COMMENTS OF THE COMMITTEE ON COURT RULES OF DIVISION IV OF THE DISTRICT OF COLUMBIA BAR ON PROPOSED DISTRICT OF COLUMBIA COURT OF APPEALS RULES

Ellen Bass, Co-Chair
David J. Hayes, Co-Chair
John P. Hume
Noel Anketell Kramer
Larry P. Polansky
Claudia Ribet
Arthur B. Spitzer

Steering Committee, Division IV (Courts, Lawyers and the Administration of Justice), D.C. Bar

John T. Boese, Co-Chair
Gerald P. Greiman, Co-Chair
Gregory J. Miner
Richard B. Nettler*

Members of Committee on Court Rules Who Drafted Comments

*Project Chair

Dated: August 27, 1984

STANDARD DISCLAIMER

"The views expressed herein represent only those of Division IV: Courts, Lawyers, and the Administration of Justice, of the D.C. Bar and not those of the D.C. Bar or of its Board of Governors."

Introduction

We are writing to submit the comments of the Committee on Court Rules of Division IV of the District of Columbia Bar regarding the Proposed Rules of the District of Columbia Court of Appeals. */

The Committee notes that this is the first substantial rewriting of the Court's rules in more than ten years. Generally, the Proposed Rules clarify many aspects of appellate practice which have been confusing both to attorneys and parties proceeding pro se.

In the comments set forth below, the Committee has addressed some of the changes proposed by the Court, and has suggested other changes. The Committee has commented on those Proposed Rules which it feels could be clarified even further, or which may be inconsistent with other Proposed Rules. The most important comments relate to the Proposed Rules which concern the record before this Court in civil and agency matters. The Committee has not commented on the Proposed Rules which were not considered to be in need of further clarification, or which are substantially the same as the present rules.

Finally, the Committee recognizes the substantial amount of time that the members of the Court have invested in preparing the Proposed Rules, and hopes that its comments will be of some assistance to the Court.

---

*/ Supplemental comments may be forthcoming with further review of the proposed rules.

Proposed Rule 1

The Committee suggests that under Proposed Rule 1, the Court make clear that the term "counsel" also subsumes an individual proceeding pro se insofar as the rules impose obligations on counsel.

Proposed Rule 3(a)

Present Rule 4(a), from which proposed Rule 3(a) is derived, contains a provision that "Form 1 in the Appendix of Forms is a suggested form of a notice of appeal." Proposed Rule 3(a) contains a similar provision but adds the language "but the use of a particular form shall not be required."

By informal practice, the Superior Court presently requires the use of a particular form for a notice of appeal. The form currently used is substantially different from and more complex than D.C. Court of Appeals Form 1 and Superior Court CA Form 27. It requires the appellant to set forth various information about the case, including a statement of the issues to be presented on appeal and a designation of the portions of the transcript needed on appeal. Presumably, Proposed Rule 3(a) would eliminate any requirement that the current Superior Court form or any other particular form be used.

The Committee supports this change. We believe that the minimum requirements for the notice of appeal should be fairly brief and simple, consistent with present Court of Appeals Form 1 and Superior Court CA Form 27, particularly since the timely filing of a notice of appeal in proper form is necessary to vest the Court of Appeals with jurisdiction. Also, designation of the

issues to be raised on appeal and the portions of the transcript needed on appeal is already governed by other Court of Appeals rules. Further, other information requested on the current Superior Court form is available from the Superior Court jacket. To the extent that the Superior Court requires information at the time the notice of appeal is filed beyond what would be reflected on a simple notice of appeal, we believe that it would be preferable to require that such additional information be furnished in a separate filing rather than in the notice of appeal itself -- perhaps on a form analogous to the civil cover sheet now used by the U.S. District Court.

Proposed Rule 3(b)

Proposed Rule 3(b) contains new language specifying how two or more parties, after filing separate notices of appeal, may jointly pursue an appeal -- i.e. "and by filing a joint designation of record or stipulation with the Clerk of the Superior Court."

The Committee believes that the term "and" which appears as the first word of the clause quoted above is extraneous and potentially confusing, and therefore recommends that it be deleted.

Also, the Committee believes that if two or more parties are going to jointly pursue an appeal, joinder should be effected as early as possible, and, in particular, before a settlement conference is held, so that a single settlement conference can be held in multiple party cases. One problem with effecting joinder by filing a joint designation of record is that in civil cases,

no designation of record is required to be filed until after the settlement conference procedure has been concluded. See Proposed Rule 7A(f). Thus, having joinder turn on the filing of a joint designation of record may defer the time of joinder. Accordingly, the Committee recommends that Proposed Rule 3(b) be revised to provide that while joinder may be accomplished by filing a joint designation of record, parties who wish to join in appeals are encouraged to do so by stipulation, and at the earliest practicable time.

Proposed Rules 4(a)(1) and 4(b)(1)

The Committee believes that an appellant who mistakenly files a notice of appeal in the Court of Appeals rather than in the Superior Court, and whose error is not discovered until after the time for appeal has run, should not thereby lose his or her appeal rights or have to bear the burden of filing a motion alleging excusable neglect. Accordingly, we suggest that the following language be added to Proposed Rules 4(a)(1) and 4(b)(1): "If a notice of appeal is mistakenly filed in the Court of Appeals, the Clerk of the Court of Appeals shall note thereon the date on which it was received and transmit it to the Clerk of the Superior Court and it shall be deemed filed in the Superior Court on the date so noted." The suggested language is derived from FRAP (4)(a)(1).

Proposed Rule 4(a)(2)

Proposed Rule 4(a)(2), in specifying the types of motions which will terminate the running of the time for filing a notice of appeal, adds a reference to motions "for reconsideration if

authorized by the rules of the Superior Court." The apparent purpose of the change is to make clear, as the Court of Appeals has held, that a timely filed motion which ultimately seeks judgment notwithstanding the verdict, amended or additional findings of fact, a new trial, or to vacate, alter or amend a judgment or order, will be effective to toll the running of the time for appeal even though it is merely labelled as a motion for reconsideration. See Coleman v. Lee Washington Hauling Co., 388 A.2d 44 (D.C. 1978). We assume that the added language is not intended to change the existing rule in this jurisdiction that motions pursuant to Superior Court Civil Rule 60 do not toll the time for appeal, see, e.g., Smith v. Canada, 305 A.2d 521 (D.C. 1973), or to otherwise change existing law.

Assuming that no change in existing law is intended, the Committee has some concern over whether the added language is necessary, in light of the fact that the rule, after enumerating the specific motions referred to above, already refers to "any other motion seeking relief in the nature of the foregoing." Also, it is conceivable that the added language could create more uncertainty than it eliminates, particularly with respect to Rule 60 motions.

If, on the other hand, the Proposed Rule is intended to change existing law, new language is appropriate; however, the Committee recommends that the rule more precisely itemize the types of motions which will toll the time for appeal, in order to avoid confusion.

Proposed Rule 4(a)(3)

Present Rule 4(a)(3) provides, among other things, that a judgment or order shall not be considered as having been entered, for purposes of computing the time for appeal, until a certain length of time after notice thereof has been mailed to the parties or counsel, if the judgment or order was "entered or decided out of the presence of the parties and counsel and without previous notice to them of the court's decision." Proposed Rule 4(a)(3) deletes the language "and without previous notice to them of the court's decision," and thus defers the commencement of the running of the time for appeal until notice has been mailed in all cases where a judgment or order is entered or decided outside the presence of the parties or counsel.

Under the present rule, substantial uncertainties could arise over whether a party or counsel had previous notice of the court's decision. For example, problems could arise where the court orally decided an issue with a written order to follow, or where oral notice was transmitted by a law clerk or opposing counsel. Accordingly, the Committee supports the proposed change as promoting greater certainty as to when the time for appeal commences to run. See also, Comment to Proposed Rule 15.

Proposed Rule 4(b)(3)

Proposed Rule 4(b)(3) changes the time for filing a notice of appeal in criminal cases from 10 days to 30 days. Thus, the Proposed Rules adopt a uniform 30 day time period for filing a notice of appeal in all cases -- civil, criminal and agency. The Committee supports this change.

Proposed Rule 4(c)(1)

Proposed Rule 4(c)(1) makes clear that in expedited appeals, counsel for appellant must advise the Clerk of the Court of Appeals of the forthcoming appeal, in person or by telephone, at the time the notice of appeal is filed with the Superior Court. The rule, however, is silent as to notice to the opposing party or counsel.

The Committee feels that opposing parties or their counsel should have notice of a forthcoming expedited appeal as early as possible, just as the Court of Appeals should. We, therefore, recommend that a provision be added requiring counsel for appellant to provide the same notice to opposing parties or counsel as is required to be provided to the Court of Appeals, and at the same time. This change can be accomplished by inserting the words "and opposing counsel" after the words "clerk of the court" in the fourth line of the proposed rule.

Proposed Rule 4(c)(9)

Proposed Rule 4(c)(9) clarifies that in expedited appeals, opposing counsel shall also comply with Proposed Rule 4(c)(7) "by submitting [to the clerk] any response or additional memoranda or documents." We recommend that opposing counsel's obligations in this regard be further clarified by making explicit the implicit requirement in the rule that opposing counsel must personally serve copies of such response or additional memoranda or documents on other counsel. This change can be effected by inserting the words "and serving a copy personally on opposing counsel" after the word "document" on the third line of the

proposed rule.

Proposed Rule 7A(b)(3)

Proposed Rule 7A(b)(3) provides that "if a cross-appeal is filed, a cross-appellant shall file a counter - [civil appeal] statement within seven days after service of the appellant's civil appeal statement."

However, the interplay of this rule with Proposed Rules 7A(b)(1), 7A(b)(2) and 4(a)(1) may give rise to anomalous situations. For example, Proposed Rule 7A(b)(1) merely requires that an original appellant's civil appeal statement be filed no later than 15 days after filing of the notice of appeal, and does not preclude earlier filing of the statement. Thus, an appellant could file a civil appeal statement immediately after filing a notice of appeal. Were that to happen, an appellee's/potential cross-appellant's response or counter-civil appeal statement would be due within seven days, and, thus, before the time within such party must decide whether or not to file or cross-appeal.

To obviate these anomalies, the Committee recommends that Proposed Rules 7A(b)(2) and 7A(b)(3) be revised to provide that an appellee's response to a civil appeal statement or a cross-appellant's counter-civil appeal statement shall be filed within eight days after the expiration of the time for filing a cross-notice of appeal. Under such an approach, an appellee will not be required to prematurely decide whether or not to file a cross-appeal before responding to the appellant's civil appeal statement; and a cross-appellant will always have at least seven days after the filing of appellant's civil appeal statement

within which to file a counter-statement.

Proposed Rule 7A(f)

Proposed Rule 7A(f) addresses the tolling of procedural requirements in certain circumstances. However, neither this rule nor Proposed Rule 3(b) addresses whether or not the pendency of a motion for consolidation under the latter rule tolls procedural requirements until the motion is resolved.

The Committee believes that resolving motions to consolidate before other procedural requirements must be met would promote orderly and efficient processing of appeals. Also, we believe that consolidation issues should be resolved before a settlement conference is held, so that a single settlement conference can be held in multiple party cases. Accordingly, the Committee recommends that a provision be added to Proposed Rule 7A(f) or 3(b) to the effect that the filing of a motion to consolidate shall toll the time for complying with the provisions of Rule 10 and the scheduling of a settlement conference until the motion has been resolved.

Proposed Rule 8

The Committee notes that line 10 of Proposed Rule 8(a) should read "for the relief which the applicant requested."

With respect to Proposed Rule 8(b), the Committee recommends that provision be made for insuring that any interest accumulated on security placed in an escrow account is paid to a party being deprived of monies to which it ultimately becomes entitled. Thus, if a stay is granted of a money judgment and the sum is placed in an escrow account, any interest accumulated should be

paid to the party which prevailed in the Superior Court if it should prevail on appeal. If the party partially prevails, then the interest paid would reflect the extent to which the party's judgment may have been reduced.

Proposed Rule 9

The Committee does not understand why the Court has proposed to eliminate Rule 9(e) regarding custody in habeas proceedings. We are aware that there are not many situations where the rule can be applied, but these situations do exist and are unaddressed by the Proposed Rules.

Proposed Rule 10

The Committee supports that portion of Proposed Rule 10(a)(3) in which the Court makes it clear that the filing of a designation of record in criminal and juvenile delinquency cases is not required.

We suggest amending Proposed Rule 10(b)(1) to provide that "One legible copy of the pertinent papers and exhibits and one copy of the reporter's transcript, if any, shall be transmitted * * *." The cost of providing four legible copies is often the sole reason why litigants, who cannot proceed in forma pauperis, are unable to proceed with an appeal. We, therefore, believe that both the Court's ability to review the record and the appellant's ability to proceed with an appeal would be furthered by a requirement that the appellant instead file four copies of a record extract or "record excerpts" when it files its brief, and that the appellee do the same if it believes that additional record items are pertinent to issues raised in its brief. Cf.

Local Rule 9(a)(1) of the United States Court of Appeals for the District of Columbia Circuit. The record excerpts would include only those items pertinent to the issues briefed, which in most circumstances would be less than the number of items noted in the designation of record. This amendment retains the ready availability of the record to the Court, assists litigants whose finances are marginal, and focuses the Court on what the parties believe are the pertinent parts of the record. Alternatively, the Committee would suggest consideration of providing for an Appendix, along the lines provided for in FRAP 30, in lieu of requiring four copies of the record.

Proposed Rule 10(b)(2)-(4) primarily makes editorial changes to the present Rule 10(b)(2)-(4) except that, in subsection (2), the trial court may direct transmittal of the original record where "necessary" rather than when merely "proper". The Committee suggests that subsections (2)-(4) be consolidated into one subsection which reads:

> (b)(2) ORIGINAL PAPERS AND EXHIBITS. Whenever this Court or any party believes that questions presented may be presented more appropriately by the use of original papers and exhibits instead of copies, or the trial court believes their transmission is necessary, this Court or the trial court may direct that such originals be included in the record on appeal. Any party may file a motion in this Court requesting that the originals be transmitted if the trial court has first refused such relief. The Clerk of the Superior Court is to transmit these original papers to the Clerk of this Court when so ordered.

The Committee supports Proposed Rule 10(c)(2)'s requirement that a statement of "issues to be presented" be filed when no

transcript is ordered. Appellant should be bound by this statement unless the Court, prior to briefing, permits the statement to be modified. Thus, consistent with present case law, evidentiary issues should not be permitted to be raised in the brief if no transcript is prepared. The statement, however, should not ordinarily bind one to the legal issues that can be argued.

The Committee likewise supports Proposed Rule 10(d), formerly Rule 10(j). As a result of problems recently experienced by the Court with statements of proceedings and evidence, we believe that such statements should be allowed to be filed only under the most "extraordinary circumstances". We note, with approval, that in subsection (d)(2), appellant may submit a revised statement for approval if the trial judge disapproves of the initial statement filed. We suggest that appellee be given the same opportunity, and only if the trial judge then disapproves the revised statements should a transcript have to be ordered. Considering the time consuming process outlined in Proposed Rule 10(d), we think that only a compelling showing that such a statement is appropriate and will be approved by a trial judge warrants proceeding before the Court with a statement of proceedings and evidence.[1/]

Proposed Rule 15

We support the Court's amendment of Rule 15 to provide an

1/ Proceeding with a statement may be appropriate in those circumstances where an agreed statement was authorized by Rule 10(k).

aggrieved party 30 days to seek review of an agency order or decision. This establishes a uniform time for seeking review from this Court of civil, criminal and agency matters. The Committee also agrees with that portion of Proposed Rule 15(a) which makes it clear that a petition for review is not timely filed unless the docketing fee is tendered at the time the petition is filed. There are, however, a number of amendments to the rule which are unclear.

Under the present rule, a party has 15 days to file a petition from the date the agency order or decision is received. The proposed rule can be read to commence the 30 day period from the time notice is sent, not received, plus five days for mailing, if the decision is made out of the presence of the parties. While this procedure is consistent with appeals from civil and criminal matters, it is not absolutely clear that this is the procedure prescribed in Proposed Rule 15. In addition, it is not clear whether the five days for mailing applies to both petitions which need to be filed within 30 days of notice being given and petitions which must be filed less than seven days from the date of the decision or order. We suggest that the five days apply to both petitions and that the 30 days begin to run from the date the decision or order is sent. Also, the Committee suggests that an excusable neglect provision be incorporated into the rules governing the time for filing a petition for review.

Although it is unclear, the Committee also believes that the language of Proposed Rule 15(a) continues to require a party to file a petition within 30 days of receipt of the decision or

order, if received in person, and not to provide that party an additional five days if either the agency rules require mailing or a mailing is performed notwithstanding receipt of a decision or order in person.

Proposed Rule 15(b) represents a change from the existing rule in that it provides that a petition for review must be filed within 30 days of service of an order denying a petition for rehearing or reconsideration, instead of from the date of decision, or, if mailed, 33 days. Cf. Poyner v. Police and Firemen's Retirement & Relief Bd., 456 A.2d 1249 (D.C. 1983). The Committee believes that there is no reason for the time period not being consistent with both Proposed Rule 15(a) and Proposed Rule 4(b). That is, the period should commence to run from the date notice is sent, plus five days for mailing, if the decision is made out of the presence of the parties.

Proposed Rule 15(c) perpetuates the present confusion as to the correct respondent in a petition for review of an administrative decision. First, if the respondent is the correct administrative agency and not also the parties who prevailed before that agency, the rule should make that clear by providing that "The petition shall * * * designate the respondent agency * * *." If the Court meant to provide that the respondent could also be the parties who prevailed before the agency, the Clerk of the Court could not be in a position to provide the "correct name or title of the respondent" as stated in Proposed Rule 15(c). While the Committee believes that the respondent can only be the agency whose decision or order is sought to be reviewed, the

proposed rule should be clarified.[2/]

The confusion generated by Proposed Rule 15(c) is perpetuated by Proposed Rule 15(e) which provides that the petition for review is to be transmitted to "each respondent and * * * counsel representing the agency"; and that "the petitioner shall serve a copy thereof on all parties * * * other than the respondents." (emphasis added). Respondent is at times equated with the agency and at other times given a broader connotation. Again, the Committee believes that respondent, when used, should modify agency, to wit, "respondent agency" or "respondent agencies".

With respect to the requirement that petitioner serve a copy of the petition for review "on all parties who formally participated in the proceedings", it should be noted that one who formally participates before the agency may not necessarily be someone who can appear before this Court as a party. Thus, the requirement can be burdensome. We suggest that the broad language be modified to include only those "who participate as a party in accordance with either the agency's rules or the applicable statute."

Finally, the Committee assumes that "in the proceeding" in Proposed Rule 15(f) refers to an agency proceeding. If so, we fail to understand why the party should discuss its interest in that proceeding as opposed to its interest in the court

---

2/ See discussion infra regarding the requirement in Proposed Rule 15(c) that the petition "shall * * * set forth" "the grounds on which petitioner relies and concerning [the] error * * * alleged" and the provisions of Proposed Rule 17.

proceeding. If the terms refer to the court proceeding, they are redundant.

Proposed Rule 17

With respect to Proposed Rule 17(b), the Committee believes that the Court should specifically allow an agency to submit a tape of its hearings in lieu of a transcript where no transcript exists. Inasmuch as many of the agencies do not have sufficient funds to have hearings transcribed or rules providing that a petitioner bear the cost of a transcript, many of the agencies will simply provide a statement of proceedings and evidence. We believe a tape may be more accurate and, therefore, should be provided in addition to a 17(c) statement. This is especially so since Proposed Rule 17(c) provides no mechanism by which a party can contest the statement of proceedings and evidence.

An additional problem with Proposed Rule 17(c), is that given what the Committee believes will be an increasing use of statements of proceedings and evidence, pro se petitions which fail to accurately assert the error claimed, as required by Proposed Rule 15(a), will be confronted with narrow statements of proceedings and evidence. If the 15(a) requirement is to be strictly applied then the unwary pro se petitioner will rarely be able to proceed with his or her case. While the filing of a hearing tape should not be a signal that the 15(a) requirement is to be treated lightly, the Committee believes that the filing of tapes where a transcript does not exist will ultimately aid the

administration of justice.[3/]

While the Committee recommends retention of Rule 10(k)'s agreed statement provision, we have no strong opposition to the Court's amendment of Rule 17(d) to preclude the filing of such a statement in agency cases.

Proposed Rule 19

The Committee strongly suggests that the Court specifically incorporate the requirements of Proposed Rule 8 rather than simply referencing the rule. Thus, the last sentence would read "as the court deems necessary, and in accordance with Rule 8(b)". The Committee also believes, as it does with Proposed Rule 8, that this rule should provide for the establishment of an interest bearing escrow account, which interest shall be paid to the appropriate party.

Proposed Rules 27 and 32

Proposed Rules 27(e) and 32(a) continue the present requirement that legal size paper be used for briefs and motions filed in this Court. The Committee favors the use of letter size paper in this Court so that the requirements of this Court and the federal courts will be the same, and believes that the adoption of new Rules by this Court is an appropriate time to make this change.

Proposed Rule 28

The Committee notes that Proposed Rule 28(a) provides for

3/ We note that, to be consistent with 17(b), "available" in 17(c) should be replaced with "in existence", since the terms do not have the same meaning.

the notation, on one's brief, of the counsel who will argue the appeal. We do not object to this requirement upon the understanding that it no way limits the party to having other counsel of record argue the matter by notifying the Clerk of the Court, by letter, of the party's intention to have such other counsel argue the case.

The Committee also supports the requirement contained in Proposed Rule 28(f) that relevant statutes, rules or regulations must be reproduced either in the brief, or as an addendum or as a separate pamphlet as is provided in Rule 28(f) of the Federal Rules of Appellate Procedure (FRAP). It is suggested that briefs which fail to comply with Proposed Rule 28 be lodged with the Court and that the party responsible for the brief be required to prepare a proper brief before it can be filed. Improperly prepared briefs should not be tolerated.

The Committee also supports Proposed Rule 28(n), which incorporates existing case law prohibiting citation of unpublished opinions and orders of this Court. The Rule places all counsel, including those who have no knowledge of unpublished decisions and orders, on equal footing. We suggest, however, that the Proposed Rule further provide that unpublished opinions and orders of other courts, as well, shall not be cited where such opinions are not considered precedent under the rules of the court which issued them.

With respect to Proposed Rule 28(k), the Committee agrees with the adoption of another federal rule, that is, Rule 28(j) of the FRAP. The Court has modified the federal rule, however, to

provide that four copies of a Proposed Rule 28(k) letter be submitted along with a copy of any "supplemental authorities * * * not readily available in published form." We support the modification of the federal rule.

Proposed Rule 29

While the Court, in Proposed Rule 29(b), has not modified its requirement that a motion for leave to argue must be filed at the time either a consented to amicus brief is filed or when the motion for leave to file an unconsented to brief is filed, the Committee recommends that the rule be modified so as to allow for such motions to be filed "three days after the last reply brief is due to be filed." Often an amicus will be unable to determine whether its participation in argument is appropriate until responsive briefs have been considered. Thus, the requirement that an amicus make such a judgment prior to that time does not appear to aid the Court in any way, especially since the argument calendar is not prepared until some time after the reply brief is due to be filed.

Proposed Rule 39

Proposed Rule 39(a), which incorporates present Rules 39(a), (b) & (c), adopts Rule 39(a) of the FRAP. Accordingly, we assume the Court intends to adopt the relevant case law as well. See, e.g., Baez v. United States, 684 F.2d 999, 1002 (D.C. Cir. 1982).

The Committee does not support Proposed Rule 39(b). Moreover, we believe that it is inconsistent with Proposed Rule 39(f).

Proposed Rule 39(b) modifies the present rule, and Rule 39(b) of the FRAP, to preclude an award of costs for or against the District of Columbia or its agencies unless authorized by law. The rule was originally adopted when costs were not available against the United States on sovereign immunity grounds. The nonavailability of such costs was changed by the amendment of 28 U.S.C. § 2412. See Notes of Advisory Committee on Appellate Rules, Title 28 U.S.C.A. That statute provides for costs against the United States in almost all civil cases. Although there is no District counterpart to § 2412, the District does not enjoy sovereign immunity with respect to costs, the Proposed Rule will place the District in a position different from all other litigants. No costs can be awarded for or against it. Cf. Dillard v. Yeldell, 334 A.2d 578 (D.C. 1975).[4/] The Committee sees no reason for placing the District in such a position when it has treated the District as any other litigant before.

We also note that while the court has "apparently" precluded an award of costs for or against a District agency in Proposed Rule 39(b), it specifically authorizes them in Proposed Rule 39(f). If costs can only be awarded as "authorized by law," and in a manner in which they are authorized against the United States, then Proposed Rule 39(f) is invalid. The Court should

---

4/ In Dillard, the Court held that 28 U.S.C. § 1920 provided it with the authority to award costs. That section does not authorize an award of costs against the United States, only § 2412 does. Proposed Rule 39(b) can be read to require a specific statutory authorization of costs against the District, as with the United States, which, of course, does not exist.

delete, from Proposed Rule 39(b), reference to the District of Columbia.

Proposed Rule 39(d) also constitutes an adoption of FRAP Rule 39(d). In adopting the federal rule, the Court no longer provides that costs are to be a part of the mandate, if it should delay the issuance of the mandate, and the proposed rule shortens the time requirements provided in its federal counterpart. Inasmuch as the costs that can be awarded under the proposed rule are not varied, we support the time limitations imposed by Proposed Rule 39(d).

Although Proposed Rule 39 does not contain any counterpart to FRAP Rule 39(c), which pertains to costs taxable in the Court of Appeals, the Committee assumes that the cost of copying a brief which is not printed is taxed by this Court. That is the Court's past practice.

In addition, the Committee suggests that the Proposed Rule contain a provision which would direct the Superior Court to defer taxing costs until a motion for attorney's fees and costs is filed, where there is statutory authorization for attorney's fees. The federal courts of appeals are split on when a bill of costs must be filed and acted upon and by which court, trial or appellate, when a case is a statutory fee case. The Court should consider the administrative and practical problems involved with such situations since there are now almost sixty statutes in the D.C. Code authorizing attorney's fees.

The Committee also suggests that the Court promulgate rules to govern requests for attorney's fees from the Court of

Appeals. Some statutes authorize this court to award fees (e.g. D.C. Code § 45-1592), but there is no rule dealing with fee applications. The Supreme Court has suggested that courts establish rules to deal with fee requests, in light of the fact that fee requests are collateral to decisions on the merits (see White v. New Hampshire, 455 U.S. 445, 454, n.16 (1982)), and, thus, the Committee believes this Court should do so.

Proposed Rule 40

We assume, although it is unclear from the Proposed Rule, that "active or retired judge" includes any Superior Court judge who was a member of the division which heard the case. If the assumption is incorrect, we suggest that Proposed Rule 40(b) be amended to include Superior Court judges who were members of the division which heard the particular case.

Proposed Rule 41

The Committee does not agree with the language amending Proposed Rule 41(a) which provides that a petition for rehearing by one party in a consolidated case does not "stay the mandate as to any other party." We believe judicial economy would be served by staying the mandate as to all other parties because, in the event rehearing is granting, it would not be in the interests of justice to allow the result in the consolidated cases to be fragmented. This would be different if the basis for granting rehearing was unrelated to portions of the decision which affected only those who did not seek rehearing. In any event, the Court's amendment would not stay the mandate as to other parties who seek rehearing en banc even though one party has

sought rehearing. Thus, since a request for rehearing in that circumstance is merely a matter of form, the mandate should not be issuing in one consolidated case when issuance has been stayed in the other case.

Proposed Rule 47

The Committee suggests that Proposed Rule 47(b) be modified to provide that: "No attorney shall be permitted to withdraw an appearance at any time without leave of court unless another attorney enters or has entered an appearance at the time withdrawal is sought and provided that consideration of the appeal will not be delayed." See Local Rule 1-4(c) of the United States District Court for the District of Columbia.