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George E. Hutchinson
United States Court of Appeals for the Federal Circuit

Ernest C. Baynard III
United States Court of Appeals for the Federal Circuit

LOCAL RULES AND PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GEORGE E. HUTCHINSON*

ERNEST C. BAYNARD, III**

Effective October 1, 1982, the Federal Courts Improvement Act of 1982 (or the Act)[1] abolished the United States Court of Claims[2] and the United States Court of Customs and Patent Appeals[3] and created the United States Court of Appeals for the Federal Circuit (CAFC) and the United States Claims Court. The new CAFC inherited the appellate functions formerly exercised by the United States Court of Claims and the jurisdiction of the Court of Customs and Patent Appeals. It was also given jurisdiction to hear appeals from the United States district courts in patent infringement actions,[4] appeals from the Merit Systems Protection Board,[5] and Tucker Act cases decided by the United States district courts, except for tax cases.[6]

The Act provided for an advisory committee to be appointed by the CAFC in order to study the proposed rules of practice and internal operating procedures of the court.[7] The recommendations of the advisory committee were given considerable weight when the court promulgated the *Rules of the United States Court of Appeals for the Federal Circuit* (hereinafter referred to as "CAFC Rules") and a procedural handbook effective October 1, 1982. The rules are intended to supplement the Federal Rules of Appellate Procedure (hereinafter referred to as FRAP) and to reflect the court's nationwide and varied jurisdiction, as well as a commitment to the expeditious determination of cases brought before it.

The geographic extent of the Federal Circuit is reflected by CAFC

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* Clerk, United States Court of Appeals for the Federal Circuit. A.B., LL.B., George Washington University.

** Associate Solicitor, United States Department of the Interior; Member Advisory Committee, United States Court of Appeals for the Federal Circuit. B.A., Trinity College; J.D., Georgetown University.

[1] Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified throughout sections of titles 2, 5, 7, 10, 15, 16, 18, 19, 22, 25, 26, 28, 30, 31, 33, 35, 40, 41, 42, 44, 45, and 50 app. U.S.C. (1982)).

[2] Federal Courts Improvement Act, § 105(a), 28 U.S.C. § 171(a).

[3] *Id.* § 106, 28 U.S.C. § 221. *See In re* Makari, 708 F.2d 709 (Fed. Cir. 1983).

[4] *See* Baker Perkins, Inc. v. Werner & Pfleiderer Corp., 710 F.2d 1561 (Fed. Cir. 1983).

[5] *See* Carroll v. Department of Health & Human Servs., 703 F.2d 1388 (Fed. Cir. 1983).

[6] For the jurisdiction of the United States Court of Appeals for the Federal Circuit, see *id.* § 127, 28 U.S.C. § 1295.

[7] *Id.* § 208(a), 28 U.S.C. § 2077(b).

Rule 2(b), which states that the Court may hold sessions in any place named in section 48 of title 28 and permitted under section 48(b) of the same title.[8] In determining where sessions will be held, the court will attempt to secure reasonable opportunity for citizens to appear before it with as little inconvenience and expense as is practicable.[9]

Rule 3 of the CAFC provides that panels of the court will consist of an odd number of judges and that there not be less than three.[10] This is a departure from the procedure usually followed in the regional United States courts of appeal, which sit either in panels of three or, occasionally, en banc. Congress believed that the Court of Appeals for the Federal Circuit would decide an unusual number of complex cases involving inconsistently applied law. "Authoritativeness" of decisions and "doctrinal stability" would be promoted if the court could sit in panels of greater than three without having to sit en banc.[11]

The court follows the FRAP relative to hearings or rehearings which take place before a panel of more than three judges.[12] The granting of requests for such hearings would depend on the complexity of issues involved. Thus, the empaneling of more than three judges occurs sua sponte or as a result of a suggestion for a hearing or a rehearing en banc.

To avoid a court of specialized judges, Congress provided for court determination of a method for rotating judges from panel to panel so that all judges would sit on a representative cross-section of cases. This requirement is reflected in CAFC Rule 3(b).[13]

The issue addressed by CAFC Rule 4 is whether former employees should be allowed to practice before the Federal Circuit. A provision in an earlier proposed rule that would have prohibited any former employee from practicing before the court within two years after termination of his employment was omitted in the final version. It is now established that "[n]o employee of the Court shall engage in the practice of law. No former employee shall participate or assist, by way of representation, consultation, or otherwise, in any case pending in the Court during the period of employment."[14]

Some initial confusion was caused by CAFC Rule 6, which provides for

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[8] FED. CIR. R. 2(b).

[9] H.R. REP. No. 312, 97th Cong., 1st Sess. 31 (1981).

[10] FED. CIR. R. 3(a).

[11] H.R. REP. No. 312, 97th Cong., 1st Sess. 30-31 (1980-81). Accordingly, the court has provided in its procedural manual that cases will normally be heard by a panel of three judges, "unless circumstances warrant a larger panel." UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, PROCEDURAL HANDBOOK ¶ 20 (1982). Apparently, larger panels will be utilized if a case is unusually complex, of great import, or involves an area of the law which requires uniformity.

[12] FED. CIR. R. 19.

[13] Federal Courts Improvement Act, § 103(b)(3), 28 U.S.C. § 48(b)(3).

[14] FED. CIR. R. 4.

admission to the bar of the court.[15] The rule did not expressly provide that attorneys admitted to practice before either the United States Court of Claims or the United States Court of Customs and Patent Appeals as of September 30, 1982, were deemed admitted to practice before the CAFC; however, it was announced by the judges of the new court that members in good standing of the predecessor courts could automatically become members of the bar of the new Court of Appeals on October 1, 1982, by notifying the court of their desire to become such.[16]

Under CAFC Rule 7(a) every party or amicus to the court must appear through an attorney admitted to practice before the court, except for individuals appearing pro se.[17] The rule also requires one individual attorney to be appointed as the attorney of record for a party. Other attorneys assisting the attorney of record may be designated as "of counsel" on motions, petitions, briefs and other papers.[18]

The effect of CAFC Rule 7(b) is to require each attorney of record to file a written appearance with the clerk of the court within ten days after the appeal has been docketed.[19] An attorney may not withdraw from a case unless he serves notice on the party and obtains the consent of the court. Substitution of parties is governed by FRAP 43. An individual appearing pro se must file a written appearance within the same time period. If the attorney has been retained or appointed after the appeal has been docketed, he must file his written appearance with the clerk within ten days from the date he was retained or appointed.

In 1974, Congress substantially amended the recusal statute.[20] That

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[15] Attorneys representing the United States or any federal, state or local government office or agency may appear before the court of appeals without having been formally admitted to practice before the court. *Id.* 6(d). However, if a government attorney wishes to practice before the court, he would be admitted as any other attorney and pay the required fee.

[16] *Id.* 6(a).

[17] *Id.* 7(a).

[18] Only the attorney of record need be a member of the bar of the court, and attorneys designated as "of counsel" need not be formally admitted to practice before the court. *Id.*

[19] *Id.* 7(b). Until an attorney of record has filed a written appearance for a party or that party has appeared pro se, service will be made upon the party's attorney of record in the trial court or administrative agency or, if a party appeared pro se, upon the party. *Id.*

[20] 28 U.S.C. § 455 (1982):

> Disqualification of justice, judge, magistrate, or referee in bankruptcy. (a)Any justice, judge or magistrate . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b)He shall also disqualify himself in the following circumstances:
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> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or

statute currently provides, inter alia, that a judge shall disqualify himself from a case if he "has a financial interest in the subject matter in controversy or in a party to the proceeding. . . ."[21] "Financial interest" is defined as "ownership of a legal or equitable interest, however small . . . ."[22]

In light of the requirements imposed by the recusal statute, CAFC

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expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c)A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interest of his spouse and minor children residing in his household.

(d)For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stage of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e)No justice, judge, or magistrate . . . shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification. *Id.*

[21] *Id.* § 455(b)(4).

[22] *Id.* § 455(d)(4).

Rule 8 requires a party or amicus curiae, other than the United States, to file a certificate of interest along with the first paper that is filed in the court.[23] The certificate of interest must list, among other things, "any publicly held affiliates" of a corporation that is a party or amicus in the case.[24]

Rules similar to CAFC Rule 8 have been adopted by many of the circuits and by the Supreme Court of the United States.[25] The term "affiliate" is widely used in securities law and its meaning is apparently well understood by corporate counsel. Generally, corporation *B* is an affiliate of corporation *A* if *B*, directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with corporation *A*.[26] By limiting the affiliates that must be listed to those that are publicly held, CAFC Rule 8 does not require counsel to perform the tedious and unnecessary task of listing those corporations that are wholly owned by a party or otherwise not publicly held, and in which a judge could not own any interest.

Rule 8 of the CAFC also requires the listing of all law firms whose partners or associates appeared for a party in the "lower tribunal."[27] The term "lower tribunal" includes any agency or court in which prior proceedings in the case have been conducted and in which counsel for a party has entered an appearance. For example, if an appeal was taken from an administrative agency to the Claims Court and then to the CAFC, those firms whose partners or associates appeared for the party before the Claims Court and the administrative agency would have to be listed.

The Federal Rules of Appellate Procedure 27(b) provides that a court may by rule or order provide that the clerk dispose of specified types of procedural motions. Such motions are listed in CAFC Rule 9.[28] The im-

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[23] FED. CIR. R. 8.

[24] *Id.* 8(c).

[25] The Supreme Court requires a "listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation." SUP. CT. R. 28.1. Presumably, under the Supreme Court rule, corporations that are not wholly owned by a corporate party but which, nonetheless, are wholly owned by a corporate party and another corporation, would have to be listed.

[26] This definition of "affiliate" is used throughout the securities laws. *See, e.g.*, 17 C.F.R. §§ 210.1-02(b), 230.133(f), 230.144(a)(1) (1982). Hence, in the case of the large public issue corporation, corporate counsel should have readily available a list of the corporation's affiliates. Thus, compliance with this rule should not be onerous.

[27] FED. CIR. R. 8(d).

[28] The clerk may dispose of any unopposed procedural motion timely filed and served, which seeks to: dismiss an appeal; remand a case; enlarge the time for filing a brief, appendix, or petition, or other paper, or for designating the contents of an appendix; stay issuance of a mandate pending application to the Supreme Court for a writ of certiorari for a period not to exceed thirty days; consolidate appeals; correct a brief or other paper; correct or modify a record in accordance with FRAP 19(e) or FRAP 16(b); file a brief amicus curiae pursuant to FRAP 29; grant an amicus curiae leave to participate in oral argument by shar-

portant thrust of the rule is that the motion must be consented to or be unopposed. Yet there may be instances where a motion, although agreed upon by the parties, may not be acted upon by the clerk because the nature of the motion would require specific action of the court. Such a motion could be for an extension of time which would delay the hearing of an appeal. Another such motion may involve the remand of a case whereby language of the order of remand would demand court approval. Should a party be adversely affected by the clerk's action, FRAP 27(b) provides for court review.

The clerk may act upon a motion to correct or modify the record in accordance with FRAP 10(e) or 16(b).[29] Pursuant to FRAP 16(b), in an appeal from an administrative agency the parties or the court may correct material misstatements or omissions in the record. Under FRAP 10(e), the parties, the trial court or the Court of Appeals may correct material misstatements or omissions in the record occurring through error or accident; however, any necessary corrections or modifications of the record should be made by the trial court, if possible. If the trial court does modify or correct the record, the transmission of a supplemental record will not always be necessary since, as a rule, the original record will be retained by the trial court.

The notice of appeal from a lower court to a court of appeals is filed with the clerk of the lower court. However, CAFC Rule 10(a)(1) provides that a notice of appeal may be deemed filed when mailed, if the court from which the appeal is taken has established such a rule pursuant to statute.[30] The Court of International Trade possesses this authority[31] and has exercised it by promulgating Court of International Trade Rule 5(g). Accordingly, pursuant to CAFC Rule 10(a)(1) notices of appeal from the Court of International Trade to the CAFC will be deemed filed when mailed to the Clerk of the Court of International Trade. The timely filing of the notice of appeal is the sole jurisdictional requirement. Failure of appellant to take any other step, such as payment of the filing fee, does not affect the validity of the appeal. It should be noted that the petition for review of a decision or order of an administrative agency must be filed within the statutory period with the clerk of the court and not the agency.[32] However, a notice of appeal from the Patent and Trademark Office must still be filed in that office with a copy of the notice sent to the court.[33]

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ing time with other counsel; stay further proceedings; withdraw or substitute an appearance or a party; permit an excess of not more than ten pages beyond limitations contained in FRAP; or advance or continue a case. *Id.* 9.

[29] *Id.* 9(g).

[30] *See* FED. R. APP. P. 3, 4(a), 25(a); *cf.* CL. CT. R. 3(b)(2), 72.

[31] 28 U.S.C. § 2632 (1982).

[32] FED. R. APP. P. 15(a).

[33] 35 U.S.C. § 142 (1976) (amended 1982); 15 U.S.C. § 1071 (1976) (amended 1982).

Pursuant to CAFC Rule 10(a)(2), the clerk of the trial court will promptly transmit to the clerk of the court of appeals a copy of the notice of appeal, a certified copy of the docket entries and an appeal information sheet. Upon receipt of these documents, the clerk of the court of appeals enters the appeal on the docket. The clerk then gives notice to all parties of the date on which the appeal was docketed.

Within sixty days from the date on which the appeal is docketed, the appellant must serve and file its brief.[34] The appellee must serve and file its brief within forty days after the service of the brief of the appellant.[35] As provided in FRAP 31, an appellant may serve and file a reply brief within fourteen days after service of the brief of the appellee; however, except for good cause shown, a reply brief must be filed at least three days before oral argument. Pursuant to CAFC Rule 13(f), if a reply brief is filed four business days or less prior to oral argument, it must be served in such a manner as to reach the person upon whom it is served prior to oral argument.

Ordinarily, the clerk of the trial court assembles and transmits the record to the clerk of the court of appeals.[36] Upon receipt of the record, the clerk of the court of appeals sends notice to all parties of the date upon which the record was filed.[37] The appellants brief is due within forty days from the date on which the record was filed and the appellee's brief thirty days after service of the brief of appellant.[38] Although the time periods for filing briefs provided in the CAFC rules are longer than those generally provided in FRAP, the briefs will be filed sooner after the notice of appeal has been filed because, as a rule, only a certified list of the docket entries, and not the complete record, will be sent by the trial court to the Court of Appeals for the Federal Circuit.[39] The CAFC rules provide that should the parties or the court find it necessary to a proper consideration of the case, the record, or any part thereof, may be ordered from the lower court at any time during pendency of the appeal.[40]

The Federal Courts Improvement Act amended section 1292 of title 28 to allow appeals by permission to be heard by the CAFC.[41] The statute

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[34] FED. CIR. R. 13(f).

[35] *Id.*

[36] FED. R. APP. P. 11(b).

[37] *Id.* 12(b).

[38] *Id.* 31(a).

[39] FED. CIR. R. 10(b)(3).

[40] *Id.* 11(a)(4).

[41] Appeals by permission pursuant to 28 U.S.C. § 1292(d) should not be confused with appeals taken pursuant to rule 54(b) of the Claims Court. Section 1292(d) allows the appeal of an interlocutory order if the trial judge includes in the order a statement that a "controlling question of law is involved with respect to which there is substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate determination of the litigation . . . ." By contrast, a rule 54(b) judgment is a final judgment where there are multiple parties or multiple claims, and the judgment is final as

governing appeals by permission in the CAFC[42] is essentially parallel to the provision applicable to appeals by permission to the other courts of appeals.[43] Accordingly, the CAFC rules adopt the provisions of FRAP 5 which govern these types of appeals. As with appeals as of right, the entire record will ordinarily be retained by the lower court and not transmitted to the court of appeal. Unlike an appeal as of right, there will be no notice of appeal filed in the trial court.[44]

Appeals from decisions of administrative agencies will likewise receive expedited treatment under the CAFC rules. The rules provide that the agency will transmit to the court a certified list of all documents, transcripts, exhibits and other material that comprise the record.[45] Upon receipt of this list the clerk of the court enters the appeal on the docket.[46] Under CAFC Rule 10(c)(2), the agency is required to "promptly" transmit the certified list to the court. Presumably, "promptly" means less than forty days, that being the period of time which the agency would have under FRAP 17(a) to file the entire record with the clerk of the court if that were required. The time period in FRAP has been considered as the maximum time period for transmittal. Should additional time be required, the agency must request such a period from the Court.

Appeals from decisions of the Patent and Trademark Office are procedurally much the same as appeals from administrative agencies.[47] However, there are statutory peculiarities associated with taking an appeal from the Patent and Trademark Office.[48] As previously mentioned, the notice of appeal, which must include the reasons of appeal, is filed with

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to one or more of the parties or claims, and the trial court judge certifies that there is no just reason for delay. CL. CT. R. 54(b). *Cf.* United States v. Vera, 701 F.2d 1349 (11th Cir. 1983) (denial of motion to challenge prospective juror for cause was not abuse of discretion where no bias or partiality was shown). The only similarity between a § 1292(d) appeal and a rule 54(b) appeal is that they both involve initial certification by the trial judge. *See* Wheeler Mach. Co. v. Mountain States Mineral Enter., 696 F.2d 787 (10th Cir. 1983); 9 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 110.22(5)(2) (2d ed. 1976). *See also* Veach v. Vinyl Improvement Prod., 700 F.2d 1390 (Fed. Cir. 1983) (appeal from denial of summary judgment not proper under rule 54(b) or § 1292(d)); Aleut Tribe v. United States, 702 F.2d 1015 (Fed. Cir. 1983) (court lacked jurisdiction over claim where district court failed to make rule 54(b) determination; § 1292(d) appeal dismissed where district court failed to certify the order); Harrington Mfg. Co. v. Powell Mfg. Co., 709 F.2d 710 (Fed. Cir. 1983) (Federal Ciruit lacks jurisdiction over interlocutory appeals on questions certified to the court by the district court).

[42] 28 U.S.C. § 1292(d) (1982).

[43] *Id.* § 1292(b).

[44] However, there may be a situation where, for tactical reasons, counsel would wish to file both a notice of appeal and a petition for permission to appeal. *See* Gillespie v. United States Steel Corp., 379 U.S. 148 (1964); 9 J. MOORE, *supra* note 39, at ¶ 110.22(5)(2).

[45] FED. CIR. R. 10(c)(2).

[46] *Id.* 11(b)(2).

[47] *Id*, 10(c)(3).

[48] *See* 35 U.S.C. § 132 (1976) (amended 1982); 15 U.S.C. § 1070(a)(2) (1976) (amended 1982).

the Commissioner of Patents and Trademarks and a copy sent to the court.

Rule 30 of the FRAP contains alternative methods of designating the contents of the appendix. Further, CAFC Rule 12(b) provides that the method used will be that prescribed by FRAP 30(b).[49] If there is no agreement as to the contents, the appellant serves on the appellee, within ten days from docketing, a designation of those parts of the record which he intends to include in the appendix,[50] along with a statement of the issues he intends to present for review. If there are portions of the record not designated by appellant that appellee wishes to include in the appendix, the appellee must serve his designation of those portions of the record on appellant within ten days of receipt of appellant's designation.

If the appellant requires a transcript in order to designate the appendix and the transcript has been ordered but not completed in time for him to comply with the ten day requirement in CAFC Rule 12(b), he may move for an extension of time within which to designate the contents of the appendix. The clerk of the court is authorized by CAFC Rule 9(c) to grant unopposed motions for extensions of time for designating the contents of the appendix. The court encourages the parties to agree as to its contents, and it is only where there is disagreement that an extension need be involved. The provisions of FRAP 30(b) require the appellant to include all parts designated in the appendix. Thus, if there is disagreement and the appellant feels the material designated is irrelevant, the appellee shall advance the cost of including such parts[51] with the entire cost of producing the appendix to be taxed as costs under FRAP 39. It is important to note that the appendix is a part of the brief and if printed separately, must be filed simultaneously with the brief.

Both briefs[52] and appendices must be 8 1/2 by 11 inches with typed matter 6 1/2 by 9 1/2 inches.[53] The option, otherwise available under FRAP 32(a), to produce briefs and appendices 6 1/8 by 9 1/4 inches with type matter 4 1/6 by 7 1/6 inches has been eliminated. Without leave of court, principal briefs may not exceed fifty pages and reply briefs may

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[49] FRAP 30(b) allows the appellant ten days after the date on which the record is filed to serve on the appellee the designation of those parts of the record which he intends to include in the appendix. Because, as a rule, the record will not be filed in the CAFC, the ten days referred to in FRAP 30(b) begins to run from the date the appeal is docketed. FED. CIR. R. 11(b).

[50] Other than by leave of court, the appendix may not include: briefs and memoranda; notices; subpoenas; summonses in appeals other than those from the Court of International Trade; motions to extend time; admissions and affidavits of service and mailing; and jury lists. *Id.* 12(a).

[51] FED. R. APP. P. 30(b).

[52] Briefs held together with ring type bindings are not acceptable and externally positioned staples must be covered with tape. *Id.* 13(c).

[53] *Id.*

not exceed twenty-five pages.[54] The court is disinclined to grant motions to file briefs in excess of the page limitations, as underscored by CAFC Rule 14(b). An unopposed motion for leave to exceed the page limitation by ten pages or less, however, may be granted by the clerk, who may still transmit the motion to the court for action based on the aforementioned policy. Counsel are urged to have all typed matter double-spaced regardless of the printing process utilized, although the rules themselves only require such spacing where a typewritten offset method is used. This policy is based on the fact that the court finds it much easier to read briefs or other papers reproduced in such a manner. Yet, in recognition of the page limitation, it may be necessary to use single lines to keep within the rule. Margins and size of type are also important provisions which must be followed. Emphasis must be placed on the fact that covers for briefs must not utilize ring or plastic bindings.

The court permits the filing of twelve copies of a brief rather than the twenty-five copies provided for in FRAP 31(b) unless the paper carries confidential matter.[55] In this event, the court requires twelve copies of a non-confidential brief and five copies of the brief which contains confidential matter.[56] In the event the suggestion for an en banc hearing is made and granted by the court, counsel should be prepared to submit three additional copies.[57]

The use of visual aids at oral argument is permitted under CAFC Rule 14. If a visual aid was not part of the presentation below, its proposed use must be brought to the attention of opposing counsel not less than fifteen days before the oral argument.[58] Any objections must be in writing, served on all adverse parties, and filed not less than five days prior to oral argument.[59] The court will then decide the matter prior to the argument.

If oral argument is allowed, CAFC Rule 15 provides that the court will decide the amount of time granted for it. The Federal Circuit's Procedural Handbook, however, provides that the time allotment will ordinarily be fifteen minutes.[60] More or less time may be allotted depending upon the nature or complexity of the issues presented in the case.

Pursuant to FRAP 34(a), the court will allow oral argument in all cases unless a panel of three judges, after examination of the briefs, is unanimously of the opinion that oral argument is not needed. Any party has the opportunity to file a statement with the court indicating why oral

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[54] *Id.* 13(b).
[55] *Id.* 13(d).
[56] *Id.* 13(g).
[57] *Id.* 19(d).
[58] *Id.* 14(c).
[59] *Id.*
[60] UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, PROCEDURAL HANDBOOK ¶ 21 (1982).

argument should be heard.[61]

Under CAFC Rule 16, a party, after his brief has been filed or after oral argument but before decision, may bring additional authority to the attention of the court. The authority may be incorporated into a letter that refers to a page of the brief or a point raised at oral argument which states in a single sentence[62] the proposition the authority supports. No other argument or explanation of the submission may be made. Within seven days of service of the letter, opposing counsel may file a letter containing a short statement on why the authority is inapplicable.

Rule 19 of the CAFC allows the filing of a formal suggestion for a hearing or rehearing en banc.[63] The suggestion that an appeal be heard en banc consists of a concise statement indicating why consideration by the full court is necessary to secure or maintain the uniformity of its decisions, or why the case involves a question of exceptional importance. A suggestion for a rehearing en banc consists of a single sentence to this effect.[64]

If a petition for rehearing is combined with a suggestion for rehearing en banc, the petition will be decided by a majority vote of the panel that rendered the initial decision, and the suggestion for rehearing en banc will be decided by a majority vote of all active judges.[65] The mere suggestion by a party that an appeal be reheard en banc does not require the judges to be polled on whether there should be such a rehearing.[66] Rather, as provided by FRAP 35(b), a vote is required if requested by a judge in regular active service or a judge who was on the panel that decided the case initially.

The issuance of mandates by the Court is governed by FRAP 41. Under this rule the mandate will issue twenty-one days after entry of judgment, which corresponds to the date of the decision.[67] A timely petition for rehearing or a motion for stay of mandate which has been granted will automatically stay issuance. If the petition is denied, the

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[61] FED. CIR. R. 15(a).

[62] The requirement that the statement referred to in CAFC Rule 16 be in a single sentence may result in sentences unknown in English prose. Nonetheless, the rule should prevent parties from filing expansive supplemental briefs without leave of court under CAFC Rule 16.

[63] *See* FED. R. APP. P. 35.

[64] FED. CIR. R. 19(b).

[65] FED. R. APP. P. 35(b).

[66] Accordingly, a petition for rehearing may be disposed of without any reference to the suggestion that the rehearing be heared en banc. Hence, FRAP 35(c) provides that "[t]he pendency of such a suggestion [for a rehearing en banc] whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay of issuance of the mandate." A petition for rehearing, of course, does affect the finality of the judgment for purposes of filing a petition for writ of certiorari. *See* Department of Banking v. Pink, 317 U.S. 264, 266 (1942).

[67] FED. R. APP. P. 41(a).

mandate will issue seven days after entry of the order denying the petition. A stay of mandate is generally based on a party filing a petition for writ of certiorari in the Supreme Court of the United States.[68] If granted, the mandate will be stayed until final disposition by the Supreme Court. If the petition is denied, the mandate issues immediately. The issuance of a mandate does not affect the right to apply for a writ of certiorari.

Provisions of FRAP 39 regarding costs are now applicable in the CAFC. Both predecessor courts lacked a rule allowing recovery of certain costs by the winning party, restricting any recovery to matters involving printing of irrelevant material by one or both parties. Thus under the Federal Rules of Appellate Procedure, the court will allow costs permitted by section 1920 of title 28 to be recovered by the winning party unless the court orders otherwise or there is an agreement among the parties. The court provides a bill of cost form which is transmitted with the decision and must be filed within fourteen days after the date of decision. Objections are due ten days after the service of the bill. As provided in the Federal Rules of Appellate Procedure, the mandate will not be delayed for taxation of costs. If issued before the determination of costs, the mandate will be amended and the lower tribunal advised.

If court of appeals determines that an appeal is frivolous it may award damages to the appellee pursuant to FRAP 38. In *Asberry v. United States Postal Service*,[69] the CAFC applied this rule and assessed $500 in costs and attorneys' fees against the appellant and his lawyer for prosecuting a frivolous appeal. The appellant had previously entered into a settlement with the Postal Service but subsequently sought administrative review of that settlement before the Merit Systems Protection Board. The Board dismissed his appeal and the appellant sought judicial review. The court found that "[t]here is not the slightest evidence . . . that could remotely indicate that [the Board's order dismissing the appeal] resulted in any manner from an abuse of discretion."[70] Because appellant and counsel may not have understood that FRAP 38 was applicable, the court remitted the award of costs and attorneys' fees, but indicated that it would not remit such awards in the future.

The criteria by which the court will decide whether to dispose of an appeal with a published or unpublished opinion were established by CAFC Rule 18. "Opinions which do not add significantly or usefully to the body of law or would not have precedential value will not be published in commercial reports of decision."[71] If an opinion is unpublished it may not be used by the court or cited by counsel as precedent; however, it may be cited in support of a claims of res judicata, collateral estoppel,

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[68] *Id.* 41(b).

[69] 692 F.2d 1378 (Fed. Cir. 1982).

[70] *Id.* at 1380.

[71] FED. CIR. R. 18(a).

or law of the case. A party to an appeal that has been decided by an unpublished opinion may file a motion requesting that the unpublished opinion be reissued as a published opinion. It should be noted that a list of all unpublished opinions is printed quarterly in the *Federal Reporter, 2nd Series*, and in intellectual property cases, in the *United States Patents Quarterly*.

The Equal Access to Justice Act[72] provides for the award of attorney fees and expenses to a prevailing party in litigation against the United States "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[73] The court has construed this provision as referring to the "position of the United States" in court, and not before an administrative tribunal prior to the case being filed in court.[74] Furthermore, the justification for the government's position in court "must be measured against the law as it existed when the government was litigating the case," and not by new law announced by the court in deciding that case.[75] Simply because the United States lost a case, its position will not be found not "substantially justified"; nor will the position of the United States be found to be "substantially justified" simply because the United States, in litigating a case, was attempting to uphold a decision in its favor by the tribunal below.[76]

CAFC Rule 20(a) provides: "Applications [for attorneys fees and expenses] and petitions for leave to appeal denials of applications must be filed within 30 days after the date of decision involved." The content of such an application is described in CAFC Rule 20(b).

As indicated, the CAFC, in adopting new rules, had as its primary objective the supplementation of the Federal Rules of Appellate Procedure only in areas where modifications and additions were dictated by the

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[72] 28 U.S.C. § 2412 (1982).

[73] *Id.* § 2412(d)(1)(A). The statute also provides that:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the term of any statute which specifically provides for such an award.

28 U.S.C. § 2412(b). This section would make the government liable for attorney fees when it acts in bad faith. Gava v. United States, 699 F.2d 1367 (Fed. Cir. 1983); *see generally* Fidelity Constr. Co. v. United States, 700 F.2d 1379 (Fed. Cir. 1983) (the award of costs and attorneys fees against the United States in administrative proceedings); Bennett v. Department of the Navy, 699 F.2d 1140 (Fed. Cir. 1983).

[74] Broad Ave. Laundry and Tailoring v. United States, 693 F.2d 1387, 1390 (Fed. Cir. 1982).

[75] Kay Mfg. Co. v. United States, 699 F.2d 1376, 1379 (Fed. Cir. 1983).

[76] 693 F.2d at 1391-92.

court's jurisdiction. Thus, provisions in FRAP applicable to appeals from United States District Courts were applied to both the United States Court of International Trade and the United States Claims Court. Appeals from various administrative agencies fall generally under the FRAP rubric except in cases from the Patent and Trademark Office where specific provisions had to be included. Between October 1, 1982 and the publication of this article, both bench and bar have found the rules quite workable. However, as the court has indicated, changes and amendments can and will be made in the future as required.