SECTION ON COURTS, LAWYERS
AND THE ADMINISTRATION OF JUSTICE
OF THE DISTRICT OF COLUMBIA BAR

COMMENTS OF THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR ON PROPOSED AMENDMENTS TO RULES 27, 28 AND 32 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

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RULE 27. MOTIONS

We generally agree with the proposed amendments to Rule 27. However, we strongly urge one additional change.

The proposed revision to Rule 27 proposes a change to the current requirement under the rule that oppositions to motions are due seven days after service of the motion. The new rule proposes that a response be filed within ten days after service of the motion unless the court shortens or extends the time. While ten days is adequate for non-dispositive motions, responses to dispositive motions for summary affirmance or reversal merit an allowance of additional time. Many circuits now resolve a substantial percentage of appeals on motion, for summary affirmance or reversal. It is clear that the movant controls when such a motion is filed, and ten days is a short period of time in which to respond. Even if an opposition is relatively straight forward and requires only modifying and updating District Court briefs (which is often not the case), it is frequently difficult for counsel with other responsibilities to complete this task within ten days. This burden is even greater when, as periodically occurs with both private and governmental litigants, a different lawyer represents a party on appeal than in the trial court.

The problem could be alleviated to some extent if extensions of time were generously granted. Such an approach, however, would place a significant burden on understaffed clerks' offices, particularly given the short time within which a ruling on such a motion would be needed. As well, many circuit courts have taken the position that the grant of extensions of time is a practice which is frowned upon.

For these reasons, we propose that the time to respond to the dispositive motions be made twenty-one days. The time to respond to other motions (for example, motions to stay) would continue to be ten days as proposed in the current revisions.

RULE 28. BRIEFS

We agree generally with the proposed revisions to Rule 28 of the Federal Rules of Appellate Procedure. However, as will be more thoroughly addressed with regard

to Rule 32, and its proposed revisions, the requirement that a brief be accompanied by a certification of compliance with proposed word limits, unless the brief falls within certain specified "safe harbors" as defined by Rule 32, needs clarification. If a certification requirement remains in the Rules as implemented, it must be clarified to insure that counsel may rely on the counting provisions of the particular word processing/computer software used to prepare the brief.

RULE 32. FORM OF A BRIEF, OTHER PAPERS

The Committee agrees, generally, that the length of briefs and other papers should be primarily governed by limits placed upon the number of words, and by general rules concerning the layout of pages. However, the proposed amendments are overly detailed and confusing to practicing attorneys not versed in typographic issues. For example, Rule 32(a)(5)(A) requires that a brief be prepared in either a proportionally spaced or a monospaced face, and requires that a proportionally space face include serifs, but also indicates that sans-serif type may be used in headings and captions. Many attorneys are not familiar with these terms or provisions, but conversely, all are knowledgeable concerning when a brief is legible. Less technical requirements would appear to be sufficient, and would promote compliance.

Other provisions of the rule are likewise overly technical and restrictive. For example, 32(a)(6) limits the type styles to be used generally in a brief to a "plain, roman" style. The rule as it currently exists mandates only the size of type and does not address the style of the type utilized. This can be confusing because "roman" is not only a reference to the "plain nature" of type, but is a category of type, ("Roman" or "Times Roman") and this may lead to some confusion. The rule could instead provide only that a brief must be set in plain block style.

Likewise, the provision in Rule 32(a)(1)(B) provides that the text clarity must be such that it "equal[s] or exceeds the output of a laser printer." This is again a reference to a requirement with which a large number of attorneys may be completely unfamiliar. If an attorney's office is using typewriters, ink jet printers or daisy wheel printers, or other type printing devices, it is unlikely that those devices will as a matter of course meet the output of a laser printer. The Committee note to the proposed rules defines this to mean a print resolution of 300 dots per inch or more to insure legibility. This again seems overly technical, and is now not even a part of the rule. As the Committee note indicates some ink jet printers, for example, do not meet this standard.

What the rule should be striving for is legibility, and clearly defined requirements with regard to brief length. The proposed rule is overly technical, and as

illustrated by the Committee note, requires an understanding and knowledge of type styles, characters, laser, daisy wheel and dot matrix printers, and other technical printing requirements such as "serif" type. In the opinion of the Committee, the rule should be rewritten to be simpler, to address the issues of legibility and brief length in a way that is more understandable to the practitioner, and written in a way to facilitate compliance.

The proposed Rule also contains in 32 (a)(7) a certification requirement, whereby counsel filing principal briefs which exceed 30 pages in length, and reply briefs which exceed 15 pages in length must include a certificate attesting that the type volume of the brief does not exceed the limitations contained in Rule 32(a)(7)(B). Should the Rule as implemented continue to include this provision, it should be clarified to insure that counsel may rely in making the attestation, on the count provided by the particular wordprocessor/computer software utilized to prepare the brief as the count mechanisms of various programs are not necessarily uniform.