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## Separate Appendix in Federal Appellate Practice - Necessary Tool or Costly Luxury

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# THE SEPARATE APPENDIX IN FEDERAL APPELLATE PRACTICE—NECESSARY TOOL OR COSTLY LUXURY?

by

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IN his Year-End Report on the Judiciary,<sup>1</sup> the Chief Justice once again<sup>2</sup> emphasized the pressing need for members of the bench and bar to address the problem of “reducing the unnecessary costs of all litigation procedures.”<sup>3</sup> As the Chief Justice’s report notes, the battle against unnecessary expense must be waged in many different areas of the American legal process and at both state and federal levels.<sup>4</sup> This essay focuses on one particular aspect of the overall situation, the costs incurred by the litigants in the federal appellate system because of the general requirement in rule 30, Federal Rules of Appellate Procedure for a separate appendix. More precisely, this essay sets forth the present problem faced by the courts with respect to the rule, describes the current attempts of the various circuits to confront the problem, and then suggests the directions that future research and discussion must take if we are to make an informed choice in future rule-making decisions.

## I. THE PRESENT RULE

### A. *The Problem Stated*

In present federal appellate practice, the requirement for a separate appendix is set forth in rule 30, Federal Rules of Appellate Procedure.<sup>5</sup> In

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1. W. Burger, Year-End Report on the Judiciary (Dec. 29, 1980) (copy on file at Underwood Law Library, Southern Methodist University) [hereinafter cited as Year-End Report].

2. The Chief Justice had also addressed this issue in W. Burger, Annual Report on the State of the Judiciary—1980, Midyear Meeting of the American Bar Association (Feb. 3, 1980). These remarks were later published. 66 A.B.A.J. 295 (1980).

3. Year-End Report, *supra* note 1, at 7.

4. *Id.* Among the other efforts in this field noted by the Chief Justice is the ABA Action Commission to Reduce Court Costs and Delay. See generally Janofsky, *ABA Attacks Delay and High Cost of Litigation*, 65 A.B.A.J. 1323 (1979); see also A. MILLER, ATTORNEYS FEES AND CLASS ACTIONS (Federal Judicial Center 1980).

5. FED. R. APP. P. 30 provides:

(a) DUTY OF APPELLANT TO PREPARE AND FILE; CONTENT OF APPENDIX; TIME FOR FILING; NUMBER OF COPIES. The appel-

general terms, the rule requires the preparation and filing of an appendix to the brief that contains: (1) the relevant docket entries in the proceeding below; (2) those portions of the pleadings, charge, findings, or opinion of the court below that are relevant to the appeal; (3) the judgment, order, or decision of the lower court; and (4) "any other parts of the record to which the parties wish to direct the particular attention of the Court."<sup>6</sup> This last requirement produces the problem of inflated costs. Despite the fact that the record on appeal has already been filed with the court,<sup>7</sup> a large segment of that record is duplicated at least a dozen times<sup>8</sup> and bound sepa-

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lant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

(b) DETERMINATION OF CONTENTS OF APPENDIX: COST OF PRODUCING. The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, he shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented he may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party.

(f) HEARING OF APPEALS ON THE ORIGINAL RECORD WITHOUT THE NECESSITY OF AN APPENDIX. A court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

6. *Id.*

7. *Id.* 10, 11.

8. *Id.* 30 reads in part:

(a) . . . Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with his brief. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number. . . .

(e) REPRODUCTION OF EXHIBITS. Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably

rately. Moreover, despite the rule's explicit reassurance that the court will consult parts of the record not included within this separate appendix,<sup>9</sup> there has always been a tendency for counsel, understandably anxious to present the client's case in the most favorable light, to overdesignate those portions of the appellate record that are to be included within the appendix.<sup>10</sup> Indeed, in rather complex civil matters, it is not at all unusual for this appendix to the briefs to comprise hundreds of pages bound in several volumes.

The present rule has attempted to deal with the problem of overdesigna- tion of material in the appendix by permitting the disallowance of costs for unnecessary material.<sup>11</sup> While this sanction has been used in egregious cases,<sup>12</sup> the overall effectiveness of this approach appears to have been minimal. Courts have been understandably reluctant to engage in the nec- essary post facto exercise of second-guessing counsel.<sup>13</sup> In any event, the question is far more basic than overdesigna- tion. Given the availability of the entire appellate record to the court, is it really necessary that any por- tions of the transcript be reproduced and bound separately? This question

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indexed. Four copies thereof shall be filed with the appendix and one copy shall be served on counsel for each party separately represented. The tran- script of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this subdivision.

9. *Id.* 30(b); see *Billings v. Chicago, R.I. & Pac. R.R.*, 570 F.2d 235, 238 (8th Cir. 1978) (original records are always available to the court and both court and counsel may rely on parts of the record not included in the appendix). *But see Doyn Aircraft, Inc. v. Wylie*, 443 F.2d 579, 584 (10th Cir. 1971) (15-page appendix inadequate to represent eight-volume rec- ord).

10. See, e.g., *Drewett v. Aetna Cas. & Sur. Co.*, 539 F.2d 496, 498-501 (5th Cir. 1976) (reproduction of entire trial transcript); *Bernard v. Omaha Hotel, Inc.*, 482 F.2d 1222, 1225-26 (8th Cir. 1973) (inclusion of complete medical testimony that was totally irrelevant to appeal).

11. FED. R. APP. P. 30(b): "The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessa- rily the court may impose the cost of producing such parts on the party."

12. *Drewett v. Aetna Cas. & Sur. Co.*, 539 F.2d 496, 498-501 (5th Cir. 1976) (costs not allowed when appellee reproduced entire trial transcript and all exhibits in the supplemental appendix and also included all memoranda of law submitted to the trial court by both par- ties on all issues); *Oliver v. Michigan State Bd. of Educ.*, 519 F.2d 619 (6th Cir. 1975) (costs not allowed when 3311 pages of appendix were unnecessary for resolution of the issues before the court); *Bernard v. Omaha Hotel, Inc.*, 482 F.2d 1222, 1225-26 (8th Cir. 1973) (defendant would have to absorb its own costs and pay one-half the costs of the overall appendix when it had required appendix to contain the complete medical testimony of the trial that was totally immaterial on appeal); *Aquascutum of London, Inc. v. S.S. Am. Cham- pion*, 426 F.2d 205, 213 n.6 (2d Cir. 1970) (costs not permitted when appellants included memoranda of law submitted to the trial court in their brief); *Silvertsen v. Guardian Life Ins. Co. of America*, 423 F.2d 443, 446 (4th Cir. 1970) (prevailing party must pay costs of printing material not relevant to appeal that it caused to be included in appendix); *Volkswa- genwerk Aktiengesellschaft v. Church*, 413 F.2d 1126 (9th Cir. 1969) (memoranda of law should not be included in appendix and costs for printing such material will not be allowed).

13. See, e.g., *Pennsylvania v. Rizzo*, 530 F.2d 501, 508 (3d Cir.), *cert. denied*, 426 U.S. 921 (1976) (costs will be disallowed only for abusive and unnecessary inclusions of material in appendix; such a sanction is not appropriate when the issues on appeal "by their nature, contemplate comprehensive appellate review of the record").

requires critical examination in any comprehensive effort to eliminate the unnecessary costs of appellate practice.

### B. *History of the Present Rule*

In undertaking such a critical evaluation of present practice, the comfortable approach would perhaps be simply to dismiss the requirement for a separate appendix as the product of the conventional wisdom of an earlier period. However, the history of rule 30 does not permit such a facile disregard of the work of the drafters. The present rule was the product of a conscious choice among several options, and a decent respect for the work of our predecessors requires that, in reevaluating the present rule, the rationale that produced it be understood.

#### 1. *Practice Prior to Adoption of Federal Rules of Appellate Procedure.*

Prior to the adoption of the Federal Rules of Appellate Procedure, seven circuits used an appendix. In all but one of those circuits, the appellant filed, with his brief, an appendix containing those parts of the record that he deemed essential to the questions presented. If the appellee deemed additional parts of the record necessary, he had to include such parts in an appendix to his brief. Three circuits, the Fifth, Eighth, and Tenth, required a printed record, although, in the words of the Advisory Committee on the Federal Appellate Rules, "the rules and practice in those circuits combine to make the difference between a printed record and the appendix . . . largely nominal."<sup>14</sup> The Ninth Circuit permitted the litigants to proceed on the original record and two copies thereof in any case in which any party so desired.<sup>15</sup>

2. *The First Advisory Committee Draft.* In its preliminary draft of March 1964,<sup>16</sup> the Advisory Committee on the Federal Appellate Rules proposed adoption of a rule that provided for the so-called deferred appendix. Under this system, the parties were to file a joint appendix after the filing of both briefs. In opting for this method, the committee cited the fragmentary nature of the record produced under the system then employed in most circuits and the tendency of appellants to underestimate what was necessary for a determination of the issues presented. The advisory committee also noted that it had considered the Ninth Circuit rule but had decided not to recommend "any general dispensation from the requirement of submitting an appendix."<sup>17</sup> The draft rule did permit, however, an individual court to dispense with the requirement of submitting an appendix.<sup>18</sup>

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14. Prop. Fed. R. App. P. 30, Advisory Committee Note, March 1964 Preliminary Draft [hereinafter cited as Preliminary Draft], reprinted in 9 MOORE'S FEDERAL PRACTICE § 100.01, at 9-10 (1980).

15. MOORE'S FEDERAL PRACTICE, *supra* note 14, at 10. The Eighth Circuit dispensed with its printed record in criminal, habeas corpus, and 28 U.S.C. § 2255 cases.

16. MOORE'S FEDERAL PRACTICE, *supra* note 14, at 7.

17. Prop. Fed. R. App. P. 30, Advisory Committee Note, Preliminary Draft, *supra* note 14.

18. Prop. Fed. R. App. P. 30(a) (March 1964 Draft).

3. *The Standing Committee's Options.* During the period of comment from the bench and bar, there was "a great deal of professional opposition to the deferred appendix."<sup>19</sup> Therefore, on December 30, 1966, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference, the advisory committee's parent unit in the Judicial Conference committee structure, proffered three substitute drafts for comment:

Draft A<sup>20</sup> proposed the use of the single appendix system to contain all the record material "which it is deemed by the parties essential for the judges to read."<sup>21</sup> It was to be filed with the appellant's brief, with the option, upon stipulation or order, to file it within 21 days of service of the appellee's brief. Each circuit was given the right to dispense with the appendix and to hear appeals on the original record.

Draft B<sup>22</sup> prescribed the separate appendix system then employed in most of the United States courts of appeals. By rule or order of the court or by stipulation of the parties, a joint appendix could be filed either with the appellant's brief or deferred until after the filing of the appellee's brief. Each circuit was given the right to dispense with the appendix and to proceed on the written record.

Draft C<sup>23</sup> prescribed the system used in the Ninth Circuit of proceeding on three copies of the record papers other than the transcript and two copies of the latter: Each circuit could decide to dispense with the requirements for filing copies and "direct that the appeal be heard on the original record alone."<sup>24</sup>

A special note accompanying Draft A confirms that the real debate at the time was not over whether there would be an appendix but over what type of appendix ought to be required.<sup>25</sup> In commenting on Draft C, the advisory committee noted the advantage of the Ninth Circuit practice "in certain types of appeals, particularly those with voluminous transcripts of which large portions require appellate consideration as when convictions are attacked as being without sufficient evidence, or in appeals *in forma pauperis*."<sup>26</sup> While conceding that the circuits ought to have the option of using such a system, the advisory committee cited the following reasons for not adopting the procedure as a general principle: (1) a busy court is entitled to the help of lawyers in finding those parts of the record essential to the disposition of the case; (2) selecting parts of the record will help lawyers in their own presentation; (3) the size of the original record will precipitate problems of transmittal; (4) there will be insufficient copies for

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19. MOORE'S FEDERAL PRACTICE, *supra* note 14, at 10.

20. *Id.* at 12-16.

21. Letter from Judge Maris, Chairman of the Standing Committee, to the bench and bar (Dec. 30, 1966), *reprinted in* MOORE'S FEDERAL PRACTICE, *supra* note 14, at 10.

22. MOORE'S FEDERAL PRACTICE, *supra* note 14, at 20-23.

23. *Id.* at 25-27.

24. *Id.* at 27.

25. Special Note to the December 30, 1966, Proposed Draft A by the Advisory Committee on Appellate Rules, *reprinted in* MOORE'S FEDERAL PRACTICE, *supra* note 14, at 18-20.

26. *Id.* at 20.

simultaneous use by judges, law clerks, and for deposit in law libraries.<sup>27</sup>

4. *Adoption of Federal Rule of Appellate Procedure 30 and Subsequent Amendments.* The rule finally recommended by the advisory committee and later promulgated<sup>28</sup> was based principally on Draft A. Some changes were made to conform to rule 36 of the Supreme Court.<sup>29</sup> Subdivision (f) of the adopted appellate rule gave the circuits authority to dispense with the appendix in all or some cases.<sup>30</sup> In 1970 rule 30 underwent several changes that, while considerably curtailing the use of the so-called deferred appendix, did not alter the rule in any way relevant to our present inquiry.

### C. *Present Circuit Practice Under Rule 30(f)*

In his dissenting opinion in *New York State Ice Co. v. Liebmann*<sup>31</sup> Justice Brandeis described how, within our constitutional framework of federalism, one state may act as a laboratory in the development of a solution to a social or economic problem.<sup>32</sup> In a very real sense, within the federal judicial system, the individual circuits perform an analogous function when, by local rule or practice, they confront problems in judicial administration.

For instance, by exercising the option to dispense with the separate appendix in all or some cases,<sup>33</sup> several circuits are, in effect providing the entire federal judicial system with laboratory evidence of how the entire appellate system would operate under alternative arrangements. These experiments with respect to the appendix are important for two reasons. First, the great majority of circuits have exercised their authority under rule 30(f). Therefore, there is a significant variety of practices to observe and to evaluate. Secondly, some of the most radical departures from the separate appendix rule have taken place in circuits with heavy caseloads, complex litigation, and wide geographic dispersion of judges. The experience of these circuits ought to be of special value in evaluating any change to the present rule.

At present, those circuits that have abolished or modified the requirement for a separate appendix can be divided into three basic groups: (1) those in which an abbreviated "record excerpt" has replaced the separate appendix; (2) those that have opted to proceed on the original record in the vast majority of cases; and (3) those that, while retaining the separate appendix requirement in most cases, have permitted its elimination in certain specified cases.

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27. *Id.*

28. The Standing Committee reported to the Judicial Conference of the United States on Sept. 12, 1967. The Supreme Court promulgated the rules on Dec. 4, 1967.

29. By its rule 36, the Supreme Court adopted the single appendix. The rule was adopted June 12, 1967, and became effective Oct. 2, 1967.

30. *See* note 5 *supra*.

31. 285 U.S. 262 (1932).

32. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory . . ." *Id.* at 311.

33. FED. R. APP. P. 30(f).

1. *The "Record Excerpt" Circuits.* The Fifth, Seventh, and Ninth Circuits have basically adopted the record excerpt method in lieu of the separate appendix. While each circuit's practice differs with respect to minor points,<sup>34</sup> the basic thrust of the approach is the same. Under this method, the appeal is heard on the original appellate record.<sup>35</sup> Additionally, each judge of the panel is provided with a document containing the essential papers in the case. For instance, in the Fifth Circuit the panel is provided with a record excerpt containing: (1) the docket sheet; (2) any pretrial order; (3) the judgment or interlocutory order appealed from; (4) other orders sought to be reviewed; (5) any supporting opinion, finding of fact, or conclusions of law.<sup>36</sup> The Ninth Circuit requirement is virtually identical.<sup>37</sup> In the Seventh Circuit, the local rule states that the court prefers that this document also contain "any other short excerpts from the record . . . important to a consideration of the issues raised on appeal."<sup>38</sup>

2. *The "Original Record" Circuits.* In the Eighth<sup>39</sup> and Tenth Circuits<sup>40</sup>

34. See text accompanying notes 35-38 *infra*.

35. FED. R. APP. P. 10.

36. 5TH CIR. R. 13. Four copies must be filed. The rule further provides that reviews of orders of an administrative agency proceed on the original record. The petitioner files, at the time of the filing of his brief, four copies of the following: (1) order sought to be reviewed; (2) any supporting opinion; (3) findings of fact or conclusions of law.

37. 9TH CIR. R. 13 provides that the appellant file five copies of the following documents:

- (a) the complaint and answer(s) and, in criminal cases, the indictment;
- (b) the pretrial order, if any;
- (c) the judgment or interlocutory order from which the appeal is taken;
- (d) other orders sought to be reviewed, if any;
- (e) any supporting opinion, findings of fact or conclusions of law filed or delivered orally by the trial court (citations if opinion is published);
- (f) the motion and response upon which the court rendered judgment, if any;
- (g) the notice of appeal;
- (h) the trial court docket sheet, and
- (i) the parties' stipulation to a direct appeal to the U.S. Court of Appeals

if the appeal is taken directly from a decision of the U.S. Bankruptcy Court.

With respect to administrative proceedings, the same rule requires the petitioner to file five copies of any order to be reviewed and of any supporting opinion, findings of fact or conclusions of law filed by the agency, board, commission, or officer.

38. 7TH CIR. R. 12 states that a full appendix is not required. The appellant files, either bound with his brief or as a separate document, an appendix containing the judgment or order under review, and any opinion, memorandum, findings of fact, or conclusions of law of the trial court or the administrative agency. The local rule also states that the court prefers that the brief appendix contain "any other short excerpts from the record . . . important to a consideration of the issues raised on appeal." The rule also declares that "costs for a lengthy appendix will not be awarded." It is apparently fairly rare for these "other short excerpts" to exceed 15 pages.

39. 8TH CIR. R. 11 permits all cases to be heard on a "designated record" as defined in FED. R. APP. P. 10(a). The original and two copies of the designated record must be filed. Effective Feb. 1, 1981, the Eighth Circuit has amended its rule to provide that only one copy of the designated portions of the transcript and of the designated exhibits must be filed. This amendment moves the Eighth Circuit practice somewhat closer to the practice of the Fifth, Seventh, and Ninth Circuits. See 8TH CIR. R. 11(2)(b) (effective Feb. 1, 1981).

40. 10TH CIR. R. 10, 11 provide that, with the exception of civil cases containing a



the appeal is generally heard on the original record. Instead of providing the members of the panel with the record excerpts used in the Fifth, Seventh, and Ninth Circuits, copies are made of the entire record on appeal for each member of the panel.

3. *The "Specific Exception" Circuits.* The First, Second, Third, Sixth, and District of Columbia Circuits have, by local rule, eliminated the requirement for the separate appendix in certain types of cases. For instance, in many of these circuits in forma pauperis cases are heard on the original record. In some, social security cases are treated in this fashion. In some of these circuits the panel is also provided with copies of those portions of the transcript that are necessary to the appeal.<sup>41</sup>

In addition to these three basic departures from the separate appendix requirement of rule 30, some circuits have taken other steps designed to reduce the expense of the separate appendix. These changes are also significant because they exhibit a heightened awareness of the expense involved in the separate appendix requirement. For instance, the First Circuit has, by local rule, reduced the number of appendices that must be filed and has further provided that, on cause shown, the parties may be allowed to file even fewer copies.<sup>42</sup> In *United States v. Noall*<sup>43</sup> the Second

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transcript of 300 pages or more, the appeal shall proceed on the original record. All criminal appeals are heard on the original record.

41. The First Circuit generally uses a separate appendix. However, 1ST CIR. R. 11(i) provides that, absent order of the court, all in forma pauperis cases shall be considered on the record on appeal as certified by the district court without the necessity of filing an appendix.

In the Second Circuit, 2D CIR. R. 30.2 authorizes hearing appeals on the original record without printed appendix in: (1) all appeals under CJA; (2) all other in forma pauperis proceedings; (3) all appeals involving a social security decision. In such cases, the appellant files three legible copies of those portions of the transcript that he wants the court to read. To avoid additional expense, application may be made to file less than three copies.

In the Third Circuit, 3D CIR. R. 10 permits hearing on original papers in applications for writs of habeas corpus and for relief under 28 U.S.C. § 2255 when permission has been granted to proceed in forma pauperis. The appeal is heard on the original record, three copies of the opinion (if any), and the order from which the appeal is taken. In any other case, the court may dispense with the requirement of a record and proceed on the original record.

In the Sixth Circuit, 6TH CIR. R. 10 permits the parties to dispense with an appendix in two classes of cases: (1) when the record is less than 100 pages; and (2) social security cases. In cases within the first category, the appellant prepares three copies of the record on appeal. In the latter category, the United States Attorney submits four legible copies of the administrative record; the appellant must attach to his brief copies of the opinion and order from which the appeal is taken.

D.C. CIR. R. 17(c)(3) permits in forma pauperis appeals on the original record without the necessity of an appendix. The appellant furnishes two copies of the relevant parts of the transcript with a list of the page numbers of the transcript so furnished. The findings of fact and conclusions of law and the opinion, if any, of the district court must always be included. The appellee furnishes two copies of any pages of the transcript to which he wishes to call the court's attention and that were not furnished by the appellant.

42. 1ST CIR. R. 11(f).

43. 587 F.2d 123 (2d Cir. 1978).

Circuit recently admonished counsel not to include in the appendix extraneous material such as memoranda of counsel to the trial court.<sup>44</sup>

In sum, there has already been a notable movement away from the requirement of a separate appendix in contemporary federal appellate practice. The experience of the circuits under each of these alternate procedures remains to be assessed.

## II. EVALUATION OF CIRCUIT EXPERIENCE: THE TASK AHEAD

The task of evaluating the experience of the circuits will involve two basic steps. First of all, the comparative costs of the various methods of handling the record on appeal must be set out in detail and critically evaluated. For instance, a determination must be made whether the savings incurred by use of the record excerpt method or the original record method are indeed significant. Secondly, the impact of these alternative methods on the appellate process must be assessed. How do these methods affect the quality of both the court's and the advocate's work product?

With respect to cost savings under the new methods, more comprehensive data must still be gathered. The preliminary data with respect to the record excerpt method is significant, however. For instance, in the Fifth Circuit, the clerk of the court estimates that the implementation of the record excerpt method resulted in a savings of \$2,547,200 in printing costs and \$1,439,000 in attorney time during the thirty-month period from May 1, 1978, to November 30, 1980.<sup>45</sup> Similarly, during the first year of its operation, the record excerpt method reduced costs of litigation in the Ninth Circuit by at least \$750,000.<sup>46</sup>

In assessing cost savings, however, care must be taken to take into account hidden costs built into the new approaches. For instance, any increased administrative and clerical time involved in mailing the original record must be factored into an overall cost assessment.<sup>47</sup> Similarly, in those circuits that reproduce the entire appellate record, the costs of such copying are hardly unsubstantial. The increased costs of storage associated with such a system must also be taken into account.

Even if considerable cost savings result from the use of alternatives to the appellate record, those savings must be evaluated in light of the impact

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44. *Id.* at 125 n.1. The same judge had admonished the bar on the same matter eight years earlier. *Aquascutum of London, Inc. v. S.S. Am. Champion*, 426 F.2d 205, 213 n.6 (2d Cir. 1970). Before its abandonment of the separate appendix requirement, the Ninth Circuit had also noted its disapproval of the practice. *Volkswagenwerk Aktiengesellschaft v. Church*, 413 F.2d 1126 (9th Cir. 1969).

45. Report from Gilbert F. Ganucheau to the Honorable Robert A. Ainsworth, Jr., Chairman, Advisory Committee on the Federal Appellate Rules (Dec. 29, 1980) (copy on file with the Advisory Committee on the Federal Appellate Rules).

46. Letter from the Honorable James R. Browning, Chief Judge, United States Court of Appeals for the Ninth Circuit, to the Honorable Robert A. Ainsworth, Jr., Chairman of the Advisory Committee on the Federal Appellate Rules (Feb. 26, 1980) (copy on file with the Advisory Committee on the Federal Appellate Rules).

47. To date, no problem of this kind has been reported to the committee.

that the new method has on the appellate process. As indicated earlier,<sup>48</sup> in adopting the present rule, the advisory committee of that era felt the separate appendix was justified by four basic considerations: (1) a busy court is entitled to the help of lawyers in finding those parts of the record essential to the disposition of the case; (2) selecting parts of the record will help lawyers in their own presentation; (3) the size of the original record will precipitate problems of transmittal; and (4) there will be insufficient copies for simultaneous use by judges, law clerks, and for deposit in law libraries. Before suggesting any change in the current rule, the answer to whether these concerns still outweigh any cost savings must be determined.

This sort of determination must, of necessity, be far more subjective than the relatively simple computation of cost savings. Of the four concerns listed by the committee, the latter two are probably the easiest with which to deal because they involve the physical management of the record. With respect to these aspects of the problem, it might be argued for instance, that the record excerpt approach will precipitate difficulties because more than one member of the geographically separated panel will require the original record at the same time. The Seventh Circuit experience is of relatively little help as all members of that court are stationed in Chicago and maintain chambers in one building. On the other hand, the Fifth and Ninth Circuits, the other two circuits using the record excerpt system, have great geographic dispersion of judges. Yet, the existence of a single record has not seemed to have created problems for the judges of those circuits.

The first two concerns of the earlier advisory committee deal with the qualitative aspects of appellate practice and, consequently, are not easily evaluated. The committee must rely on the candid impressions of a wide cross-section of the bench and bar. At this point, neither concern appears to have weighed heavily with those members of the judiciary who have responded to the advisory committee's invitation for views on the matter.

Perhaps the most difficult task for the committee in evaluating the views presented to it will be to distinguish between predilections based on habit or convenience and those grounded in a concern for the quality of the final judicial work product and for the smooth operation of the appellate system. Like everyone else, judges develop work habits. In the "hydraulic pressure"<sup>49</sup> of today's caseloads, set patterns of working become understandably important to those who must bear the burden of administering justice in such an overburdened system. Yet while judicial comfort clearly does contribute to the quality of the ultimate decision, it cannot become an end in itself.

### III. CONCLUSION

In the months ahead, the Advisory Committee on the Federal Appellate Rules will undertake the evaluation process outlined in the foregoing

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48. See text accompanying note 27 *supra*.

49. Northern Sec. Co. v. United States, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting).

paragraphs. In addition to requesting comprehensive cost data from each of the circuits that have chosen an alternative to the separate appendix, the detailed views of all members of the federal appellate bench will again be solicited. Similarly, the views of the bar and of the clerks of the various circuits will be invited because both these groups view many of the foregoing factors from a distinctly different perspective than do judges. At the conclusion of its deliberations, the committee will report its findings and any accompanying proposed rule change to its parent committee, the Judicial Conference Standing Committee on Practice and Procedure.

The battle against ever-escalating litigation costs must, as the Chief Justice suggested,<sup>50</sup> be fought on many fronts. The problem of unnecessary documents on appeal is, however, a significant part of the problem. With the help of the bench and the bar, the advisory committee will ensure that the final decision reflects accurately the demands of contemporary federal appellate practice.

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50. See text accompanying note 4 *supra*.

