



D I S T R I C T O F C O L U M B I A B A R
Courts, Lawyers and the Administration of Justice Section

**Public Statement of the D.C Bar Courts, Lawyers and the Administration of Justice Section¹
on Modernizing the Rules of The District of Columbia Court of Appeals**

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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 Section² of the District of Columbia Bar and its Court Rules Committee strongly support this Court of Appeals project. This statement is issued to set out our recommendations for the revised DCApp Rules. Following the controlling statute, D.C.Code §11-743 (2001), our recommendations adhere word-for-word, for the most part, to the modern Federal Rules of Appellate Procedure (“FRAppP”), with some exceptions to reflect local practice and the differences between state and federal courts. Our recommendations comment on the Court of Appeals proposed new amendments to DC App Rule 4(c) (“Expedited and Emergency Appeals”) in light of recent legislation requiring Superior Court “permanency hearings” for abandoned, neglected or abused children within certain statutory time limits. Our recommendations also incorporate the most recent amendments to the FRAppP that were approved by the United States Supreme Court on April 29, 2002, and transmitted to Congress pursuant to 28 U.S.C. §§2072 – 75. Unless altered by Congress, these amendments to the FRAppP will take effect December 1, 2002. *See* 70 USLW at 2693, 4295-4302 (May 7, 2002). We believe that updating the Court of Appeals Rules, to make them conform more closely to the FRAppP, is long overdue. The impact will be to streamline and modernize the DCApp Rules.

Traditional practices before the Court of Appeals will be significantly affected by some of our proposed amendments, such as the proposed switch to an Appendix system in civil appeals (*see* proposed DCApp Rules 10, 11, 17, 30) and the proposed shortening of the permissible length of appellate briefs (*compare* current DCApp Rule 28(g) *with* FRAppP 32(a)(7)). 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 #1 (June 2002) (enclosed), updating DCApp Rules 1 through 30. Tentative Draft #1 reflects comments and suggestions already received from many sources, including the United States Attorney’s Office, the Public Defenders’ Office, the Corporation Counsel’s Office, the Council on Court Excellence, the Court Rules Committee and Steering Committee of the Section, and Judges and Clerk’s Office personnel from both the Superior Court and the Court of Appeals. To facilitate further comment, our Section is hereby issuing Tentative Draft #1 (June 2002) as a public statement. It will be posted on the Section’s web site. The Section will make its final recommendations for modernizing the DCApp Rules in a later Proposed Final Draft.

¹ The views expressed herein represent only those of the Courts, Lawyers and the Administration of Justice Section of the District of Columbia Bar and not those of the District of Columbia Bar or of its Board of Governors.

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* During deliberations on the proposed DCApp Rule changes, the Committee met with or received input from these persons. Their views do not necessarily reflect the views of their employers or institutions. The Committee is solely responsible for the contents of this public statement and its proposals for modernizing the DCApp Rules.

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

TENTATIVE DRAFT #1 (June 2002)

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

<i>Subjects Covered:</i>	<i>Page:</i>
Title I. Introductory Provisions	
Rule 1. Title and Definitions	1
Rule 2. Seal and Process (<i>No Change</i>).....	2
Title II. Appeals from Judgments and Orders of the Superior Court	
Rule 3. Appeal as of Right- How Taken	3
Rule 4. Appeal as of Right- When Taken	5
Rule 5. Appeals by Permission Pursuant to DC Code 11-721(d)	19
Rule 6. Appeals by Application Pursuant to DC Code 11-721(c) and 17-301 (<i>No Change</i>).....	21
Rule 7. Bond for Costs on Appeal in Civil Cases	21
Rule 7A. Docketing Statement and Status and Settlement Conference Procedures (<i>No Change</i>)	21
Rule 8. Stay or Injunction Pending Appeal.....	22
Rule 9. Release in a Criminal Case (<i>No Change</i>)	23
Rule 10. The Record on Appeal	24
Rule 11. Forwarding the Record	27
Rule 12. Docketing the Appeal; Filing of the Record (<i>No Change</i>).....	29
Rule 13. Dismissal for Failure of Appellant to Comply with the Rules of This Court (<i>No Change</i>)	29
Rule 14. Dismissal by Court	29
Title III. Review of Orders of Administrative Agencies	
Rule 15. Review of Agency Orders (<i>No Change</i>)	30
Rule 16. Record on Review	30
Rule 17. Filing the Record	30
Rule 18. Stay Pending Appeal	31
Rule 19. Settlement of a Judgment Enforcing an Agency Order in Part	32
Rule 20. Applicability of Other Rules (<i>No Change</i>).....	32

Title IV. Extraordinary Writs	
Rule 21. Writs of Mandamus and Prohibition	33
Rule 22. Other Extraordinary Writs	34
Title V. Proceedings In Forma Pauperis	
Rule 23. Proceedings in Forma Pauperis (<i>No Change</i>).....	35
Rule 24. Proceedings in Forma Pauperis- Administrative Agencies (<i>No Change</i>)	35
Title VI. General Provisions	
Rule 25. Filing and Service	36
Rule 26. Computing and Extending Time	39
Rule 26.1. Corporate Disclosure Statement	40
Rule 27. Motions	41
Rule 28. Briefs	46
Rule 29. Brief of an Amicus Curiae	51
Rule 30. Appendix to the Briefs	53

MEMORANDUM

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 1 through 30. Other public statements, covering updates to the remainder of the DCApp Rules, will be issued in the near future.

*1. **FRAppP as a model.*** The Section's proposals essentially track the FRAppP word-for-word, with a few modifications to account for patterns of local practice. There are several reasons why the Section adopted this approach. *First*, using the FRAppP as a word-for-word model is faithful to the controlling legislation. 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."). *Second*, following the FRAppP essentially word-for-word (as opposed to some other model crafted by the Section or its Court Rules and Legislation Committee) allows the Court of Appeals to draw on federal precedent and experience in interpreting the DCApp Rules. See, e.g., Wright & Miller, *Federal Courts & Procedure*. *Third*, using the FRAppP as a word-for-word model ensures the quality and acceptability of the product: a workable, up-to-date set of DCApp Rules. Wide agreement should be possible within the Bench, the Bar, and our community, by closely following the FRAppP.

The short of it is that the FRAppP are a model for updating the DCApp Rules, not because the FRAppP are perfect, but because the FRAppP are a widely-accepted benchmark of reasonableness, with an objectively-ascertainable meaning, faithful to the controlling legislation and useful to our Court of Appeals, with wide-spread acceptability.

Tentative Draft #1 (June 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 *italics* also reflect the word-for-word language of the FRAppP. *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. After each proposed new Rule, the changes that are being proposed to current DCApp Rules are explained in comments from the Section's Court Rules and Legislation Committee in *SECTION COMMITTEE COMMENTS*.

The changes being proposed to the DCApp Rules -- mirroring the changes made in the FRAppP over the last 15 years as well as the changes recently approved by the United States Supreme Court (see 70 USLW 2693, 4295-4302 (May 7, 2002)) -- are often nonsubstantive clarifications of the older FRAppP. Taken as a whole, however, the changes are significant. Updating is clearly appropriate for outdated provisions such as current DCApp Rule 27(e) ("Until January 1, 1991, papers may continue to be submitted on legal size paper."). Other changes—such as extending the time limits for amicus briefs to permit them to be filed 7 days after the principal brief of the party being supported is

filed (*see* proposed DCAppRule 29 modeled on FRAppP 29) – represent small but useful improvements in appellate practice. Still other changes – such as the proposed switch to a Court of Appeals Appendix system for cases litigated in the D.C. Court of Appeals (*see* proposed DCApp Rule 30 modeled on FRAppP 30) --will be significant for practitioners and the Court of Appeals. The *SECTION COMMITTEE COMMENTS* at the end of each proposed DCApp Rule, and the discussion in section “3. *Issues*” below, highlight the significant proposed substantive changes.

2. Open public procedures. Tentative Draft #1 (June 2002) is designed to be publicly circulated, for comment, after compliance with the internal review procedures of the District of Columbia Bar for issuing public statements. Under the Bar’s procedures, Tentative Drafts of proposed DCApp Rules may be publicly circulated, and posted on the Section’s web site, if they are approved by the Section Steering Committee and if they otherwise comply with the Bar’s internal review procedures. Tentative Drafts may be modified by following these same internal D.C. Bar review procedures.

Tentative Draft #1 (June 2002) already reflects comments and suggestions received from a wide variety of sources, including the United States Attorney’s Office, the Public Defenders’ Service, the Corporation Counsel’s Office, the Council on Court Excellence, members of the Section’s Steering Committee and Court Rules Committee, and Judges and Clerk’s Office personnel from both the Superior Court and the Court of Appeals. The Section and its Court Rules and Legislation Committee are most grateful for this input. One result of our work was the Court Rules and Legislation Committee’s Report on *Trial Transcript Delays* (work-in-progress, June 2002). The Section will make its final recommendations for modernizing the DCApp Rules in a Proposed Final Draft.

3. Issues. The significant issues addressed in Tentative Draft #1 (June 2002) include the following:

(a) Should a criminal defendant have ten days (FRAppP) or 30 days (current DCApp Rules) after judgment within which to file notice of appeal? The Committee and the Section, after consulting with the United States Attorney’s Office, the Corporation Counsel’s Office, and the Public Defenders’ Service, are proposing to keep the current 30 day period. *See* proposed DCApp Rule 4(b)(1).

(b) What new DCApp Rules are appropriate to implement recent legislation mandating expedited appellate review of certain Family Court cases, and requiring Superior Court “permanency hearings” within statutory time limits for children who are abandoned, neglected or abused? The Court of Appeals has proposed new amendments to DC App Rule 4(c) (“Expedited and Emergency Appeals”) that comply with the District of Columbia Family Court Act of 2001 (Pub.L. 107-114) by requiring expedited appellate review in termination of parental rights cases and cases “granting or denying a petition to adopt” (115 Stat. at 2111). Tentative Draft #1 (June 2002) proposes expedited appellate

treatment, in addition, for two categories of child “neglect” cases. *First*, “emergency appeal” status under proposed new DCApp Rule 4(c)(2)(A) (“Emergency Appeals”) should be accorded to the special category of neglect appeals where “reasonable efforts” at original-family-reunification are dispensed with and a “permanency hearing” is statutorily required within 30 days from the Superior Court finding of abandonment/abuse under review. *See* DC Code 4-1301.09a(d)(2001); DC Code 16-2323(a)(3)(2001) and DC Code 4-1301.09a(e) (2001); Adoption and Safe Families Amendment Act of 2000 (DC Law 13-136, DC Act 13-315), 47 DC Reg 2850, 2855-2856 (April 28, 2000). *Second*, the scope of proposed new DC App Rule 4(c)(1) (“Expedited Appeals”) should be expanded to cover appeals from a finding of neglect, to ensure appellate court resolution of the question before the Superior Court is required by statute (*see* DC Code 16-2316.01 (2001)) to start follow-on “permanency hearings” within 14 months of its finding of neglect. These recommendations seek to preserve the Superior Court’s resources, by requiring the Court of Appeals to act promptly to resolve appeals that could obviate the need for statutorily-required “permanency hearings” in Superior Court. The Committee was split, and it invites further comment on, whether (and to what extent) expedited appeal status should be accorded to child neglect appeals.

(c) What set of management practices and rules are best suited to address the general problem of delays that practitioners have experienced in obtaining trial transcripts? Chief Judge King of the Superior Court has initiated a bench-bar dialogue on this subject. Within the last 6 months, the staff of the Superior Court has made very significant progress in attacking the backlog of requests for production of trial transcripts. The Court Rules and Legislation Committee will issue a separate report on *Trial Transcript Delays*. These problems are being addressed primarily through management reforms within the Superior Court. New proposed DCApp Rule 4(c) should help to speed up the preparation of Superior Court trial transcripts in expedited and emergency appeals. *See* proposed DC App Rule 4(c)(“*Expedited and Emergency Appeals*”), and accompanying *SECTION COMMITTEE COMMENTS*. *See also* proposed DCApp Rule 11(rejecting a system of sanctions against court reporters as a primary remedy for late trial transcripts).

(d) Our Section recommends that the DCApp Rules follow the time limits in FRAppP 4 for filing a notice of appeal by an inmate confined to an institution. *See* proposed DCApp Rule 4(d).

(e) While current DCApp Rules require “four legible copies of the pertinent papers and exhibits” to be created for the record on appeal, should the Court of Appeals follow the FRAppP and simply require transmission of the original trial record to the Court of Appeals? The Committee and the Section think the answer to this question is “Yes.” The Court of Appeals should follow the practices of the FRAppP in defining, assembling and transmitting the record on appeal. *See* proposed DCApp Rules 10 and 11; *and see* proposed DCApp Rule 17 (record on appeal in administrative agency cases).

(f) What Court of Appeals rules should cover the filing and service of electronic records in cases on appeal? *See* proposed DCApp Rule 25(a)(2)(D). New amendments to FRAppP 25, approved by the United States Supreme Court on April 29, 2002, make provision for electronic service on other counsel, where agreed. *See* 70 USLW at 2649, 4230 (May 7, 2002). These amendments to the FRAppP, which will become effective December 1, 2002 unless Congress alters them, are mirrored in proposed new DCApp Rules 25(c) and (d).

(g) The Committee was split on whether counsel should have an additional three days (FRAppP) or 5 days (current DCApp) within which to respond to an opponent's submission that is served by mail. Tentative Draft #1 (June 2002) follows the most recent proposals in the FRAppP. *See* proposed DCApp Rule 26(c) (following FRAppP in allowing 3 extra calendar days). *And see* proposed DCApp Rule 26(a)(2) (following FRAppP in providing that, in computing deadlines under 11 days, intermediate Saturdays, Sundays, and legal holidays are excluded). *See also* proposed DCApp Rule 27(a)(3) (following most recent proposed version of FRAppP in extending the time for responding to motions and for filing replies).

(h) Our Section recommends that the Court of Appeals follow the example of the United States Court of Appeals for the D.C. Circuit and liberalize the DCApp Rules on citations of unpublished opinions. *See* proposed DCApp Rule 28(j)(1); *see also* proposed DCApp Rule 27(f) (motions follow citation rules for briefs). The D.C. Circuit does not allow citations to unpublished United States District Court opinions, which may not be publicly available. New proposed DCApp Rule 28(j)(1) would allow counsel to cite Superior Court opinions that are published in the Daily Washington Law Reporter.

(i) What should be the maximum length of briefs on appeal? (a) Main Briefs: 50 pages (current DCApp Rule 28(g)) or 30 pages (or alternatively 14,000 words or 1,300 lines of monospaced text) (as in FRAppP 32(a)(7))? (b) Reply Briefs: 20 pages (current DCApp Rule 28(g)) or 15 pages (or alternatively 7,000 words or 650 lines of monospaced text) (as in FRAppP 32(a)(7))? Tentative Draft #1 (June 2002) proposes to follow the model of the FRAppP. *See* proposed DCApp Rule 28(g), deleting current DCApp 28(g), and foreshadowing DCApp Rules that would follow FRAppP 32(a)(7). The Section solicits comment on this important issue, which directly affects practitioners before the Court of Appeals.

(j) While the current practice is not to use Appendices (*see* current DCApp Rule 30), should the DC Court of Appeals now follow the FRAppP practice of using Appendices in appellate cases? Our Section strongly believes that, at least in civil appeals, this reform is long overdue. We recommend special rules, preserving the current practice of utilizing limited appellate records (with no Appendix), in expedited appeals, *in forma pauperis* appeals, and "small record" cases on appeal. *See* proposed DCApp Rules 28(e), 30. The switch to an Appendix system in civil appeals in the Court of Appeals would be a major change in practice.

4. **Comments.** Comments on proposed DCApp Rules 1 through 30 can be submitted to the central staff of the Bar or to the Section's Court Rules and Legislation Committee Chair in any form: by Email, or FAX, or letter, or oral comment at the Court Rules and Legislation Committee's monthly meeting(s).

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The Court Rules and Legislation Committee of the D.C. Bar Courts, Lawyers and the Administration of Justice Section generally meets on the second Thursday of each month at 12:00 noon in the D.C. Bar Conference Center at 1250 H Street NW (B-1 Level), Washington, DC 20005.

COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE SECTION
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