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Proposed Comments of the Courts, Lawyers and the Administration of Justice Section[1] of the District of Columbia Bar on the District of Columbia Court of Appeals' Proposed New Amendments to DCApp Rules 31-54, and Forms

The Court of Appeals is actively considering the first comprehensive revision of its Rules ("DCApp Rules") in over 15 years. The Courts, Lawyers and the Administration of Justice Section[2] and its Court Rules and Legislation Committee strongly support this Court of Appeals project. Tentative Draft #2 (August 2002) sets out our recommendations for revising DCApp Rules 31 through 54, and Forms. Earlier we issued Tentative Draft #1 (June 2002) as a public statement, available on the Section's web site, to set forth our recommendations for updating DCApp Rules 1 through 31. *See* http://www. dcbar.org/sections/courts/proposal.html. Both these Tentative Drafts propose to update the DCApp Rules in light of changes and improvements made to the Federal Rules of Appellate Procedure ("FRAppP") within the last 15 years. This modernization of the DCApp Rules accords with the controlling statute. *See* D.C. Code §11-743 (2001) ("The District of Columbia Court of Appeals shall conduct its business according to the Federal Rules of Appellate Procedure unless the court prescribes or adopts modifications of those Rules.") There are still significant differences, which are preserved in the proposed new DCApp Rules, to reflect local practice and the differences between state and federal courts.

Tentative Draft #2 (August 2002) would amend several important Court of Appeals rules. For example, it would shorten the permissible length of appellate briefs (*see* new proposed DCApp Rule 32(a)(7)), and set new time limits for filing Petitions for Rehearing and Rehearing En Banc in civil cases involving the Government (*see* new proposed DCApp Rules 35(c) and 40(a)(1)). We believe that all affected practitioners, and all interested members of the community, should be given an opportunity to comment on these and other proposed changes to the DCApp Rules.

Open public rulemaking procedures for amending the DCApp Rules are reflected in the Section's issuance of Tentative Draft #2 (August 2002) (enclosed), updating DCApp Rules 31 through 54, and Forms. To facilitate further comment, our Section is hereby issuing Tentative Draft #2 (August 2002) as a public statement. Tentative Drafts #1 and #2, covering all the DCApp Rules, will be posted on the Section's Web site. Our Section will make its final recommendations for modernizing the DCApp Rules in a later Proposed Final Draft.

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[1] The views expressed herein represent only those of the Section and the Committee, and not those of the District of Columbia Bar or of its Board of Governors.

[2] The Courts, Lawyers and the Administration of Justice Section Steering Committee members are: Laura A. Foggan, Co-Chair; Bonnie I. Robin-Vergeer, Co-Chair; Peter Buscemi; Steven G. Gallagher; Teresa A. Howie; Edwin E. Huddleson, III; John Moustakas; Frederick V. Mulhauser; and David A. Reiser.

DISTRICT OF COLUMBIA BAR
Courts, Lawyers and the Administration of Justice Section

TENTATIVE DRAFT #2 (August 2002)

RULES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

Subjects Covered: *Page:*

SUMMARY OF PROPOSED CHANGES

The Court of Appeals is considering the first comprehensive revision of its Rules (hereinafter "DCApp Rules") in over 15 years. The statute governing DCApp Rules states that they are modeled on the Federal Rules of Appellate Procedure ("FRAppP"). *See* D.C.Code §11-743 (2001) ("The District of Columbia Court of Appeals shall conduct its business according to the Federal Rules of Appellate Procedure unless the court prescribes or adopts modifications of those Rules."). Following the FRAppP allows the Court of Appeals to draw on a wealth of federal precedent and experience. *See, e.g.,* Estate of Underwood v. National Credit Union Administration, 665 A.2d 621, 645 n.36 (D.C. 1995) (federal courts' interpretation of federal rules is persuasive, but not binding, authority in interpreting essentially identical or similar DC rules); Tupling v. Britton, 411 A.2d 349, 351 (D.C. 1980) (citing cases)(same). Over the past 15 years the FRAppP have been streamlined and modernized in many ways, making improvements in the administration of justice that are appropriate for adoption in the DCApp Rules. Some local variations from the FRAppP remain important to reflect local practice, and the differences between state and federal courts.

The Courts, Lawyers and the Administration of Justice Section of the District of Columbia Bar (hereinafter "the Section") strongly supports the Court of Appeals' project to update the DCApp Rules. The views of the Section and its Court Rules and Legislation Committee are set forth in this public statement on modernizing DCApp Rules 31 through 54 and Forms.

1. ***Issues.*** The major issues addressed in Tentative Draft #2 (August 2002) include the following:

(a) The Committee proposes to eliminate current DCApp Rule 28(g) (length of briefs: main briefs= 50 pages; reply brief = 20 pages) and to adopt the standards of FRAppP Rule 32(a)(7) on the length of briefs. This would

represent a significant change that affects all practitioners before the Court of Appeals. *See* proposed new DCApp Rule 32(a)(7).

(b) Time for filing petitions for rehearing, and petitions for rehearing en banc, would be extended to 45 days in civil cases involving the Government (its agencies and officers) under proposed new DCApp Rules 35 and 40. This follows the lead of 1994 amendments to the FRAppP, and extends the new 45-day time limits to civil cases involving the District of Columbia Government as well as cases involving the United States. *See* proposed new DCApp Rules 35(c) and 40(a)(1).

(c) New proposed DCApp Rule 38 ("Frivolous Appeal- Damages and Costs") provides for notice and opportunity to respond before sanctions can be imposed. These procedures seem required by *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980).

(d) New proposed DCApp Rule 40 updates the rules on issuance of the mandate, and stays thereof, to reflect changes occurring within the last 15 years in the Supreme Court's Rules on petitions for a writ of certiorari, as well as the proposed changes in the time limits for filing petitions for rehearing and rehearing en banc.

(e) The Committee invites further comment on whether current DCApp Rules 52 and 53 (required notice to the Attorney General, or the Corporation Counsel, in cases challenging federal or District of Columbia statutes) should be renumbered as new proposed DCApp Rule 44(a) and (b). This renumbering would conform the DCApp Rules more closely with the style and organization of the most recent amendments to the FRAppP. *See* 70 USLW 4301 (May 7, 2002).

2. Comments. Comments on proposed DCApp Rules 31 through 54, and Forms, can be submitted to the central staff of the Bar or to the Section's Court Rules Committee Chairman in any form by Email, or FAX, or letter, or oral comment at the Court Rules Committee's monthly meeting(s).

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The Court Rules and Legislation Committee generally meets on the second Thursday of each month at 12 noon at DC Bar headquarters (Room B-1 President's Room) at 1250 H Street, N.W., Washington, D.C. 20005.

August 2002

COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE SECTION

DISTRICT OF COLUMBIA RULES OF COURT
RULES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

TITLE VI. GENERAL PROVISIONS.

RULE 31. *FILING AND SERVICE OF BRIEFS*.

[No change in DCApp Rule 31]

SECTION COMMITTEE COMMENTS

(1) The Court Rules Committee's proposed revisions of the DCApp Rules generally track the current FRAppP. Tentative Draft #2 (August 2002) reflects the most recent amendments to FRAppP that were approved by the United States Supreme Court on April 29, 2002, and that are scheduled to become effective (barring Congressional objection) December 1, 2002. *See* 70 USLW at 2693, 4295 (May 7, 2002). This modeling of the DCApp Rules after the FRApp P is consistent with the controlling statute. *See* DC Code 11-743 (2001) ("The District of Columbia Court of Appeals shall conduct its business according to the Federal Rules of Appellate Procedure unless the court prescribes or adopts modifications of those Rules."). Occasionally, the proposed DCApp Rules differ from the FRAppP, in order to accommodate the differences between state and federal courts, or to reflect established local practices in the Court of Appeals.

Tentative Draft #2 (August 2002) utilizes plain text where the language of the proposed new DCApp Rule is modeled word-for-word on the FRAppP. Headings in **bold** or in *italics* also reflect the FRAppP word-for-word. ***Local DC variations from the FRAppP (carrying forward current DCApp Rules), and significant issues warranting special attention because of their importance, are noted in bold double-underlined italics.*** Where language is shown within [brackets] the suggestion is being made to delete that language. Where language is shown in [[double brackets]], there is a strong suggestion that the language within the double brackets should be deleted. *SECTION COMMITTEE COMMENTS* appear after each DCApp Rule to explain local practice points or significant issues.

(2) There are minor differences between current DCApp Rule 31 and FRAppP 31. But these differences seem to reflect a considered decision by the Court of Appeals to follow different procedures that reflect local practices in the District of Columbia. ***(a) Time for Appellant's Brief.*** Time limits for serving and filing the appellant's opening brief do not start to be measured, under current DCApp Rule 31(a)(1), until after "the complete record, *including transcript*" is filed in the Court of Appeals. This may reflect the difficulties that counsel frequently encounter in obtaining timely trial transcripts in this jurisdiction. *Compare* FRAppP 31(a)(1) ("The appellant must serve and

file a brief within 40 days after the record is filed."). Another apsect of local practice appears in DCApp Rule 31(a)(1): "If a motion for dispositive relief is filed, appellant's brief shall be filed within 40 days after entry of the order denying dispositive relief." By contrast, some federal courts of appeals such as the D.C.Circuit do not set the schedule for briefing in the case-in-chief until after the appellate court disposes of any dispositive motions. There is no specific provision in FRAppP 31 dealing with the impact of motions for dispositive relief on ordinary briefing schedules in the court of appeals. ***(b) Time for Reply Briefs.*** FRAppP 31(a)(1) allots 14 days for preparing and filing a reply brief, which "must be filed at least 3 days before argument." By contrast, DCApp Rule 31(a)(3) allows the appellant to file its reply brief "21 days after service of the brief of the appellee"; it disfavors motions to extend this time; and it specifies that "[n]o reply brief shall be filed later than 7 days before oral argument." ***(c) Transcripts***. DCApp Rule 31(a)(4) contains special directions, having no counterpart in FRAppP 31, about ordering and filing the reporter's transcript. Trial transcript delays have been a persistent problem in this jurisdiction. ***(d) Consolidated Appeals.*** Similarly, the special provisions on consolidated appeals, in DCApp Rule 31(a)(5), are not to be found in FRAppP 31. ***(e) Number of copies filed***. The Court of Appeals has deliberately chosen to require only four (4) copies of each brief to be filed with the clerk, rather than 25 copies as specified in FRApp Rule 31(b).

(3) ***Number of copies served.*** The Committee invites comment on whether the D.C.Court of Appeals should switch its practice to follow FRAppP 31(b) in requiring two (2) copies of each brief to be served on counsel for each party separately represented. *Contrast* current DCApp Rule 31(b) (only one copy of the brief need be served on each separately represented party). The most recent amendments to FRAppP 31(b) also contain a clarification, that might be incorporated into DCApp Rule 31(b), that briefs must be served on all parties, including those not represented by counsel. *See* 70 USLW 2693, 4299-4300 (May 7, 2002). Were these changes to be adopted, new proposed DCApp Rule 31(b) might read as follows:

> (b) *Number of copies to be filed and served.* Four copies of each brief shall be filed with the clerk, unless the court by order in a particular case shall direct otherwise; but if the case is to be heard en banc, ten copies of each brief shall be filed. ***Two copies must be served on each unrepresented party and on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must*** file 4 legible copies with the clerk, and one copy must be served on each unrepresented party and on counsel for each separately represented party. If a case is to be heard en banc, counsel or an unrepresented party on request of the clerk shall furnish additional copies of their brief.

RULE 32. FORM OF BRIEFS, APPENDICES, AND OTHER PAPERS.

(a) Form of a Brief.

(1) Reproduction.

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

(2) Cover. Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's red; an intervenor's or amicus curiae's, green; any reply brief, gray; ***and any supplemental brief, tan. [[see 70 USLW 4300 (May 7, 2002)]].*** The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for which the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

(3) Binding. The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

(4) Paper Size, Line Spacing, and Margins. The briefs must be on 8 ½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) Type face. Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 10 ½ characters per inch.

(6) Type Styles. A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) Length.

(A) Page limitation. A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(A)(7)(B) and (C).

(B) Type-volume limitation.

(i) A principal brief is acceptable if:

o it contains no more than 14,000 words; or

o it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(I).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, and addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

(C) Certificate of compliance.

(i) A brief submitted under Rule 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

o the number of words in the brief; or

o the number of lines of monospaced type in the brief.

(ii) ***Form 9 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 9 must be regarded as sufficient to meet the requirements of Rule 32(a)(7)(C)(I) [[see 70 USLW 4300 (May 7, 2002)]]***

(b) Form of an Appendix. An appendix must comply with Rule 32(a)(1),(2),(3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8 ½ by 11 inches, and need not lie reasonably flat when opened.

(c) Form of Other Papers.

(1) Motion. The form of a motion is governed by Rule 27(d).

(2) **Other Papers.** Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A cover is not necessary if the caption and signature page together contain the information required by Rule 32(a)(2). If a cover is used, it must be white. [[*see* 70 USLW 4301 (May 7, 2002)]]

(B) Rule 32(a)(7) does not apply.

(C) ***The paper shall contain a brief descriptive title indicating its purpose***.

(D) Four copies shall be filed with each original application for the allowance of an appeal under Rule 6. Three copies shall be filed with each petition for writ of mandamus, writ of prohibition or other extraordinary relief. Five copies shall be filed with each petition for review. Rule 40 governs the number of copies that shall be filed with a petition for a rehearing, and Rule 35 prescribes the number of copies required to be filed with a petition for rehearing en banc.

(d) Signature. Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.[[see 70 USLW 4301 (May 7, 2002)]]

(e) Variation. The court must accept documents that comply with the form requirements of this rule. By order in a particular case, the court may accept documents that do not meet all of the form requirements of this rule.

(f) Paper Submissions to Be on Recycled Paper

(1) Recycled Stationery. When paper (required by these rules to be opaque, white paper, approximately 8 ½ x 11" in dimension), is used for pleadings, court filings and other matters, including service copies, the paper used shall be recycled paper in conformity with this rule. Original exhibits, oversized papers, and other non-standard submissions are not subject to this requirement.

(2) Definition. For purposes of this Rule, "recycled paper" shall mean paper containing at least 30% postconsumer recycled materials meeting United States Government procurement standards as established under 40 C.F.R. Part 247 or other approved federal agency procurement specification or substantially equivalent paper.

(3) Certification required. Papers subject to this rule shall contain a certification, immediately following the signature block or in the certificate of service, substantially as follows: "I hereby certify that these papers are submitted on recycled paper as required by Rule .

(4) Exemption and Waiver for Good Cause. This Rule shall not apply to parties appearing in forma pauperis or pro se, to law offices having fewer than five (5) attorneys, or where in actual conflict with other law. The requirements of this Rule may be waived or modified, for good cause shown, by application to the Court.

(5) Nonconforming Papers. The Clerk shall not reject any paper for filing purposes for reason of nonconformance with this Rule; however, the clerk shall notify counsel of nonconformance.

(6) Enforcement. This Rule may be enforced by the Clerk, as provided above, or by the Court.

(7) Effective Date. This Rule shall be effective one (1) year from the date of adoption.

SECTION COMMITTEE COMMENTS

(1) There are some obsolete provisions in current DCApp Rule 32 that clearly need to be eliminated. *See* DCApp Rule 32(a) (2002 edition) "Until January 1, 1991, briefs and other papers may continue to be submitted on legal size paper." The Committee also favors generally conforming DCApp Rule 32 to the substance and language of FRAppP Rule 32.

(2) ***Length of Briefs.*** The Committee proposes to eliminate current DCApp Rule 28(g) (length of briefs: main briefs= 50 pages; reply brief = 20 pages) and to adopt the standards of FRAppP 32(a)(7) on the length of briefs. New proposed DCApp Rule 32(a)(7) above follows the FRAppP model by stating length requirements in alternatives measured in pages, or words, or lines of monospaced type. This new rule would significantly affect practitioners coming before the Court of Appeals. *See also* new proposed DCApp Rule 35(b)(2) (ordinarily, "a petition for an en banc hearing or rehearing must not exceed 15 pages") *and compare* current DCApp Rule 40(b) & (d) (10 page limit for such petitions).

One comment opposed the switch to FRApp P length limits: "Brevity is desirable, but it is not always possible to compress fact-dependent arguments often found in DC criminal appeals into the FRAP limits. Ruling on routine page-limit extensions is a waste of the Court and Clerk's time. It is better to establish limits that are appropriate for all but a tiny number of cases, than to set limits that often require extensions. Additionally, I think the DC Court of Appeals relies more hheavily on counsel's presentation of the law than is true in many federal courts of appeals. The DCCA also deals with many issues that may require a discussion or survey of holdings in other states. Truncating briefs would, in my judgment, be a disservice to the DCCA. I also think it is a waste of resources to require color-coded briefs, given the large volume of IFP appeals."

The Committee invites further comment on the page limits, and color-coding requirements, of proposed DCApp Rule 32(a)(7) & (2).

(3) ***New Form 9.*** New proposed DCApp Rule 32(a)(7)(C)(ii) provides that a new Form 9, in which a party certifies that a brief complies with Rule 32's type-volume limitation, must be regarded as sufficient to meet the certification requirement of Rule 32. It also requires that every brief, motion, or other paper filed with the court be signed by the attorney or unpresented party who files it. These proposals track the most recent proposed amendments to the FRAppP. *See* 70 USLW 2693, 4300- 4301 (May 7, 2002).

(4) New proposed DCApp Rule 32(c) ("Form of Other Papers"), modeled on FRAppP 32(c), takes the place of current DCApp Rule 33 ("Form of Other Papers").

(5) Two features of current DCApp Rule 33 that are not accounted for in the FRApp P are set forth in new proposed DCApp Rule 33(c)(2)(C) (statement of "purpose" required for "other papers" that are not "motions") and new proposed DCApp Rule 33(c)(2)(D)(specifying the number of copies that must be filed for "other papers" that are not "motions"). Traditionally, ten (10) copies must be filed of any petition for rehearing or rehearing en banc in the Court of Appeals. *See* current DCApp Rules 33, 27(e); *see also* Advisory Committee Notes to 1994 Amendments to FRAppP 35. Otherwise, however, the Committee questions whether there is any real need for the complexity of current DCApp Rule 33, which specifies different numbers of copies that must be filed (3, 4, or 5) instead of four (4) copies for the "other papers" listed.

(6) The Committee invites comment on proposed new DCApp Rule 32(f) on recycled paper. This proposal comes from the Environment, Energy & Natural Resources Section ("EENRS"). Their proposal is designed to work in harmony with new electronic filing rules, since it requires recycled paper only where an old-fashioned paper filing (non-electronic) is made. EENRS reports that today "all federal and DC courts are required to purchase recycled paper. This rule will further encourage the use of recycled paper and make a significant positive contribution to our environment." EENRS has filed a detailed "petition" to require the same rule in Superior Court.

RULE 33. ***CALENDARING OF CASES.***

[No change to current DCApp Rule 34 ("Calendaring of Cases") which would be renumbered as proposed new DCApp Rule 33]

SECTION COMMITTEE COMMENTS

There is no counterpart in the FRApp P to current DCApp Rule 34 ("Calendaring of Cases"). The subject of FRAppP 33 ("Appeal Conferences") is covered in more specific detail by DCApp Rule 7A ("Docketing Statement and Status and Settlement Conference Procedures"). To conform more closely with the structure and numbering of the FRAppP, current DCApp Rule 33 ("Form of Other Papers") appears in new proposed DCApp Rule 32(c) ("Form of Other Papers"). *Accord*: FRAppP 32(c) ("Form of Other Papers").

RULE 34. ORAL ARGUMENT.

[No change to current DCApp Rule 35 ("Oral Argument") which would be renumbered as proposed new DCApp Rule 34]

SECTION COMMITTEE COMMENTS

(1) Tradition, custom and practice is for the Court of Appeals to set its own rules for oral argument. The Committee agrees that within broad general limits oral argument rules are, and should remain, individually crafted to reflect the unique character of the Court of Appeals. In any event, current DCApp Rule 35 contains a number of provisions that have no counterpart in FRAppP 34 ("Oral Argument"). These include presumptive time limits for oral argument in various categories of cases.

(2) The Court of Appeals may wish to consider *sua sponte* whether to adopt any of the provisions in FRApp P 34 ("Oral Argument") that are not reflected in current DCApp Rule 34 ("Oral Argument"). ***(a)*** FRAppP 34(a)(2) states that "oral argument must be allowed in every case," unless three judges unanimously agree to dispense with oral argument for one or more of three specified good reasons. ***(b)*** FRAppP 34(c) and (d) contain admonitions about the contents of oral argument: "Counsel should not read at length from briefs, records, or authorities." "Separate parties should avoid duplicative argument." ***(c)*** FRAppP 34(g) governs the use of physical exhibits at argument.

RULE 35. EN BANC DETERMINATION

(a) When hearing or Rehearing En Banc May Be Ordered. A majority of the judges of the court who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

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

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc:

(1) The petition must begin with a statement that either:
- **(A)** the panel decision conflicts with a decision of the United States Supreme Court or of this court (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or
- **(B)** the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of a United States Court of Appeals ***or of the Supreme Court of another State*** that have addressed the issue.

(2) Except by the court's permission, ***a petition for an en banc hearing or rehearing must not exceed 15 pages***, excluding material not counted under Rule 32.

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

(c) Time for Petition for Hearing or Rehearing. ***A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due.*** A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

(d) Number of Copies. ***Ten copies of a petition for hearing or rehearing en banc shall be filed with the clerk..***

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

(f) Call for a Vote. A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

SECTION COMMITTEE COMMENTS

(1) The modern FRAppP separate the rules for en banc determinations (FRAppP Rule 35) from the rules for petitioning the original panel for rehearing (FRAppP 40). By contrast, current DCApp Rule 40 covers both. The Committee believes the structure of the modern FRApp P is clearer.

(2) The issues involved in en banc determinations and rehearings warrant careful consideration in updating the DCApp Rules. ***(a) Standards***. New proposed DCApp Rule 35(b)(1)(B) adds conflict with the decision of the Supreme Court of another State to the "examples" of cases listed in FRApp P 35(b)(1)(B) that may present questions of exceptional importance warranting a hearing or rehearing en banc. One commentator questioned whether FRApp P 35(b)(1)(B)'s elaborated criteria, and required statement, improved upon the general criteria in current DCApp Rule 40(e): "Such a hearing or rehearing [en banc] 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." The Committee invites further comment on this issue.

(b) Page Limits. Ten pages is the page limit set by current DCApp Rule 40(b) & (d) for petitions for en banc determination or rehearing. Though the FRApp P are generally shortening the page limits for court of appeals papers, FRAppP 35(b)(2) allows 15 pages for such petitions. Tentative Draft #2 (August 2002) follows the 15-page page limit in FRAppP 35(b)(2). *But cf.* Advisory Committee Note to 1998 Amendments to FRApp P 35 ("Each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources."). The Committee invites further comment on this issue.

(c) Time for Filing: En Banc Hearing. New proposed DCApp Rule 35(c) follows the FRApp P in stating that a "petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due." This leaves open the odd possibility that an appellant might wait until "the date when the appellee's brief is due" before filing a petition for initial en banc hearing. The implication of current DCApp Rule 40(d) is, by contrast, that such a petition must be filed when a party's initial brief (as appellant or appellee) is due filed. In practice, the two rules may work out to be the same. One commentator thought that current DCApp Rule 40(d) was clearer and better in stating the time limit for filing a petition that an appeal be heard initially en banc. The Committee invites further comment on this issue.

(d) Time for Filing: Petitions for Rehearing En Banc in Government Civil Cases. Time limits for filing a petition for rehearing en banc, under proposed new DCApp Rule 35(c), are the same as the time limits in proposed new DCApp Rule 40 for

filing a petition for rehearing before the original panel. *Accord*: FRAppP 35(c), 40(a)(1). Ordinarily, the time is 14 days after judgment. *See id.* In 1994, the FRAppP were amended to give the United States (its agencies and officers) 45 days after judgment to file a petition for rehearing or rehearing en banc. The Committee believes that the policies supporting those 1994 amendments to FRAppP also support extending the same 45-day time limit to petitions for rehearing en banc in civil cases involving the District of Columbia (its agencies and officers). The resources of the Corporation Counsel's Office are limited, and it needs time to conduct a thorough review of the merits of a case before requesting a rehearing. The Committee invites further comment on this proposal. *See SECTION COMMITTEE COMMENTS* under proposed new DCAppp Rule 40.

(e) Finality of Court of Appeals decision. In 1998 FRAppP 35 and 41 were amended to indicate that "a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and delay the running of the period for filing a petition for writ of certiorari." Advisory Committee Notes to 1998 Amendments to FRAppP Rule 35. Under the proposed new DCApp Rules, the same effect would be given to a request for rehearing en banc by the Court of Appeals.

EXISTING DC RULE 36. JUDGMENTS AND OPINIONS

(a) Preparation and Entry of Judgments. The notation of a judgment on the docket constitutes entry of the judgment. The clerk shall prepare, sign, and enter the judgment immediately after 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 after final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign, and enter the judgment upon instructions from the court.

(b) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment, the clerk shall serve by mail upon each party to the proceeding a copy of any opinion accompanying the order or judgment. If there is no opinion, the clerk shall serve a copy of the order or judgment. Service on a party represented by counsel shall be made on counsel.

(c) Publication of Opinions. An opinion may be either published or unpublished. Any party or other interest person may request that an unpublished opinion be published by filing a motion within thirty days after issuance of the opinion, stating why publication is merited. Publication shall be granted by a vote of two or more members of the division which issued the opinion, but a motion filed by a non-party shall not be granted except on a showing of good cause. The court sua sponte may also publish at any time a previously issued but unpublished opinion.

[[PROPOSED]] RULE 36. ENTRY OF JUDGMENT; NOTICE

(a) Entry. A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment:

(1) after receiving the court's opinion—but if settlement of the judgment's form is required, after final settlement; or

(2) if a judgment is rendered without an opinion, as the court instructs.

(b) Notice. On the date when judgment is entered, the clerk must ***serve on*** all parties a copy of the opinion—or the judgment, if no opinion was written—and a notice of the date when the judgment was entered. ***[[see 70 USLW 4301 (May 7, 2002)]]***

(c) Publication of Opinions. An opinion may be either published or unpublished. Any party or other interested person may request that an unpublished opinion be published by filing a motion within thirty days after issuance of the opinion, stating why publication is merited. Publication shall be granted by a vote of two or more members of the panel that issued the opinion, but a motion filed by a non-party shall not be granted except on a showing of good cause. The court sua sponte may also publish at any time a previously issued but unpublished opinion.

SECTION COMMITTEE COMMENTS

To make the rule more easily understood, FRApp P Rule 36 was revised in 1998 and 2002. The changes were intended to be stylistic only. New proposed DCApp Rule 36 is based on the amended federal Rule, and adds subsection (c) to retain current DCApp Rule 36(c) regarding publication of opinions.

EXISTING DC RULE 37. INTEREST ON JUDGMENTS

Unless otherwise provided by law, if a judgment for money in a civil case in the Superior Court or a monetary award in an agency proceeding is affirmed, whatever interest is allowed by law shall be payable from the date of that judgment. If a judgment is modified or reversed with a direction that a judgment for money be entered in the Superior Court, or if a monetary award in an agency proceeding is affirmed, but the case is remanded for further proceedings, the prevailing party, by motion filed with the clerk within ten days after judgment or the issuance of an agency award on remand, may request the allowance of such interest as the party believes appropriate.

[[PROPOSED]] RULE 37. INTEREST ON JUDGMENT

(a) When the Court Affirms. Unless the law provides otherwise, if a money judgment in a civil case ***or monetary award in agency proceeding*** is affirmed, whatever interest is allowed by law is payable from the date ***when the judgment or award*** was entered.

(b) When the Court Reverses. If this court modifies or reverses a judgment with a direction that a money judgment be entered in ***Superior Court, or if a monetary award in an agency proceeding is affirmed but the case is remanded for further proceedings***, the mandate must contain instructions about the allowance of interest.

SECTION COMMITTEE COMMENTS

FRApp P Rule 37 was amended in 1998 to make the Rule more easily understood. The changes were intended to be stylistic only. Proposed DCApp Rule 37 is based on the revised federal Rule, but retains language in the existing Rule concerning monetary awards in agency proceedings.

EXISTING DC RULE 38. DAMAGES FOR DELAY

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

[[PROPOSED]] RULE 38. FRIVOLOUS APPEAL—DAMAGES AND COSTS

If this court determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

SECTION COMMITTEE COMMENTS

The words of new proposed DCApp Rule 38 mirror those of FRAppP Rule 38. The 1994 amendment to FRApp P Rule 38 required that the appellate court provide notice and an opportunity to respond before imposing sanctions. This reflects the basic principle enunciated in the Supreme Court's opinion in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions.

EXISTING DC 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 section (a); otherwise costs shall not be awarded for or against the United States.

(c) Prepayment Not Required of United States or District of Columbia. Prepayment of costs shall not be required of the Untied States or the District of Columbia or an officer or agency thereof.

(d) Request for Costs. A party entitled to costs may, within ten days from the date of decision, submit and serve on opposing counsel a written request to the clerk to insert a specified amount in the mandate or process sent to the Superior Court. Objections may be filed within seven days after service of the request on the party against whom costs are to be taxed. The issuance of the mandate shall not be delayed for taxation of costs; if the mandate is issued before costs are determined, the costs shall be added to the mandate by the Clerk of the Superior Court upon request by the clerk of this court.

(e) Costs on Appeal Taxable in the Superior Court. 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 cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be determined in the Superior Court and taxed, if assessed, in that court as costs of the appeal in favor of the party entitled to costs under this rule. If the briefs or the record on appeal are printed, the cost of printing by any method shall not be taxed as an allowable cost.

(f) Costs on Appeal in Agency Cases. Costs specified in section (e) incurred in appeals from agency orders, decisions, or rulings shall be determined in this court and taxed, if assessed, in this court as costs of the appeal in favor of the party entitled to costs under this rule. If the briefs or the record on appeal are printed, the cost of printing by any method shall not be taxed as an allowable cost.

[[PROPOSED]] RULE 39. COSTS

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
(2) if a judgment is affirmed, costs are taxed against the appellant;
(3) if a judgment is reversed, costs are taxed against the appellee;
(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) Costs For and Against the United States. Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law. ***Prepayment of costs shall not be required of the United States or the District of Columbia or an officer or agency thereof.***

(c) Costs of Copies. ***The maximum rate for taxing the cost of producing necessary copies of a brief or appendix or copies of records authorized by Rule 30(f) shall be set by the Clerk. The rate must not exceed that generally charged for such work in Washington, D.C.***

(d) Bills of Costs: Objections; Insertion in Mandate.
(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the clerk, with proof of service, an itemized and verified bill of costs.
(2) Objections must be filed within 10 days after service of the bill of costs, unless the court extends the time.
(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the ***Superior Court*** clerk must—upon this court's clerk's request—add the statement of costs, or any amendment of it, to the mandate.

(e) Costs on Appeal Taxable in *Superior Court*. The following costs on appeal are taxable in ***Superior Court*** for the benefit of the party entitled to costs under this rule:
(1) the preparation and transmission of the record;
(2) the reporter's transcript, if needed to determine the appeal;
(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and
(4) the fee for filing the notice of appeal

(f) Costs on Appeal in Agency Cases. Costs specified in section (e) incurred in appeals from agency orders, decisions, or rulings shall be determined in this court and taxed, if assessed, in this court as costs of the appeal in favor of the party entitled to costs under this rule.

SECTION COMMITTEE COMMENTS

New proposed DCApp Rule 39 generally follows FRApp P Rule 39 word-for-word. As contemplated by the language of FRApp P 39(c), new DCApp Rule 39(c) states that the Clerk shall set the maximum rate for taxing costs. Section (b) retains a sentence

from the existing DCApp Rule that pre-payment of costs is not required for the United States or the District of Columbia. New subsection (f) ("Costs on Appeal in Agency Cases") retains that section from existing DCApp Rule 39(f).

EXISTING DC RULE 40. PETITIONS FOR REHEARING, REHEARING EN BANC, OR INITIAL HEARING EN BANC

(a) Time for filing a Petition for Rehearing or Rehearing En Banc. A petition for rehearing or rehearing en banc may be filed within fourteen days after entry of judgment unless the time is shortened or extended by order. In cases consolidated on appeal, a petition filed by one party shall not be deemed to be filed by any other party.

(b) Content; Answer. 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. The petition shall not exceed ten pages in length. Oral argument in support of the petition ordinarily will not be permitted. No answer to a petition for rehearing or rehearing en banc shall be received unless requested by the court, but a petition will ordinarily not be granted in the absence of a request. The clerk shall transmit a petition for rehearing en banc to the judges of the court who are in regular active service, and to any retired judge who was a member of the division that heard the case. A vote will be taken to determine whether the case shall be reheard en banc only if a judge of this court in regular active service or a retired judge of this court who was a member of the division that rendered the decision sought to be reheard requests that a vote be taken.

(c) Grant of Petition for Rehearing or Rehearing En Banc. If a petition for rehearing or rehearing en banc is granted, the court may make a final disposition of the case without reargument, may restore it to the calendar for reargument, or may make such other orders as it deems appropriate in the particular case.

(d) Petition for Initial Hearing En Banc. A party, upon filing a brief, may request a hearing en banc by filing ten copies of a petition with the clerk. The petition shall not exceed ten pages in length. The clerk shall transmit the petition to the judges of the court who are in regular active service. A vote will be taken to determine whether the case shall be heard initially en banc only if a judge in regular active service requests that a vote be taken.

(e) When Hearing or Rehearing En Banc Will be Ordered. A majority of the judges in regular active service may order than an appeal or other proceeding be heard or reheard by the court en banc. Such 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.

[[PROPOSED]] RULE 40. PETITION FOR PANEL REHEARING

(a) Time to File; Contents; Answer; Action by the Court if Granted

(1) Time. Unless the time is shortened or extended by this court, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States (or its officer or agency) ***or the District of Columbia (or its officer or agency)*** is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.

(2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes this court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) Answer. Unless this court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.

(4) Action by the Court. If a petition for panel rehearing is granted, the Court may do any of the following:

(A) make a final disposition of the case without reargument;
(B) restore the case to the calendar for reargument or resubmission; or
(C) issue any other appropriate order.

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Unless this court permits, a petition for panel rehearing must not exceed 15 pages.

SECTION COMMITTEE COMMENTS

(1) Overall, proposed new DCApp Rule 40 reflects the wording of FRAppP Rule 40, as it was recently amended in 1994 and 1998.

(2) There are several issues worth noting in updating DCApp Rule 40. ***(a) Time Limits in Government Civil Cases***. The 1994 amendments to FRApp P Rule 40 lengthened the time for filing a petition for rehearing from 14 to 45 days in civil cases involving the United States or its agencies or officers. The Committee believes that sound policy also supports extending (to 45 days after entry of judgment) the time for filing a petition for rehearing in civil cases involving the District of Columbia or its agencies or officers. These same extended 45-day time limits would apply to petitions for en banc hearing or rehearing en banc under Rules 35(c) and 40(a)(1). The resources of the Corporation Counsel's Office are limited, and it needs time to conduct a thorough review of the merits of a case before requesting a rehearing. The Committee invites further comment on this proposal. ***(b) Page Limits***. Ten pages is the page limit set by

current DCApp Rule 40(b) for petitions for panel rehearing. Though the FRApp P are generally shortening the page limits for court of appeals papers, FRAppP 40(b) allows 15 pages for such petitions. Tentative Draft #2 (August 2002) follows the 15-page page limit in FRAppP 40(b). The Committee invites further comment on what page limits should apply to petitions for panel rehearing. ***(c) Organization of rules on En Banc Hearings and Petitions for Rehearing.*** Existing DCApp Rule 40 contains provisions on petitions for rehearing en banc. The procedures for seeking en banc review are now contained in new proposed DCApp Rule 35.

EXISTING DC RULE 41. ISSUANCE OF MANDATE; STAY OF MANDATE

(a) Date of Issuance. The mandate of the court shall issue twenty-one days after the entry of judgment, unless the time is shortened or extended by order. A certified copy of the judgment, 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 or rehearing en banc will stay the mandate until disposition of the petition unless otherwise ordered by the court. In cases consolidated on appeal, a petition filed by one party shall not operate to stay the mandate as to any other party. If the petition is denied, the mandate shall issue seven days after entry of the order denying the petition unless the time is shortened or extended by order.

(b) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion. The stay shall not exceed thirty days from the date on which the mandate would have issued pursuant to section (a) of this rule unless the period is extended for cause shown. If, before issuance of the mandate pursuant to section (a), or during the period of a stay ordered by the court, there is filed with the clerk a notice from the Clerk of the Supreme Court that a petition for writ of certiorari has been filed in that court, the clerk shall not issue the mandate until final disposition by the Supreme Court of the petition. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the clerk shall issue the mandate immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

(c) Recall of Mandate. In any appeal from a judgment of conviction in a criminal case, no motion to recall a mandate based on the asserted failure of counsel to represent the appellant effectively on appeal shall be considered by the court unless the motion is filed within 180 days from the issuance of the mandate.

(d) Disciplinary Cases. No mandate shall issue in any disciplinary case that has been initiated in this court by a report and recommendation from the Board on Professional Responsibility. Any order of disbarment or suspension from the practice of law shall state the date on which it is to take effect. After the order is entered, the court may extend its effective date on motion of any party, for good cause shown, unless an extension is otherwise prohibited.

(e) Certification of Questions of Law. Rule 54 governs the procedure for stay of transmittal of opinions in certification matters.

[[PROPOSED]] RULE 41. MANDATE: CONTENTS; ISSUANCE AND EFFECTIVE DATE; STAY

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

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 ***calendar*** days after entry of an order denying a timely petition for panel rehearing, ***petition for*** rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time. ***[[See 70 USLW 4301 (May 7, 2002)]]***

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

(d) Staying the Mandate.

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

(2) Pending Petition for Certiorari.

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The clerk must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

(e) Recall of Mandate. In any appeal from a judgment of conviction in a criminal case, no motion to recall a mandate based on the asserted failure of counsel to represent the appellant effectively on appeal shall be considered by the court unless the motion is filed within 180 days from the issuance of the mandate.

(f) Disciplinary Cases. No mandate shall issue in any disciplinary case that has been initiated in this court by a report and recommendation from the Board on Professional Responsibility. Any order of disbarment or suspension from the practice of law shall state the date on which it is to take effect. After the order is entered, the

court may extend its effective date on motion of any party, for good cause shown, unless an extension is otherwise prohibited.

(g) Certification of Questions of Law. Rule 54 governs the procedure for stay of transmittal of opinions in certification matters.

SECTION COMMITTEE COMMENTS

(1) The specialized sections in new proposed DCApp Rule 41 (e),(f),(g) carry forward sections (c),(d),(e) of existing DCApp Rule 41. Otherwise, new proposed DCApp Rule 41 mirrors FRAppP 41, as amended in 1994,1998 and 2002.

(2) The impact of changes in the Supreme Court's rules, and changes to the FRAppP occurring within the last 15 years, call for updating DCApp Rule 40. ***First,*** the FRApp P were amended to extend the time for issuing the court of appeals mandate, from 21 days after entry of judgment, to 7 days after entry of the order denying a petition for rehearing, to take into account a 1994 change to Rule 40(a) that allows the government 45 days to file a petition for rehearing. The old rule requiring the mandate to issue 21 days after entry of judgment would cause the mandate to issue while the government might still be considering requesting a rehearing. *See* proposed new DCApp Rules 40(a)(1), 35(c). ***Second***, as to new proposed DCApp Rule 40(b), if a petition for rehearing or rehearing en banc is granted, the court enters a new judgment after the rehearing and the mandate issues within the normal time after that judgment. ***Third***, subsection (c) makes it clear that the Court of Appeals' judgment or order is effective when the appellate court issues its mandate. At that time the parties' obligations become fixed. The effectiveness of the Court of Appeals' mandate is not delayed until receipt of the mandate by the trial court or agency, or until the trial court or agency acts upon it. ***Fourth,*** the provisions of proposed new DCApp Rule 41(d)(1), and those in proposed new DCApp Rule 35, make it clear that the mandate is stayed until disposition of any petitions for panel rehearing, petitions for rehearing en banc, or motion for stay of mandate. Under subsection (d)(2), the maximum period for a stay of mandate, absent a court order extending the stay or the filing of a petition for writ of certiorari, is 90 days. The presumptive 30-day period in existing DCApp Rule 40 was adopted when a party was required to file a petition for a writ of certiorari in criminal cases within 30 days after entry of judgment. Supreme Court Rule 13.1 now provides that a party has 90 days after entry of judgment by a state court of last resort to file a petition for a writ of certiorari, whether the case is civil or criminal. The amendment does not require the Court of Appeals to grant a stay of mandate that is coextensive with the period granted for filing a petition for a writ of certiorari. The granting of a stay and the length of the stay remain within the discretion of the court.

RULE 42. VOLUNTARY DISMISSAL.

[No change in current DCApp Rule 42]

SECTION COMMITTEE COMMENT

Though there are minor differences in style, the substance of current DCApp Rule 42 seems identical to FRAppP 42. The Committee invites comment on whether current DCApp Rule 42 should be conformed word-for-word to the stylist changes made in 1998 in FRAppP Rule 42.

RULE 43. SUBSTITUTION OF PARTIES.

[No change in current DCApp Rule 43]

SECTION COMMITTEE COMMENT

Though there are significant differences in style and clarity, the substance of current DCApp Rule 43 is largely identical to FRAppP 43. The Notes to the 2002 edition of DCApp Rule 43 state that this DCApp Rule was last amended in 1996. The Committee invites comment on whether current DCApp Rule 43 should be conformed word-for-word to the technical and stylistic changes made in 1986 and 1998 in FRApp P 43. One commentator stated that the structure and visual appearance of FRAppP 43 make it much easier to follow than current DCApp Rule 43.

RULE 44. DISABILITY OF JUDGES

[No change in current DCApp Rule 44]

SECTION COMMITTEE COMMENTS

(1) There is no FRAppP corollary to current DCApp Rule 44 ("Disability of Judges"). The substance of FRAppP Rule 44 ("Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party"), as amended in 2002 (*see* 70 USLW 4301 (May 7, 2002)), appears in DCApp Rule 52 ("Cases Involving Constitutional Questions Where United States is Not a Party"). *See also* current DCApp Rule 53 ("Cases Involving District of Columbia Statutes or Regulations Where the District of Columbia Government Is Not A Party").

(2) One commentator suggested renumbering current DCApp Rules 52 and 53 as proposed new DCApp Rules 44(a) and (b), to better track the organization and structure of the recently-amended FRAppP. *See* new amendments to FRAppP Rule 44 in 70 USLW 4301 (May 7, 2002). Were this suggestion to be taken, then proposed new DCApp Rule 44 might read as follows:

RULE 44. CASE INVOLVING A CONSTITUTIONAL QUESTION WHEN THE UNITED STATES IS NOT A PARTY; CASE INVOLVING DISTRICT OF COLUMBIA STATUTES OR REGULATIONS WHEN THE DISTRICT OF COLUMBIA IS NOT A PARTY.

(a) Constitutional Challenge to Federal Statute. If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the court of appeals clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) Challenge to District of Columbia Statute or Regulation. If a party questions the constitutionality of ***an enactment of the Council of the District of Columbia, or questions the validity of such an enactment under the District of Columbia Self-Government and Reorganization Act, as amended,*** in a proceeding in which the District of Columbia or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the court of appeals clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact ***to the Corporation Counsel of the District of Columbia. For purposes of this rule, the District of Columbia shall not be considered a party to the proceedings unless represented by the Corporation Counsel***.

See new amendments to FRAppP Rule 44 in 70 USLW 4301 (May 7, 2002). The same commentator suggested that current DCApp Rule 44 ("Disability of Judges") might be repositioned as new DCApp Rule 52. *See also* U.S. Court of Appeals, D.C.Circuit Rules 47.1 through 48 ("Circuit Rules for which there is no Corresponding Federal Rule.") The Committee invites further comment on these suggestions.

RULE 45. DUTIES OF CLERK OF THE COURT.

[No change in current DCApp Rule 45]

SECTION COMMITTEE COMMENT

The Committee believes that current DCApp Rule 45 already reflects the proper rules for the Clerk's Office of the Court of Appeals. One of the more "user friendly" provisions of current DCApp Rule 45, as opposed to FRAppP Rule 45 ("Clerk's Duties"), is the statement in DCApp Rule 45(a) that: "The court shall always be deemed open for the purpose of filing, considering, and disposing of emergency matters." There are no specific "service" requirements imposed on the clerk by DCApp Rule 45, unlike FRAppP 45(c). *See also* 70 USLW 4301 (May 7, 2002) (changing old "serve by mail" to "serve" in FRAppP Rule 45(c)).

RULE 46. ADMISSION TO THE BAR.

[No change to DCApp Rule 46]

SECTION COMMITTEE COMMENTS

One of the most important Rules in this jurisdiction, DCApp Rule 46 has been closely watched and repeatedly updated, as is shown by its extremely detailed provisions, which were updated in 1986, 1989, 1991, 1994, 1998, 1999, and December 3, 2001.

RULE 47. APPEARANCE AND WITHDRAWAL OF ATTORNEYS; SELF- REPRESENTATION

[No change to DCApp Rule 47]

SECTION COMMITTEE COMMENTS

There is no FRAppP analogue to current DCApp Rule 47. FRAppP Rule 46 ("Attorneys") does not address entry of appearance, withdrawal of appearance, and self-representation, which are addressed in DCApp Rule 47.

RULE 48. LEGAL ASSISTANCE BY LAW STUDENTS.

[No change to DCApp Rule 48]

SECTION COMMITTEE COMMENTS

There is no counterpart in the FRAppP to current DCApp Rule 48. Properly utilized, this Rule should benefit both "clinical programs" and the courts. The Committee notes that, with appropriate approval from the United States Attorney or the Corporation Counsel's Office, DCApp Rule 48(a)(2) allows law students to appear in cases for the government.

RULE 49. UNAUTHORIZED PRACTICE OF LAW.

[No change in current DCApp Rule 49]

SECTION COMMITTEE COMMENTS

Updated repeatedly (in 1985, 1988, 1989, 1992, 1993, 1996, 1998, and April 30, 2002), DCApp Rule 49 reflects the current views of the Court of Appeals. The most recent April 30, 2002 amendments made extensive changes to DCApp Rule 49(c). *See* http://www.dcbar.org/dcca/orders Andnotices/212-01.html (No. M-212-01). There is no corresponding rule in the FRAppP.

RULE 50. EMPLOYEES NOT TO PRACTICE LAW.

[No change in current DCApp Rule 50]

SECTION COMMITTEE COMMENTS

There is no corresponding rule in the FRAppP.

RULE 51. JUDICIAL CONFERENCE OF THE DISTRICT OF COLUMBIA.

[No change in current DCApp Rule 51]

SECTION COMMITTEE COMMENTS

There is no corresponding rule in the FRAppP. The Courts of Appeals traditionally have local rules addressing their Judicial Conference. *See, e.g.*, U.S. Court of Appeals, D.C.Circuit Rule 47.1 ("Judicial Conference").

RULE 52. CASES INVOLVING A CONSTITUTIONAL QUESTION WHEN THE UNITED STATES

[No change in current DCApp Rule 52]

SECTION COMMITTEE COMMENTS

The Section invites further comment on whether the substance of current DCApp Rules 52 and 53 should be restated as new proposed DCApp Rule 44(a) and (b). *See SECTION COMMITTEE COMMENTS* on DCApp Rule 44. This would provide greater conformity between the DCApp Rules and the most recent amendments to the FRAppP. *See* new amendments to FRAppP Rule 44 in 70 USLW 4301 (May 7, 2002). If this change were made, current DCApp Rule 44 ("Disability of Judges") would be renumbered as new proposed DCApp Rule 52, and current DCApp Rule 54 would be renumbered as new DCApp Rule 53. The Committee was split on this proposal.

RULE 53. CASES INVOLVING DISTRICT OF COLUMBIA STATUTES OR REGULATIONS WHERE THE DISTRICT OF COLUMBIA GOVERNMENT IS NOT A PARTY.

[No change in current DCApp Rule 53]

SECTION COMMITTEE COMMENTS

The Section invites further comment on whether the substance of current DCApp Rules 52 and 53 should be restated as new proposed DCApp Rule 44(a) and (b). *See SECTION COMMITTEE COMMENTS* on DCApp Rule 44. This would provide greater conformity between the DCApp Rules and the most recent amendments to the FRAppP. *See* new amendments to FRAppP Rule 44 in 70 USLW 4301 (May 7, 2002).

RULE 54. CERTIFICATION OF QUESTIONS OF LAW.

[No change in current DCApp Rule 54]

SECTION COMMITTEE COMMENTS

There is no corollary in FRAppP to current DCApp Rule 54.

SCHEDULE OF FEES AND COSTS.

[No change in current Schedule]

SECTION COMMITTEE COMMENTS

The Committee invites comment on the suggestion of the Court of Appeals Clerk's Office that the Court might dispense with motions fees. The Committee also invites comment on the controversial suggestion that it might reduce the number of frivolous appeals (and the large number of appellate cases currently being dismissed by the Court of Appeals for failure to prosecute) by charging a $150 filing fee for filing a notice of appeal. *See SECTION COMMITTEE COMMENT* #3 to DCApp Rule 3.

APPENDIX OF FORMS

Form 9. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of DCApp Rule 32(a)(7)(B) because:

__ this brief contains [*state the number of*] words, excluding the parts of the brief exempted by DCApp Rule 32(a)(7)(B)(iii), or

__ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by DCApp Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of DCApp Rule 32(a)(5) and the type style requirements of DCApp Rule 32(a)(6) because:

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(s) _____

Attorney for _____

Dated: _____

SECTION COMMITTEE COMMENTS

(1) New proposed Form 9 is modeled word-for-word after new Form 6 in the most recent amendments to the FRAppP, with appropriate substitution of references to DCApp Rules (instead of FRApp Rules). *See* 70 USLW 4301- 4302 (May 7, 2002).

(2) The Court of Appeals should *sua sponte* consider the Clerk's suggestion that the operations if its Office would be aided if the appellant supplied some additional information at the time of filing a notice of appeal – such as the name of the trial judge, and the names, addresses, and contact information for all counsel in the case. To the extent that DCApp Forms 1, 2 and 3 do not currently provide for appellant to provide this information, the Court might consider amending those model forms. *See, e.g.,* Form 1 (no place on standard notice of appeal form for appellant to list the name of the trial judge); Forms 2 and 3 (no place on standard forms for appellant to list the name and contact information of the opposing counsel or criminal prosecutor). *See SECTION COMMITTEE COMMENT* #4 to DCApp Rule 3 ("Providing the additional information is good practice. Failure to provide the additional information, however, should not affect the validity of a Notice of Appeal.")