

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

AGENDA ITEM - 10
Tucson, Arizona
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TO: Honorable Alicemarie Stotler, Chair, and Members of the Standing Committee on Rules of Practice and Procedure

FROM: Honorable James K. Logan, Chair
Advisory Committee on Appellate Rules

DATE: December 10, 1993

The Advisory Committee on Appellate Rules has one new proposal for the Standing Committee to review. At its September meeting the Advisory Committee reviewed the proposed Guidelines for Filing by Facsimile that were presented to the Judicial Conference at its fall meeting. The Advisory Committee recommends a number of changes in the Guidelines and has developed Model Local Rules governing fax filing. The Committee intends to offer the model rules for consideration by those courts of appeals that wish to permit facsimile filing. Copies of both the amended Guidelines and the proposed Model Rules are attached to this memorandum. The Committee discussion about these items is summarized at pages 1-3 and 28-38 of the minutes of the September meeting, which are also attached to this memorandum.

This memorandum will outline the status of the various projects recently completed by and under consideration by the Advisory Committee.

I. On December 1, 1993, amendments to Fed. R. App. P. 3, 3.1, 4, 5.1, 6, 10, 12, 15, 25, 28, and 34 and to Forms 1, 2, and 3 became effective.

Amendments to Rules 3(c), 12, and 15 and Forms 1, 2, and 3 deal with the Torres problem and the question of sufficient identification of the parties filing a notice of appeal or petition for review. The amendment to Rule 3 allows an attorney representing more than one party to indicate which parties are appealing without naming them

*The material on fax filing has been removed and inserted in agenda item #7, "Proposed Standards on Facsimile Transmissions."

individually as long as it is objectively clear which parties intend to appeal. The amendment to Rule 15, however, requires that each petitioner be named because a petition for review of an agency decision is the first filing in any court and is, therefore, analogous to a complaint in which all parties must be named. Rule 12 is amended to require a representation statement, a non-jurisdictional document in which an attorney who represents more than one party on appeal names each party represented by the attorney. Forms 1, 2, and 3 are amended to include cross-references to the appropriate rules concerning identification of the parties.

Amendments to Rules 3(d), 4(a)(4), 4(b) and 6 are intended to eliminate the trap that 4(a)(4) created for a litigant who filed a notice of appeal before the disposition of one of the posttrial motions enumerated in that paragraph and also eliminate related problems in criminal and bankruptcy cases. Rule 4(a)(4) treated such a notice of appeal as null and required the litigant to file a new notice after disposition of the motion. If a party failed to file a new notice of appeal, the court of appeals lacked jurisdiction to hear the appeal. The amendments hold a notice of appeal filed before disposition of the posttrial motion in abeyance and the notice ripens into an effective notice upon disposition of the last posttrial motion.

In addition Rule 4 is amended in a number of other ways:

- A. Paragraph (a)(2) is amended to treat all notices of appeal filed after announcement of a decision or order but before formal entry of such order as if the notice of appeal had been filed after such entry.
- B. Paragraph (a)(4) is amended to treat motions under Rule 60 that are made within 10 days after entry of judgment as if they were motions under Rule 59. This eliminates the difficulty of determining whether a posttrial motion made within 10 days after entry of judgment is a Rule 59(e) motion, which tolls the time for filing an appeal, or a Rule 60 motion, which does not.
- C. Paragraph (a)(4) is amended further to exclude motions for attorney's fees from the class of motions that extend the time for filing a notice of appeal.
- D. Subdivision (b) is amended by adding motions for judgment of acquittal to the list of tolling motions. Such motions are the equivalent of Fed. R. Civ. P. 50(b) motions which toll the running of time for appeal in civil cases.
- E. To make it clear in criminal cases that a notice of appeal need not be filed before entry of judgment, another amendment to 4(b) states that an appeal may be taken within 10 days after the entry of an order disposing of a tolling motion, or within 10 days after the entry of judgment, whichever is later.
- F. Subdivision (b) is further amended to allow a sentencing court to act under Fed. R. Crim. P. 35(c) to correct an arithmetical, technical, or other clear error in sentencing even if a notice of appeal has been filed.

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Amendments to Rules 4(c) and 25 make papers filed by an inmate confined in an institution timely if deposited in the institution's internal mail system, with postage prepaid, on or before the filing date.

The amendments to Rule 3.1 and 5.1 reflect the change in title from magistrate to magistrate judge.

The amendment to Rule 10 corrects a printing error.

The amendment to Rule 28 requires an appellant's brief to include a statement of the standard of review.

The amendment to Rule 34 eliminates the requirement that an opening argument include a statement of the case.

II. The Judicial Conference of the United States approved proposed amendments to Fed. R. App. P. 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 33, 35, 38, 40, 41, and 49. Those proposed amendments have been forwarded to the Supreme Court for its consideration.

The proposed amendments to Rule 3, 5, 5.1, 13, 21, 25, 26.1, 27, 30, 31, and 35 deal with the number of copies of documents that must be filed with a court of appeals. The amendments generally include identical language stating that an original and a certain number of copies must be filed "unless the court requires the filing of a different number of copies by local rule or by order in a particular case." The amendments to Rules 3, 13, and 35, however, differ from the others in that they do not establish a baseline number of copies. The amendments to Rule 3 and 13 require an appellant to file sufficient copies of a notice of appeal to enable the district court to serve each party with a copy. Amended Rule 35, governing in banc hearings, provides that the number of copies will be prescribed by local rule. Because the number of copies needed in an in banc proceeding is directly related to the number of judges on the court, establishing the number by local rule is the most sensible approach.

Rule 9 governing review of a release decision in a criminal case has been completely rewritten. The proposed amendments recognize the government's ability to appeal release decisions. The amendments also require a party seeking review to supply the court with certain basic documents: a copy of the district court's order regarding release and its statement of reasons; and, if the appellant questions the factual basis for the district court's order, a transcript of the release proceedings in the district court. In addition, subdivision (b) clarifies those instances in which review may be sought by

motion rather than by notice of appeal.

Another proposed amendment to Rule 25 provides that a clerk may not refuse to file a paper solely because it is not presented in proper form.

The proposed amendment to Rule 28 requires that a brief include a summary of argument.

Rule 33 governing appellate conferences has been completely rewritten. The proposed amendments make a number of changes: 1) the court may require parties to attend the conference in appropriate cases; 2) settlement of the case is a possible conference topic; 3) persons other than judges may preside over a conference; and 4) an attorney must consult with his or her client before a settlement conference and obtain as much authority as feasible to settle the case.

The proposed amendments to Rule 38 require that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond.

A proposed amendment to Rules 40 lengthens the time for filing a petition for rehearing from 14 to 45 days in civil cases involving the United States or its agencies or officers. A companion amendment to Rule 41 would key the time for issuance of the mandate to the expiration of the time for filing a petition for rehearing unless such a petition is filed, in which case the mandate issues 7 days after the entry of the order denying the motion.

Another proposed amendment to Rule 41 requires a motion for a stay of mandate to show that a petition for certiorari would present a substantial question and that there is good cause for a stay.

Proposed Rule 48 authorizes the use of special masters in the courts of appeals.

III. On November 1, 1993, proposed amendments to Fed. R. App. P. 4, 8, 10, 21, 25, 32, 47, and 49 were published for comment.

The proposed amendments to Rule 4 provide that a party who wants to obtain review of an alteration or amendment of a judgment must either file a notice of appeal or amend a previously filed notice. The amendments also provide that a posttrial motion must be "filed" no later than 10 days after entry of judgment in order to affect the finality of the judgment and extend the period for filing a notice of appeal. This change is a

companion to proposed amendments to Fed. R. Civ. P. 50, 52, and 59.

The amendment to Rule 8 conforms a cross-reference to Fed. R. Crim. P. 38 to previous amendments to that Rule.

The amendment to Rule 10 suspends the 10-day period for ordering a transcript if a timely postjudgment motion is made and a notice of appeal is suspended under the new amendments to Fed. R. app. P. 4(a)(4).

The proposed amendments to Rule 21 provide that the trial judge is not named in a petition for mandamus and is not treated as a respondent. The amendments also provide that the judge shall be represented *pro forma* by counsel for the party opposing relief. The judge is, however, permitted to appear to oppose issuance of the writ if the judge chooses or if the court of appeals orders the judge to do so.

One proposed amendment to Rule 25 provides that in order to file a brief using the mailbox rule, first-class mail is sufficient. Another proposed amendment permits a court of appeals by local rule or by order in a particular case, to permit service by facsimile.

The proposed amendments to Rule 32 are being republished to elicit additional comments about the printing provisions. The published draft states that if a brief is not commercially printed it must be produced 1) with no more than 11 characters per inch or 2) in 11 point type or larger and with an average or no more than 300 words per page. A footnote to the rule indicates, however, that the Committee is considering alternative printing provisions.

The proposed amendments to Rule 47 and 49 are the result of the collaborative efforts of all of the advisory committees to develop uniform rules governing local rules and technical amendments.

IV. At its September 1993 meeting the Advisory Committee approved in substance changes to Rules 27, 29, and 35 but specific language has not yet been approved. The Committee also has made recommendations concerning the Guidelines for Facsimile Transmission and has been working to develop model local rules for those courts of appeals that wish to permit fax filing.

An extensive rewriting and updating of Rule 27 governing motions practice has been discussed and several changes have been approved but the actual redrafting is not yet complete. Judge Stephen Williams chairs the subcommittee that has been working

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on Rule 27.

In addition, the Committee has approved numerous changes in Rule 29 governing the filing of amicus briefs. The Reporter has been asked to prepare a final draft for consideration at the spring meeting.

Changes to Rule 35, governing in banc proceedings, also have been approved by the Committee but not yet finalized. In light of the fact that additional changes to Rule 35 will be forthcoming soon, the Advisory Committee requested that Judge Keeton withdraw the proposed amendments to Rule 35 from the packet published on November 1. The Committee thought it preferable to publish all its recommended changes at one time; Judge Keeton concurred.

A number of other items were on the Committee's agenda for its fall meeting but because the Committee spent more than a half day discussing fax filing, several items were postponed until the spring meeting.

A copy of the draft minutes for the fall meeting and of the Advisory Committee's table of agenda items, its "docket," are attached to this report for your information. At the Advisory Committee's September meeting, Chief Judge Sloviter suggested that the Committee circulate the table of agenda items to the circuits to keep them informed of the status of the various items under consideration. I agreed to do so and will be circulating it to the chief judges.

The Appellate Rules Committee meeting has been scheduled for April 25 and 26 in Denver.