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

JOSEPH F WEIS JR
CHAIRMAN

JAMES E MACKLIN JR
SECRETARY

June 27, 1989

CHAIRMEN OF ADVISORY COMMITTEES
JON O NEWMAN
APPELLATE RULES
JOHN F GRADY
CIVIL RULES
LELAND C NIELSEN
CRIMINAL RULES
LLOYD D GEORGE
BANKRUPTCY RULES

TO THE CHAIRMAN, MEMBERS AND LIAISON MEMBERS OF THE ADVISORY COMMITTEE ON APPELLATE RULES

At the request of D an Mooney, I am transmitting a copy of the Advisory Committee's report to the Standing Committee for its meeting on July 17-18, 1989.

James E. Macklin, Jr.
Secretary

Enclosure

cc: *Honorable Joseph F. Weis, Jr.*
Mr. Robert D. St. Vrain
Associate Dean Carol Ann Mooney

Notre Dame Law School
Notre Dame, Indiana 46556

Office of the Dean

June 26, 1989

Mr. James E. Macklin, Jr.
Deputy Director, Administrative Office
of the United States Courts
811 Vermont Avenue, N.W.
Washington, D.C. 20544

Dear Mr. Macklin:

Enclosed please find a copy of the report of the Advisory Committee on Appellate Rules to the Standing Committee for its July meeting. In addition to circulating the report to the Standing Committee, would you please circulate it to the members of the Appellate Rules Committee and to Mr. St. Vrain, clerk of the Eighth Circuit.

Thank you for your assistance, I look forward to seeing you in July.

Sincerely,

Carol Ann Mooney

enclosure
cc: Honorable Jon. O. Newman

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JOSEPH F WEIS JR
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SECRETARY

June 28, 1989

CHAIRMEN OF ADVISORY COMMITTEES
JON O NEWMAN
APPELLATE RULES
JOHN F GRADY
CIVIL RULES
LELAND C NIELSEN
CRIMINAL RULES
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TO THE CHAIRMAN, MEMBERS, AND REPORTER OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, AND TO THE CHAIRMEN AND REPORTERS OF THE ADVISORY COMMITTEES

I am enclosing a preliminary draft of the agenda for the meeting of the Standing Committee which will be held in Boston on July 17-18.

Also enclosed is a copy of the report of the Advisory Committee on Appellate Rules to the Standing Committee for the July meeting.

James E. Macklin, Jr.
Secretary

Enclosure

June 26, 1989

TO: Judge Weis, Chairman, Standing Committee on Rules of Practice and Procedure

cc: Members, Advisory Committee on Appellate Rules, Mr. James E. Macklin, Jr., and Carol Ann Mooney

FROM: Judge Newman, Chairman Advisory Committee on Appellate Rules

RE: July 17 & 18, 1989, meeting

Enclosed are the Appellate Rules Advisory Committee's drafts of proposed amendments to Rules 4, 28, 30, and 34.

Rule 4. The Advisory Committee proposes to add a new subparagraph (6) to Fed. R. App. P 4(a) allowing a district judge to reopen the time for appeal upon a finding that (a) notice of entry of judgment was not timely received and (b) no party would be prejudiced by the reopening. This proposal was first submitted to the Standing Committee at its January 1989 meeting. At that time the Standing Committee requested some redrafting of the proposal. As redrafted the proposal provides that only a litigant who fails to receive notice within 21 days of the entry of the judgment or order may move for an extension of time to appeal. The reopening authority can be exercised only if a motion is filed within 7 days of receipt of notice of the judgment or, if no notice is ever received, within 180 days of entry of the judgment or order. The time for appeal may be reopened only for a period of 14 days from the date of the order reopening the time. Existing Rule 4(a)(6) would be renumbered as 4(a)(7). A conforming amendment to Fed. R. Civ. P 77(d) would also be necessary.

Rule 28. The Advisory Committee proposes to amend Fed. R. App. P. 28 to deal with two separate issues. First, the Advisory Committee recommends adding a new subparagraph to Fed. R. App. P. 28(a) that would require parties to include a jurisdictional statement in their briefs. This proposal also was submitted to the Standing Committee at its January, 1989, meeting and the Standing Committee recommended consolidating two subparts of the proposal; that has been done. The new subparagraph would be subparagraph (2). The existing subparagraphs 28(a)(2) through (5) would be renumbered and would become (3) through (6). A conforming amendment to 28(b) is also proposed.

Second, the Advisory Committee proposes an amendment to Fed. R. App. P. 28(h) dealing with cross-appeals. The Committee suggests designating the party who files the first notice of appeal as the appellant. The rules currently provide that, unless the parties otherwise agree or a court otherwise orders, the plaintiff below shall be deemed the appellant for purposes of

briefing, preparing the appendix, and oral argument. That does not always make sense. When a defendant in a civil case loses in a trial court and appeals the judgment, the plaintiff often takes a protective appeal. The plaintiff's primary posture is one of defending the lower court's decision. However, in the event the court of appeals finds merit in the defendant's claims, the plaintiff has a few complaints of his or her own that the plaintiff would like the court of appeals to consider in a remand of the case to the district court. The Committee believes that it makes more sense to treat the party who files the first appeal as the appellant. The fourth and the federal circuits have local rules that take that approach.

Rule 30. The Committee proposes an amendment to Fed. R. App. P 30(b) to require a cross appellant to serve the appellant with a statement of the issues to be explored in the cross appeal. Rule 30(b) currently requires an appellant to serve the appellee with a statement of the issues the appellant intends to present for review but the rule does not require a reciprocal statement from an appellee who has filed a cross appeal.

Rule 34. The proposed amendment to Fed. R. App. P. 34(d) is a conforming amendment to the proposed amendment of Fed. R. App. P. 28(h) regarding cross appeals. The proposal is to treat the party who files the first notice of appeal as the appellant for purposes of oral argument.

In addition to the proposed rule amendments the Advisory Committee would like the Standing Committee to consider the following items:

1. The Advisory Committee requests that the Judicial Conference ask Congress to repeal the third paragraph of 28 U.S.C. § 2107 because that paragraph provides time limits for admiralty appeals that are inconsistent with Fed. R. App. P. 4(a)(1). Section 2107 provides:

> In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

Fed. R. App. P. 4(a)(1) sets a thirty day time limit for filing civil appeals unless the United States is a party, in which case the notice of appeal may be filed within 60 days of the entry of the judgment or order appealed from.

The first case holding that Fed. R. App. P. 4(a)(1) supercedes section 2107 was decided in 1967. Hansen v. Trawler

Snoopy, Inc., 384 F. 2d 131 (1st Cir. 1967). The conflicting provisions continue to be troublesome. In 1976 the seventh circuit held that a district court did not abuse its discretion when it granted an extension for filing a notice of appeal to a litigant who, in reliance upon the 90 day statutory provision, filed a notice of appeal more than 30 days after entry of judgment, such reliance constituting excusable neglect. Feeder Line Towing Serv., Inc. v. Toledo, Peoria & Western R.R. Co., 539 F. 2d 1107 (7th Cir. 1976). It was not until 1987 that a reported case held that the 30 day limit in Rule 4(a) supercedes the 15 day period for interlocutory appeals provided in section 2107. In re White Cloud Charter Boat Co., 813 F. 2d 1513 (9th Cir. 1987).

2. The American Bar Association House of Delegates passed a resolution regarding voting procedures for in banc review. The resolution reads as follows:

> BE IT RESOLVED, That the American Bar Association favors the amendment of Federal Rule of Appellate Procedure 35(a) to provide that a majority of Court of Appeals judges in a circuit permitted to participate in a case have the power to grant en banc review, provided that the participating judges constitute a majority of the judges in regular active service.

The Advisory Committee has reviewed the Reporter's memorandum on the issue and several members of the Committee favor such an amendment; however, some members of the Committee oppose the amendment. The Committee will discuss the proposal at its next meeting but I wanted the Standing Committee to be aware of the proposal and of its current status.

Also enclosed is the Advisory Committee's Table of Agenda Items showing the current status of the items.

(6) The District Court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

~~(6)~~ (7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

Committee Note

The amendment provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to Rule 77(d) of the Federal Rules of Civil Procedure, is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. The amendment adds a new subdivision (6) allowing a district court to reopen for a brief period the time for appeal upon a finding that notice of entry of a judgment or order was not received from the clerk or a party within 21 days of its entry and that no party would be prejudiced. By "prejudice" the Committee means some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal, consequences that are present in every appeal. Prejudice might arise, for example, if the appellee had taken some action in reliance on the expiration of the normal time period for filing a notice of appeal.

Reopening may be ordered only upon a motion filed within 180 days of the entry of a judgment or order or within 7 days of receipt of notice of such entry, whichever is earlier. This provision establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a judgment to seek additional time to appeal and enables any winning party to shorten the 180-day period by sending (and establishing proof of receipt of) its own notice of entry of a judgment, as authorized

by Fed. R. Civ. P. 77(d). Winning parties are encouraged to send their own notice in order to lessen the chance that a judge will accept a claim of non-receipt in the face of evidence that notices were sent by both the clerk and the winning party. Receipt of a winning party's notice will shorten only the time for reopening the time for appeal under this subdivision, leaving the normal time periods for appeal unaffected.

If the motion is granted, the district court may reopen the time for filing a notice of appeal only for a period of 14 days from the date of entry of the order reopening the time for appeal.

If Fed. R. App. P. 4(a) is amended by adding proposed subparagraph (6), Fed. R. Civ. P. 77(d) would need to be amended. While the Advisory Committee on Appellate Rules realizes that amendment of the Rules of Civil Procedure falls outside its jurisdiction, it suggests that the following amendment would be consistent with the proposed amendment of Fed. R. App. P. 4(a).

DRAFT Fed. R. Civ. P. 77(d)

(d) **Notice of Orders or Judgments.** Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appeal, and shall make a note in the docket of the mailing. ~~Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any~~ Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

(2) A statement of subject matter and appellate jurisdiction. The statement shall include: (i) a statement of the basis for subject matter jurisdiction in the district court or agency, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; (ii) a statement of the basis for jurisdiction in the court of appeals, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; the statement shall include relevant filing dates establishing the timeliness of the appeal or petition for review and shall state that the appeal is from a final order or a final judgment that finally disposes of all claims with respect to all parties or, if not, it shall include information establishing that the court of appeals has jurisdiction on some other basis.

~~(2)~~ (3) A statement of the issues presented for review.

~~(3)~~ (4) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

~~(4)~~ (5) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the

appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.

~~(5)~~ (6) A short conclusion stating the precise relief sought.

(b) Brief of the appellee. - The brief of the appellee shall conform to the requirements of subdivisions (a)(1)-~~(4)~~(5), except that a statement of jurisdiction, of the issues, or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(h) Briefs in cases involving cross appeals. - If a cross appeal is filed, ~~the plaintiff in the court below~~ the party who first files a notice of appeal, or in the event that the notices are filed simultaneously the plaintiff in the proceeding below, shall be deemed the appellant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall ~~contain the issues and argument involved in his~~ conform to the requirements of subdivision (a)(1)-(6) of this rule with respect to the appellee's appeal as well as ~~the~~ answering ~~to~~ the brief of the appellant except that a statement of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

Committee Note

Subdivision (a). The amendment adds a new subparagraph (2) that requires an appellant to include a specific jurisdictional

statement in the appellant's brief to aid the court of appeals in determining whether it has both federal subject matter and appellate jurisdiction.

Subdivision (b). The amendment requires the appellee to include a jurisdictional statement in the appellee's brief except that the appellee need not include the statement if the appellee is satisfied with the appellant's jurisdictional statement.

Subdivision (h). The amendment provides that when more than one party appeals from a judgment or order, the party filing the first appeal is normally treated as the appellant for purposes of this rule and Rules 30 and 31. The party who first files an appeal usually is the principal appellant and should be treated as such. Parties who file a notice of appeal after the first notice often bring protective appeals and they should be treated as cross appellants. Local rules in the Fourth and Federal Circuits now take that approach. If notices of appeal are filed simultaneously, e.g., both notices arrive in the mail on the same day, the rule follows the old approach of treating the plaintiff below as the appellant. For purposes of this rule, in criminal cases "the plaintiff" means the United States. In those instances where the designations provided by the rule are inappropriate, they may be altered by agreement of the parties or by an order of the court.

(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 the appellant intends to include in the appendix and a statement of the issues which the appellant 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, the appellee 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 with respect to the appeal and any cross-appeal. 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. The provisions of this paragraph shall apply to cross appellants and cross appellees.

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 the appellant 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. Each circuit shall provide by local rule for the imposition of sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix.

Committee Note

Subdivision (b). The amendment requires a cross appellant to serve the appellant with a statement of the issues that the cross appellant intends to pursue on appeal. No later than ten days after the record is filed, the appellant and cross appellant must serve each other with a statement of the issues each intends to present for review and with a designation of the parts of the record that each wants included in the appendix. Within the next ten days, both the appellee and the cross appellee may designate additional materials for inclusion in the appendix. The appellant must then include in the appendix the parts thus designated for both the appeal and any cross appeals. The Committee expects that simultaneous compliance with this subdivision by an appellant and a cross appellant will be feasible in most cases. If a cross appellant cannot fairly be expected to comply until receipt of the appellant's statement of issues, relief may be sought by motion in the court of appeals.

Rule 34. Oral argument

(d) Cross and separate appeals. - A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the court otherwise directs. If a case involves a cross appeal, ~~the plaintiff in the action below~~ the party who first files a notice of appeal, or in the event that the notices are filed simultaneously the plaintiff in the proceeding below, shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.

Committee Note

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