circuit always penalizes an appellant's late filing by refusing to accept his brief without a court order and by considering the late filing to constitute a waiver of oral argument. 9th Cir. local R.13(a).

67. Practitioners in the Eighth and Tenth Circuits should take special note of the requirements of Rule 31(b) because under the former rules of these courts, counsel had only to file 20 copies of their respective briefs and to serve one copy thereof upon opposing counsel. 8th Cir. R. 11(a) (1967); 10th Cir. R. 16(a) (b) (c) (1967). If counsel attempts to file and serve less than the requisite number of briefs, the clerk is not obliged to file the brief, and the consequences attendant on late or non filing of the brief may arise. See FED. R. App. P. 31(c).

68. Though not required by the new rules, counsel, as a matter of courtesy, should acknowledge the clerk's advice and indicate who will appear at the oral argument and which counsel will argue. Also as a matter of courtesy, counsel should report to the clerk's office at least 30 minutes before the court convenes on the day of the argument and "check in" with the clerk.

69. FED. R. App. P. 34(b). 7TH CIR. R. 11 indicates that divided arguments are not favored by the seventh circuit. Not more than one counsel will be permitted to argue on the same side of a case without prior notice to
parties, a case may be submitted on the briefs, but the court always has the authority to direct that the case be argued regardless of the wishes of the parties.\textsuperscript{70}

Following oral argument or submission on the briefs, the court will, of course, enter a judgment. Under Rule 36 the notation by the clerk of the judgment constitutes the entry of the judgment. The clerk is to 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 judgment is not to be entered until final settlement. If a judgment is rendered without an opinion, the clerk is to enter it following instruction from the court. By this rule, the clerk is further required to mail to all parties on the date of entry of the judgment a copy of the opinion or judgment and a notice of the date of entry of the judgment. This is a very salutary rule which should insure that the parties will have exact information as to the date of entry of the judgment and will receive that information within a relatively short time of the clerk's action. This information is of crucial importance to the filing of a timely petition for a rehearing or a petition for certiorari. Under prior rules, some confusion existed as to the date of entry in certain cases.\textsuperscript{71}

The judgment may include provisions for interest, damages to the appellee as a victim of a frivolous appeal and costs of the appeal. These matters are governed by Rules 37, 38 and 39 respectively.

If a party is dissatisfied with the judgment of the court of appeals he may petition for rehearing within 14 days after entry of that judgment. Rule 40(a) requires that the petition state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended. The new rule governing petitions for rehearing does away with the certificate of good faith previously required by the rules of the Eighth Circuit.\textsuperscript{72} The new rule also provides a little welcome relief to over-worked counsel by eliminating the need for the prevailing party to answer a petition for rehearing. Indeed, the prevailing party may not file an answer unless the court requests it.\textsuperscript{73} The form of the petition for rehearing and the requirements of filing and serving the petition are governed by Rule 40(b) and are the same as that for regular briefs. The petition may not exceed 10 pages of standard typographic printing or 15 pages produced by other processes.

the clerk at least seven days before the date of the argument. See also 2d Cir. R. 34(c).
\textsuperscript{70} Fed. R. App. P. 34(f).
\textsuperscript{71} See the Advisory Committee's Note to Rule 36.
\textsuperscript{72} Former 8th Cir. R. 15(a) (1967).
\textsuperscript{73} While most of the courts of appeal encouraged the filing of answers under their former rules, e.g., 7th Cir. R. 25(a) (1967); D.C. Cir. R. 26(b) (1967), the Eighth Circuit's procedure was in conformity with the new federal rule. Former 8th Cir. R. 15(c) (1967).
Pursuant to Rule 41(a), the mandate of the court of appeals will normally issue 21 days after the entry of judgment. The timely filing of a petition for rehearing will, however, stay the mandate until disposition of the petition unless the court decrees otherwise. The issuance of the mandate may also be stayed pending petition to the Supreme Court for a writ of certiorari upon motion of the petitioning party. But while a party has 90 days after the date of entry of the judgment of the court of appeals to file his petition for certiorari, Rule 41(b) limits the stay of mandate to a period not to exceed 30 days unless such period is extended by the court for cause shown. If during the period of the stay the movant files with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the petition for certiorari has been filed, the stay is continued in effect until final disposition of the petition by the Supreme Court. The issuance of the mandate terminates the appellate process for all practical purposes.

D. Miscellaneous Provisions of Title VII.

Rule 26(a) establishes the general method for computing time. First, the day of the act, event or default from which the designated period of time runs is not included in the computation. Thus, the counting begins the following day. The last day of the period is 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 holidays are excluded from the computation. Otherwise, intermediate Saturdays, Sundays and holidays are counted.

To illustrate the operation of the rule, let us suppose that counsel is personally served on the Friday before Labor Day with a motion involving substantial matters on appeal. Rule 27(a) provides

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74. 28 U.S.C. § 2101(c) (1964).
75. "Legal holiday" as defined by the rule includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or Congress. It also includes a day appointed as a holiday by the state wherein the district court which rendered the decision appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals is located. This does not mean that the clerk's office may not be open on Saturdays or certain minor legal holidays for the purpose of receiving and filing papers or transacting other business. Pursuant to Rule 45, the courts of appeal may provide by local rule or order that the clerk's office shall be open on Saturdays and legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day and Christmas Day. And even without a formal rule, the clerk's office may be open on the basis of informal practice. E.g., the Eighth Circuit has not promulgated a local rule regarding this matter and yet the clerk's office is open on primary election day in Missouri.
that he may file a response to the motion within 7 days after service of the motion. Under Rule 26(a), the day of service, Friday is not included. However, since the period of time is not "less than 7 days," the intermediate Saturday, Sunday and Labor Day are counted as part of the period prescribed by Rule 27(a). Since these days are included in the computation, the seventh day falls on the following Friday, and counsel may find himself working over the long Labor Day weekend to meet the deadline. Now suppose the personal service had been effected on Saturday instead of Friday. Saturday is not included in the computation but Sunday and Labor Day are. Since the seventh day now falls on Saturday, the response need not be filed until the following Monday.

Rule 26(c) adds three days to any period prescribed by the rules for actions to be taken following (and as a result of) the service of papers if service is effected by mail. Returning to the hypothetical situation previously posed, suppose service is effected on Friday though counsel actually receives the motion on Saturday. Instead of having to file his response the following Friday (the seventh day), Rule 26(c) permits him to file it on the following Monday (the tenth day). This is a useful rule designed to alleviate to some degree hardships arising from mail delay.

Rule 42 provides for voluntary dismissal of the appeal either in the district court (if the appeal has not been docketed) or in the court of appeals by stipulation of the parties or on motion of the appellant.

Rule 43 provides detailed rules for the substitution of parties on appeal because of death, separation from office of a party sued in his official capacity or any other reason. Subsection (c) of the rule makes clear that in the case of public officers misnomers (i.e., failures to substitute the names of the new officeholders) not affecting the substantial rights of the parties are to be disregarded\(^\text{76}\). In an effort to avoid this misnomer problem in relation to holders of public office, subsection (c) further provides that the holder may be described by an official title rather than by name unless the court of appeals requires otherwise.

Rule 44 places a duty on parties who question the constitutionality of Acts of Congress in the courts of appeals in non-government litigation to give notice of the existence of such question to the court immediately upon the filing of the record or as soon thereafter as

\(^{76}\) While the author was with the Department of Justice, the office of Secretary of Health, Education and Welfare changed hands twice, and because of the volume of litigation involving the Secretary it was often difficult for both counsel and the courts to keep every case up to date with the name of the current Secretary. But this name gap had no effect on the litigation and misnomers were ignored.
the question is raised. Thereafter, the clerk must notify the United States Attorney General of the matter.

Rule 46 governs the admission, suspension, disbarment or other discipline of attorneys. The one change of practice worthy of note here is that it is now possible to be admitted to all courts of appeal on written motion, thereby eliminating the need for the personal appearance in the courtroom of the admittee and the sponsoring members of the bar.

E. Titles III and IV in Brief

Title III of the Federal Rules of Appellate Procedure governs the method of obtaining review of decisions of the Tax Court of the United States. The basic provisions of Title III are contained in Rule 13, and they are essentially the same as those for obtaining review of a district court decision. One major difference is that a dissatisfied party has 90 days after the decision of the Tax Court is entered within which to file his notice of appeal; and the other party then has until 120 days after the decision of the Tax Court is entered to file its cross notice of appeal. The other difference is that Rule 13 provides a safety valve for mail delay. If a notice is received by the clerk after expiration of the last day allowed for filing, the postmark date will be deemed to be the date of delivery. Rule 13, however, does not provide for any extension of time within which to file the notice or cross notice upon a showing of excusable neglect as does Rule 4. Once the notices of appeal are filed, the procedure is essentially the same as that for appeals from orders or judgments of the district courts.

Title IV governs the review and enforcement of administrative orders. Under Rule 15(a), when a respondent or other person aggrieved by an agency order wishes to have the order reviewed, he will file with the clerk of the appropriate court of appeals a timely petition to enjoin, set aside, suspend, modify or otherwise review ("petition for review"). His petition must specify the parties seeking review and the respondent agency as well as the agency order or part thereof which he wishes reviewed.

On the other hand, if the agency is seeking enforcement of its

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77. This provision is qualified by INT. REV. CODE of 1954, § 7502 which requires, inter alia, that the mail be properly addressed and stamped before the safety valve device may be resorted to.

78. The time limits for the filing of petitions for review are set forth in the statutes providing for review of the orders of the various administrative agencies. See, e.g., Federal Trade Commission Act § 5(c), 15 U.S.C. § 45(c) (1964); Securities and Exchange Act, § 25, 15 U.S.C. 78(y) (1964); Federal Communications Act of 1934 § 402(c), 47 U.S.C. § 402(c) (1964). This is one of the very few instances in which reference must be made to other than the federal or local rules for procedural guidance. Counsel are advised to study the statutory provisions relative to the agencies involved in their litigation with care.
order, it will file an application for enforcement with the clerk of the appropriate court of appeals pursuant to Rule 15(b). This application must contain a concise statement of the administrative proceedings, the facts upon which venue in the particular court of appeals is based and the relief sought. Within 20 days after the application is filed, the respondent is to serve on the agency and file with the clerk an answer to the application. If the respondent defaults, judgment will be awarded to the agency for the precise relief prayed.

Service of petitions for review or applications for enforcement is effected by the clerk of the court of appeals mailing a copy thereof to counsel of record of each party or, if a party is not represented by counsel, to the party himself at his last known address. It is the petitioner's responsibility at the time of filing his petition or application to furnish the clerk with sufficient copies thereof to insure service on each respondent. The petitioner, and not the clerk, has the further responsibility of himself serving copies of the petition or application "on all parties who shall have been admitted to participate in the proceedings before the agency other than the [named] respondents." In addition, the petitioner is required to file with the clerk a list of those thus served.

Rule 16 governs the composition of the record on review. Subsection (a) declares that the record is composed of 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. Subsection (b) provides for the correction or supplementation of the record at any time.

Under Rule 17(a), it is the responsibility of the agency to file the record with the clerk of the court of appeals within 40 days after it files its application for enforcement or is served with a copy of a petition for review. However, if the respondent fails to file an answer to an application for enforcement within 20 days of the filing of the application and seeks no extension of time for such filing, the agency is not required to file the record.

Under subsection (b) of Rule 17, the agency may file less than the entire record with the court of appeals if the parties designate selected portions for filing through a stipulation filed with the agency. Alternatively, the agency may elect to file a certified list of all documents, transcripts, exhibits and other material comprising the record

79. Fed. R. App. P. 15(c). Professor Cohn criticizes this wording as being unduly restrictive since notice need not be given to those who have an important interest in the agency proceedings but who are content to file formal comments with the agency without otherwise participating. Professor Cohn would require "a simple notice to be sent to all parties who filed formal comments or appeared at the administrative hearing." Cohn, supra note 3, at 478.
80. This time limitation is superseded in individual cases by relevant statutes providing otherwise.
or a list of designated portions of the record in lieu of the record itself. As a final alternative, the agency and the other parties may stipulate that neither the record nor a certified list be filed. When less than the entire record is filed, the court of appeals or a party may request transmittal of the record or parts thereof from the agency to the court. Such transmittal must be made.

Rule 18 governs the procedure by which a stay of agency action may be obtained pending appeal and requires application to the agency in the first instance, or a showing that such application is not feasible. Rule 19 requires that the agency, within 14 days after the court of appeals files an opinion directing entry of a judgment enforcing the order of the agency in whole or in part, serve upon the respondents, and file with the clerk a proposed judgment in conformity with the opinion. The respondents thereafter have seven days to serve and file their own proposed judgment. The court will then settle the judgment and direct its entry.

Between the transmittal of the record or procedures in lieu thereof and the settling of the court's order, the procedures are those prescribed by Title VII and have been previously discussed in connection with an appeal from an order or judgment of the district court.

CONCLUSION

The new Federal Rules of Appellate Procedure are a welcome addition to the existing Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. While they are far from perfect, they represent a good beginning. With the Advisory Committee, a permanent organization, to oversee the operation of the rules, we may expect to see continuing changes to meet the needs and desires of the appellate bench and bar.

One danger the Advisory Committee must be continually on guard against is the erosion of uniformity among the circuits through the promulgation of diverse local rules affecting basic appellate procedure. We have already had a taste of this, particularly in the Tenth Circuit. If this movement becomes pronounced, the Advisory Committee should reformulate Rule 47 to make clear that the local rules are to be directed to internal administration and not to fundamental procedure to be followed by counsel in perfecting and conducting appeals. Otherwise, what has commenced as a uniform set of rules for proceeding on appeal will become merely one of many sets of rules for counsel to consider in pursuing appeals in the federal courts. We shall then be worse off than before. Hopefully, the efforts of the Advisory Committee to bring order out of confusion will not thus be thwarted.