The District of Columbia Bar

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MEMORANDUM

TO: Board of Governors
Section Chairpersons

FROM: Lynne M. Lester
Manager, Sections Office

DATE: August 7, 1986

SUBJECT: Letter addressed to Daniel M. Gribbon, Chair, D.C. Circuit Advisory Committee on Procedures, recommending revision to U.S. Circuit Court rules.

Pursuant to the Section Guidelines No. 13, Sections a and c, the enclosed public statement is being sent to you by Court Rules Committee, Courts, Lawyers and the Administration of Justice Section

a(iii): "No later than 12:00 noon on the seventh (7th) day before the statement is to be submitted to the legislative or governmental body, the Section will forward (by mail or otherwise) a one-page summary of the comments, (summary forms may be obtained through the Sections Office), the full text of the comments, and the full text of the legislative or governmental proposal to the Manager of Sections. The one-page summary woll be sent to the Chairperson(s) of each Section steering committee and any other D.C. Bar committee that appear to have an interest in the subject matter of the comments. A copy of the full text and the one-page summary will be forwarded to the Executive Director of the Bar, the President and President-Elect of the Bar, the Section's Board of Governors liaison, and the Chairperson and Vice-Chairperson of the Council of Sections. Copies of the full text will be provided upon request through the Sections Office. Reproduction and postage expenses will be incurred by whomever requested the full text (i.e., Section, Bar committee or Board of Governors account). The

Manager for Sections shall help with the distribution, if requested, and shall forward a copy of the one-page summary to each member of the Board of Governors. In addition, the Manager for Sections shall draw up a list of all persons receiving the comment or statement, and he/she shall ascertain that appropriate distribution has been made and will assist in collecting the views of the distributees. If no request is made to the Manager for Sections within the seven-day period by at least three (3) members of the Board of Governors, or by majority vote of any steering committee or committee of the Bar, that the proposed amendment be placed on the agenda of the Board of Governors, the Section may submit its comments to the appropriate federal or state legislative or governmental body at the end of the seven-day period.

c(ii): "The Board of Governors may request, pursuant to sub-section (a)(iv), that the Section comments on proposed court rules change be placed on the Board agenda only if (a) the proposed court rule is so closely and directly related to the administration of justice that a special meeting of the Bar's membership pursuant to Rule VI, Section 2, or a special referendum pursuant to Rule VI, Section 1, should be called or (b) the proposed rule affects the practice of law--generally, the admission of attorneys, their discipline, or the nature of the profession,"

a(v): "Another Section or committee of the Bar may request that the proposed set of comments by a Section be placed on the Board's agenda only if such Section or committee believes that it has greater ot coextensive expertise in or jurisidiction over the subject matter, and only if (a) a short explanation of the basis for this belief and (b) an outline filed with both the Manager for Sections and the commenting Section's chairperson. The short explanation and outline or proposed alternate comments will be forwarded by the Manager for Sections to the Board members."

a(vi): Notice of the request that the statment bne placed on the board's agenda lodged with the Manager for Sections by any Board member may initially be telephobned to the Manager for Sections (who will then inform the commenting Section), but must be supplemented by a writen objection lodged within seven days of the oral objection.,"

c(iii): "If the comments of the Section on a proposed court rules change is placed on the agenda of the Board of Governors, the Board may adopt the comments and the Board's own views, in which case no mandatory disclaimer (see Guideline No. 14) need be placed on the comments. If the Board and the Sections differ on the proposal, each may submit its own views.

Please call me by 5:00 p.m., Thursday, August 14 if you wish to have this matter placed on the Board of Governors' agenda for Tuesday, September 9, 1986

I may be reached at 331-3883.

The District of Columbia Bar

PROPOSED PUBLIC STATEMENT SUMMARY

Date: 7/8/86

Division: 4

Committee: Court Rules Committee

Contact Person: Tom Papson (789-7500)

Type of public statement: Amicus Brief ____ Resolution ____
Letter x Testimony ____
Report/study ____ Other ____

Comments approved by the steering committee: Yes x No ____

Recipient of public statement: U.S. Court of Appeals Advisory Committee

Expedited consideration requested (two-day review period): Yes ____ No x

Standard seven-day review period requested: Yes x No ____

Subject title: Comments on proposed revision to U.S. Circuit Court rules.

Summary (please type-if more space is needed please attach a separate page)

(Comments are enclosed)

Division 4
Courts, Lawyers & the Administration of Justice
Of The District of Columbia Bar

June __, 1986

Daniel M. Gribbon, Esq.
Chairman, District of Columbia Circuit
Advisory Committee on Procedures
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Mr. Gribbon:

On behalf of Division IV of the District of Columbia Bar (the Division on Courts, Lawyers and the Administration of Justice), we are writing to make a recommendation regarding the organization and structure of the local rules of the District of Columbia Circuit, which we understand are being reviewed by your committee and the Court.

The Federal Rules of Appellate Procedure are intended to provide the bar with a uniform set of rules for litigating cases in the federal courts of appeals. Local rules are intended to inform practitioners of any variations or additional requirements which a particular court of appeals has adopted. Ideally, practitioners should be able to consult the Federal Rules to find the answer to a specific question and then check the local rules to see if there are any modifications they need to be aware of.

At the present time, the rules of the D.C. Circuit are not organized in a way that corresponds to the Federal Rules. As a result, it is often necessary for practitioners to leaf through a number of local rules in order to determine whether they are in compliance with these rules or whether they are required to do something that the Federal Rules do not require.

One of the ways that the local rules of the Court could be revised to make them more useful to the bar would be to re-organize them so that each local rule is numbered to correspond to the pertinent rule in the Federal Rules of Appellate Procedure. Such a procedure is presently employed by both the Second Circuit and the Fifth Circuit, and it would be helpful to practitioners in this circuit as well.

For example, the Second Circuit has collected its housekeeping and general administrative rules at the beginning of its local rules and numbered these rules as Rule 0.__, e.g., Rule 0.11 gives the name of the court, Rule 0.12 identifies the court seal, Rule 0.16 sets forth the hours of the clerk's office, Rule 0.22 deals with the Judicial Conference, etc . The second part of that court's local rules are then numbered to correspond to the pertinent Federal Rule, and when the court has not adopted a rule to supplement a particular Federal Rule, there is no rule identified by that number. Thus, since the Second Circuit has not adopted any rules affecting Federal Rules 1 or 2, 5 through 8, and 12 through 20, none of the local rules bear these numbers. As a result, a lawyer filing a petition for review or enforcement can examine the requirements of Federal Rule 15 and then quickly check the index of the local rules to see if there is a corresponding Local Rule 15 which imposes additional requirements; when the table reveals that there is no such rule, the lawyer knows that he or she has done all that is necessary to comply with the rules.

By contrast, a practitioner in the D.C. Circuit who is in the same situation may first consult Title V of the local rules, which deals with petitions for review and enforcement of agency rules. That Title contains a single rule which deals first with prehearing conferences and which then refers the practitioner to Title II of the local rules, which involves civil appeals. Counsel then has to read through Local Rule 6, which covers both petitions and motions practice generally, in order to assure compliance.

Experience suggests that compliance with the rules is likely to be highest if the local rules are organized so that counsel can refer to a specific rule quickly, rather than having to check a number of rules in order to make sure that all the i's had been dotted and all the t's crossed. The local rules adopted by the Fifth Circuit, which follow the approach taken in the Second Circuit, make this task fairly easy. That Court has issued a loose-leaf booklet which prints each Federal Rule, followed immediately by any local rule (which is numbered to correspond to the Federal Rule), followed by the pertinent portion of the court's Internal Operating Procedures. Thus, for example, a lawyer interested in filing a petition suggesting rehearing en banc can consult Federal Rule 35 and the local rule immediately following it to learn that the court imposes additional requirements on counsel. In the D.C. Circuit's local rules, a lawyer seeking guidance on this subject would find the subject handled in Local Rule 14, in the section on appeals from district court judgments. A copy of the pertinent portion of the Fifth Circuit's rules is attached for convenience.

The D.C. Circuit's local rules could be re-organized in this manner without much difficulty. For example, Local Rule 6

governs not only motions, but also petitions for review and mandamus petitions, which are covered by separate Federal Rules and could be renumbered accordingly. Similarly, Local Rule 7, which governs transmission of the record on appeal, could be made into a new Local Rule 11, consistent with the federal numbering. Finally, Local Rule 8, governing brief formats, page lengths, contents and updating, covers subjects dealt with in Federal Rules 28 and 32, and it might be profitably split into local rules modifying the relevant portions of those Federal Rules.

One of the benefits of more closely integrating the Local Rules into the Federal Rules is that it may allow the Court to make the local rules shorter than they presently are, thereby increasing the likelihood that they will be read more carefully and followed more often. Local rules should not repeat the requirements of the Federal Rules. Instead, they should supplement the Federal Rules, and this is done most effectively when they are limited to purely supplemental material.

We appreciate very much your consideration of this proposal, and if your committee or the Court is interesting in pursuing this approach, we would be pleased to provide necessary assistance.

Very truly yours,

Randell Hunt Norton

Thomas C. Papson
Co-chairs, Rules Committee

DETERMINATION OF CAUSES BY THE COURT EN BANC

FRAP 35.

(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. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.**

(c) ***Time for Suggestion of a Party for Hearing or Rehearing in Banc; Suggestion Does Not Stay Mandate.*** **If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a hearing in banc 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.**

(As amended Apr. 1, 1979, eff. Aug. 1, 1979.)

Loc. R. 35

35.1 *Suggestion.* A suggestion of en banc consideration upon initial hearing or rehearing may be made as provided in FRAP 35 and herein or by any judge of the Court in active service on his own motion. If en banc consideration is granted, every party shall furnish to the Clerk 15 additional copies of every brief the party has previously filed, and 15 copies of each supplemental brief on rehearing the party may file. See also the last sentence of Loc.R. 41 for effect of granting rehearing.

35.2 *Form of Suggestion.* Fifteen copies of every suggestion of en banc consideration, whether upon initial hearing or rehearing, shall be filed. The suggestion shall not be incorporated in the petition for rehearing before the panel, if one is filed, but shall be complete in itself. In no case shall a suggestion of en banc consideration adopt by reference any matter from the petition for panel rehearing or from any

other briefs or motions in the case. A suggestion of en banc consideration shall contain the following items, in order:

35.2.1 Certificate of interested persons required for briefs by 28.2.1.

35.2.2 If the party suggesting en banc consideration is represented by counsel, one or both of the following statements of counsel, as applicable:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions(s) of the United States Court of Appeals for the Fifth Circuit [or the Supreme Court of the United States], and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court:
> [citing specifically the case or cases]
>
> I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:
> [set forth each question in one sentence]

_____

Attorney for record for_____

Counsel are reminded that in every case the duty of counsel is fully discharged without filing a suggestion for rehearing en banc unless the case meets the rigid standards of FRAP 35(a).

35.2.3 Table of contents and citations;

35.2.4 Statement of the issue or issues asserted to merit en banc consideration. It will rarely occur that these will be the same as those appropriate for panel rehearing. A suggestion of en banc consideration must be limited to the circumstances enumerated in FRAP 35(a).

35.2.5 Statement of the course of proceedings and disposition of the case;

35.2.6 Statement of any facts necessary to the argument of the issues;

35.2.7 Argument and authorities. These shall concern only the issues required by paragraph (.2.4) hereof and shall address specifically, not only their merit, but why they are contended to be worthy of en banc consideration.

35.2.8 Conclusion; and

35.2.9 Certificate of service.

35.3 *Response to Suggestion.* No response to a suggestion of en banc consideration will be received unless requested by the Court.

35.4 *Time and Form—Extensions.* Any petition for a suggestion of en banc consideration upon rehearing must be filed within 14 days after the date of the opinion. Counsel should not request extensions of time except for the most compelling reasons.

Printing delays will not be considered sufficient justification for extensions as clear and legible reproduced copies of typewritten petitions are authorized in the form prescribed in FRAP and Loc. R. 32.

35.5 *Length.* A suggestion for en banc consideration shall not exceed 15 pages in length, without permission of the Court.

35.6 *Determination of Causes En Banc and Composition of En Banc Court.*

A cause shall be heard or reheard en banc when it meets the criteria for en banc set out in FRAP 35(a), and if a majority of the circuit judges who are in regular active service order that the appeal or other proceeding be heard or reheard en banc. For purposes of en banc voting under 28 U.S.C. §46(c), the term "majority" is defined as a majority of all judges of the court in regular active service presently appointed to office. Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service.

The En Banc Court shall be composed of all active judges of the Court. Any senior circuit judge of this circuit who sat as a member of the panel deciding the case being reviewed is eligible to participate, at his election, as a member of the En Banc Court. The election of a senior judge to become a member of the En Banc Panel shall be evidenced by a letter to the Chief Judge, with a copy to the Clerk.

[I.O.P.—Composition of En Banc Court—*The En Banc Court is composed of all active judges of the Court. Any senior circuit judge of this circuit who sat as a member of the panel deciding the case being reviewed is eligible to participate, at his election, as a member of the En Banc Court. The election of a senior judge to become a member of the En Banc Panel shall be evidenced by a letter to the Chief Judge, with a copy to the Clerk.*

Suggestion for Rehearing En Banc

Extraordinary Nature of Suggestions for Rehearing En Banc—*A suggestion for rehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire Court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Fifth Circuit precedent. Alleged errors in the determination of state law, or in the facts of the case (including sufficiency of the evidence), or error asserted in the misapplication of correct precedent to the facts of the case, are matters for* panel rehearing *but not for rehearing en banc.*

The Most Abused Prerogative—*Suggestions for rehearing en banc are the most abused prerogative of appellate advocates in the Fifth Circuit. While such suggestions are filed in about 15% of the cases decided, less than 1% of the cases decided by the Court are reheard en banc; and frequently rehearings granted result from a request for en banc reconsideration by a judge of the Court initiated independent of any petition.*

Handling of Petition by the Judges

Panel Has Control—*Although a copy of the suggestion for rehearing en banc is distributed to each panel judge and every active judge of the Court, the filing of a suggestion for rehearing en banc does not take the case out of the plenary control of the panel deciding the case. A suggestion for rehearing en banc will be treated as a petition for rehearing by the panel if no petition is filed. The panel may grant rehearing without action by the full Court.*

Requesting a Poll—*Within 10 days of the filing of the suggestion (30 days during the period from July to September), any active circuit judge of the Court or any member of the panel rendering the decision, desiring that the case be reheard en banc may notify the writing judge (the senior active Fifth Circuit judge if the writing judge is a non-active member) to this effect on or before the date shown on the Clerk's form which transmits the suggestion. This is also notice that in the event the panel declines to grant rehearing an en banc poll is desired.*

If the panel, after such notice, concludes not to grant the rehearing it notifies the Chief Judge of that fact and the Chief Judge then polls the Court by written ballot on whether en banc rehearing should be granted.

Requesting a Poll on Court's Own Motion—*Any active member of the Court or any member of the panel rendering the decision may request that the active members of the Court be polled on whether rehearing en banc should be granted whether or not a suggestion for rehearing en banc has been filed by a party. This is ordinarily done by a letter from the requesting judge to the Chief Judge with copies to the other active judges of the Court and any other panel member.*

Polling the Court—*When a request to poll the Court is made, each active judge of the Court casts a form ballot and sends a copy to all other active judges of the Court and panel members. The ballot form indicates whether the judge voting desires oral argument if en banc is granted.*

Negative Poll—*If the vote on the poll is unfavorable to the grant of en banc consideration, the writing judge is so advised by the Chief Judge. In this event, the panel originally hearing the case then enters the appropriate order.*

Affirmative Poll—*If a majority of the judges in regular active service vote for en banc hearing or rehearing, the Chief Judge instructs the Clerk as to the appropriate order to be entered. This order indicates that a rehearing en banc* with *or* without *oral argument has been granted, and specifies a briefing schedule for the filing of supplemental briefs.*

Every party must then furnish to the Clerk 15 additional copies of every brief the party previously filed.

No Poll Request—*If after expiration of the specified time for requesting a poll the writing judge of the panel has not received a request from any active member of the Court, the panel, without further notice, may take such action as it deems appropriate on the suggestion. However, in its order disposing of the case and the suggestion, the panel must enter an order denying suggestion for rehearing en banc showing no poll was requested by any judge.*

Effect of Granting Rehearing En Banc—*Unless otherwise expressly provided, the effect of granting a rehearing en banc is to vacate the previous opinion and judgment of the Court and to stay the mandate.]*