The rule requires an attorney to consult with his or her client before a settlement conference and obtain as much authority as feasible to settle the case. An attorney can never settle a case without his or her client's consent. Certain entities, especially government entities, have particular difficulty obtaining authority to settle a case. The rule requires counsel to obtain only as much authority ''as feasible.''

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 34. Oral Argument

(a) IN GENERAL.

(1) *Party's Statement.* Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) *Standards.* Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

(b) NOTICE OF ARGUMENT; POSTPONEMENT. The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(c) ORDER AND CONTENTS OF ARGUMENT. The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

(d) CROSS-APPEALS AND SEPARATE APPEALS. If there is a cross-appeal, Rule 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(e) NONAPPEARANCE OF A PARTY. If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.

(f) SUBMISSION ON BRIEFS. The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.

(g) USE OF PHYSICAL EXHIBITS AT ARGUMENT; REMOVAL. Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 25, 2005, eff. Dec. 1, 2005.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

A majority of circuits now limit oral argument to thirty minutes for each side, with the provision that additional time may be made available upon request. The Committee is of the view that thirty minutes to each side is sufficient in most cases, but that where additional time is necessary it should be freely granted on a proper showing of cause therefor. It further feels that the matter of time should be left ultimately to each court of appeals, subject to the spirit of the rule that a reasonable time should be allowed for argument. The term ''side'' is used to indicate that the time allowed by the rule is afforded to opposing interests rather than to individual parties. Thus if multiple appellants or appellees have a common interest, they constitute only a single side. If counsel for multiple parties who constitute a single side feel that additional time is necessary, they may request it. In other particulars this rule follows the usual practice among the circuits. See 3d Cir. Rule 31; 6th Cir. Rule 20; 10th Cir. Rule 23.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

The proposed amendment, patterned after the recommendations in the Report of the Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 1975, created by Public Law 489 of the 92nd Cong. 2nd Sess., 86 Stat. 807, sets forth general principles and minimum standards to be observed in formulating any local rule.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendments to Rules 34(a) and (e) are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

Subdivision (d). The amendment of subdivision (d) conforms this rule with the amendment of Rule 28(h).

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

Subdivision (c). The amendment deletes the requirement that the opening argument must include a fair statement of the case. The Committee proposed the change because in some circuits the court does not want appellants to give such statements. In those circuits, the rule is not followed and is misleading. Nevertheless, the Committee does not want the deletion of the requirement to indicate disapproval of the practice. Those circuits that desire a statement of the case may continue the practice.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. Substantive changes are made in subdivision (a).

Subdivision (a). Currently subdivision (a) says that oral argument must be permitted unless, applying a local rule, a panel of three judges unanimously agrees

that oral argument is not necessary. Rule 34 then outlines the criteria to be used to determine whether oral argument is needed and requires any local rule to ''conform substantially'' to the ''minimum standard[s]'' established in the national rule. The amendments omit the local rule requirement and make the criteria applicable by force of the national rule. The local rule is an unnecessary instrument.

Paragraph (a)(2) states that one reason for deciding that oral argument is unnecessary is that the dispositive issue has been authoritatively decided. The amended language no longer states that the issue must have been ''recently'' decided. The Advisory Committee does not intend any substantive change, but thinks that the use of ''recently'' may be misleading.

Subdivision (d). A cross-reference to Rule 28(h) has been substituted for a reiteration of the provisions of Rule 28(h).

COMMITTEE NOTES ON RULES—2005 AMENDMENT

Subdivision (d). A cross-reference in subdivision (d) has been changed to reflect the fact that, as part of an effort to collect within one rule all provisions regarding briefing in cases involving cross-appeals, former Rule 28(h) has been abrogated and its contents moved to new Rule 28.1(b).

Rule 35. En Banc Determination

(a) WHEN HEARING OR REHEARING EN BANC MAY BE ORDERED. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) PETITION FOR HEARING OR REHEARING EN BANC. A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

(c) TIME FOR PETITION FOR HEARING OR REHEARING EN BANC. A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

(d) NUMBER OF COPIES. The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.

(e) RESPONSE. No response may be filed to a petition for an en banc consideration unless the court orders a response.

(f) CALL FOR A VOTE. A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 25, 2005, eff. Dec. 1, 2005.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Statutory authority for in banc hearings is found in 28 U.S.C. §46(c). The proposed rule is responsive to the Supreme Court's view in *Western Pacific Ry. Corp. v. Western Pacific Ry. Co.*, 345 U.S. 247, 73 S.Ct. 656, 97 L.Ed. 986 (1953), that litigants should be free to suggest that a particular case is appropriate for consideration by all the judges of a court of appeals. The rule is addressed to the procedure whereby a party may suggest the appropriateness of convening the court in banc. It does not affect the power of a court of appeals to initiate in banc hearings *sua sponte*.

The provision that a vote will not be taken as a result of the suggestion of the party unless requested by a judge of the court in regular active service or by a judge who was a member of the panel that rendered a decision sought to be reheard is intended to make it clear that a suggestion of a party as such does not require any action by the court. See *Western Pacific Ry. Corp. v. Western Pacific Ry. Co.*, supra, 345 U.S. at 262, 73 S.Ct. 656. The rule merely authorizes a suggestion, imposes a time limit on suggestions for rehearings in banc, and provides that suggestions will be directed to the judges of the court in regular active service.

In practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled ''petition for rehearing in banc.'' Such a petition is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc. Since no response to the suggestion, as distinguished from the petition for rehearing, is required, the panel which heard the case may quite properly dispose of the petition without reference to the suggestion. In such a case the fact that no response has been made to the suggestion does not affect the finality of the judgment or the issuance of the mandate, and the final sentence of the rule expressly so provides.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

Under the present rule there is no specific provision for a response to a suggestion that an appeal be heard in banc. This has led to some uncertainty as to whether such a response may be filed. The proposed amendment would resolve this uncertainty.

While the present rule provides a time limit for suggestions for rehearing in banc, it does not deal with the timing of a request that the appeal be heard in banc initially. The proposed amendment fills this gap as well, providing that the suggestion must be made by the date of which the appellee's brief is filed.

Provision is made for circulating the suggestions to members of the panel despite the fact that senior judges on the panel would not be entitled to vote on whether a suggestion will be granted.