

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 CHANGES IN THE GENERAL RULES
OF THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar generally supports the proposed changes in the General Rules of the United States Court of Appeals for the District of Columbia Circuit. However, we suggest modifications of or additions to a few of the proposed new rules.

The Section has a standing Committee on Court Rules whose responsibilities include serving as a clearinghouse for comments on proposed changes to court rules. Comments submitted by the Section represent only its views, and not those of the D.C. Bar or of its Board of Governors.

General Comments. The overall reorganization of the court's rules to correlate with the Federal Rules of Appellate Procedure is a useful change that will simplify practice before the court. Other courts of appeals using this approach have published each of its rules along with the corresponding Federal Rule of Appellate Procedure. We suggest that this court also publish its new rules in this format.

Other changes are also welcome. For example, proposed Circuit Rule 32 properly provides that the Clerk may return for speedy resubmission filings that do not conform to the requirements of the rules; such filings should not generally be deemed untimely. Proposed Circuit Rule 46(a)

appropriately reflects this court's nationwide jurisdiction by facilitating the filing of initial papers by attorneys who are not currently admitted to the bar of the court.

Proposed Rule 27(g)(4). Proposed Circuit Rule 27(g)(4) provides for an automatic extension when a motion for extension of time is timely filed but not ruled on until after the initial filing deadline. The same grace period should be available if the ruling on the motion occurs shortly before the initial due date. We suggest that subsection (4) provide as follows (deleted language is indicated by overstrikes, new language by italics):

If a motion is filed in accordance with the requirements of subparagraphs (1) and (2) above ~~and the court does not act on the motion until after the original filing deadline has passed~~, the time for filing the pleading is automatically extended until the court rules on the motion. If a motion is denied by the court ~~under these circumstances, and the time for filing would otherwise occur before the end of the following periods~~, the time for filing will be extended automatically for the following periods after the date of the order denying the motion: for responsive pleadings that must be filed within 3 days of the pleadings to which they respond, 4 days; and for all other pleadings, 6 days.

Proposed Rule 28(e). Proposed Circuit Rule 28(e) addresses a perceived problem that single-spaced footnotes are being used to evade page limits on a sufficient scale to warrant a relatively drastic solution. Footnotes have become overused in legal writing, but they can perform legitimate functions, for example, to address secondary issues, to distinguish often too-numerous cases cited in an opponent's

brief, or to cite other authorities without interrupting the flow of the principal arguments. Double-spacing of footnotes undermines to a degree the ability of footnotes to perform these useful functions. Other courts of appeals presently allow single-spaced footnotes, although some prohibit use of footnotes to evade page limits. E.g., Second Circuit Rule 32(b) ("footnotes may be single spaced."); Fifth Circuit Rule 32.2 ("Counsel are cautioned not to attempt to circumvent the limitations on lengths of briefs by excessively quoting sources, or presenting argument in footnotes.").

We would prefer that any rule addressing the use, or abuse, of footnotes avoid any absolute prohibition against single-spaced footnotes. The Fifth Circuit's rule appears to be an appropriate model to adopt in this court.

If the court decides to adhere to its proposed general approach of double-spaced footnotes, we suggest that the court provide for the exceptions adopted by the United States Court of Appeals for the Federal Circuit. Federal Circuit Rule 32(a) permits footnotes to be single spaced, "except footnotes that are not limited to citations shall be double spaced," and "[c]itations that include parenthetical information of more than 25 words shall also be double spaced." Rule 32(a) also provides that "[q]uotes more than two lines long in the text or footnotes may be indented and single spaced." This rule allows for appropriate use of footnotes and provides a reasonably enforceable method for controlling potential abuse.

Proposed Rule 28(h). If one party files a supplemental brief, the other party should have an automatic opportunity to respond. To give the other party an opportunity to respond, and to preserve the requirement in Rule 28(h) that supplemental briefing be completed no later than 7 days before argument, we suggest that any supplemental brief be received by the parties and the court no later than 10 days before argument and that any response to any supplemental brief be received by the parties and the court no later than 7 days before argument. Like Rule 8(a), Rule 28(h) should require that supplemental briefs and responses be served by hand or, in the case of counsel located outside the greater Washington metropolitan area, by other form of expedited service. Rule 28(h) should impose a page limit of 5 pages on any supplemental brief or response.

Proposed Rule 38. Circuit Rule 38 permits the court to impose sanctions on parties that engage in improper conduct, including an award of attorneys' fees. Although this court may remand a case to the district court for a determination of attorneys' fees as a sanction, the court has itself determined an appropriate award based on submissions by the parties. E.g., Saltany v. Regan, 886 F.2d 438, 441 (D.C. Cir. 1989); American Security Vanlines, Inc., 782 F.2d 1056 (D.C. Cir. 1986); see generally J. Moore, B. Ward & J. Lucas, Moore's Federal Practice, ¶ 238,04, at 38-19 - 38-20 & nn.12-13 (1992).

If the court anticipates that it will perform this fee-setting function with any frequency, it should consider establishing in its rules procedures for these determinations. We are not aware of any federal appellate court that has adopted rules governing the award of attorneys' fees, but district courts have done so. For example, Rule 215 of the United States District Court for the District of Columbia establishes procedures for determination of attorneys' fees.