

June 21, 1988

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

cc: Members, Advisory Committee on Appellate Rules,  
James E. Macklin, Jr., Carol Ann [redacted] ney

From: Judge Newman, Chairman Advisory Committee on  
Appellate Rules

Re: July 18, 1988, meeting

Enclosed are the Appellate Rules Advisory Committee's drafts of proposed amendments to Rules 6, 26, 27, and 45, as well as a draft of a proposed new rule 26.1. These items are submitted for the Committee's consideration. It is requested that the Committee authorize publication of these proposed rules in order to obtain comments from the bench and bar.

Rule 6. The Committee suggests repeal of current Rule 6 and replacement of it by the proposed Rule 6. Rule 6 has not been amended since before the 1978 Bankruptcy Reform Act. In 1981 and 1982 the Committee prepared amendments to Rule 6, but that work was mooted by the Marathon case and subsequent statutory amendments.

The present rule deals only with discretionary appeals. The proposed rule recognizes that parties now have a right to appeal. Section (a) provides that when a district court exercises original jurisdiction in a bankruptcy matter the appeal shall be taken in identical fashion as appeals from district court decisions in other civil actions. Section (b) governs appeals which follow intermediate review of a bankruptcy judge's decision by a district court or a bankruptcy appellate panel.

The proposed rule 6 was approved by the Appellate Rules Committee as previously constituted and forwarded to the Bankruptcy Committee for its approval. At its May, 1988, meeting the Bankruptcy Committee approved the rule with two minor amendments which have been incorporated into the rule.

At its last meeting the Standing Committee discussed the possibility of eliminating official forms. If the Committee decides to eliminate official forms, the proposed form could be treated as one which has been approved by the Advisory Committee for suggested use.

Rule 26. The Committee proposes a minor revision to Rule 26 to bring it into conformity with the civil and criminal rules regarding filing papers in court on a day when inclement weather conditions have made the office of the clerk inaccessible. The Committee also proposes that Washington's Birthday be changed to Presidents' Day. With regard to whether Saturdays, Sundays, and holidays shall be excluded if the time prescribed is less than 7

or less than 11 days, the Committee expressed a mild preference for retaining the seven day rule. The Committee ultimately decided that either the seven day or eleven day rule is acceptable and that conformity with the other rules should be the goal.

Rule 26.1 The Committee proposes a new rule requiring a party to disclose its corporate affiliates so a judge can ascertain whether he or she has any interests in any of the party's related entities which would disqualify the judge from hearing the appeal.

Rule 27. The Committee proposes a minor amendment, the deletion of the word "reply" from section (a) of the rule. The rule generally permits a response in opposition to a motion, but there is no provision for a reply to the response.

Rule 45. The Committee proposes another minor amendment, changing Washington's Birthday to Presidents' Day.

Rule 30. The Committee requests a technical amendment to the Advisory Committee Note accompanying the 1986 amendment of subdivision (b). The note refers to Brennan v. Local 357, International Brotherhood of Teamsters, 709 F.2d 611 (9th Cir. 1983), to support the authority of the court to authorize sanctions. The citation to Brennan was inadvertent. The Committee intended to cite to the case immediately preceding it in the volume, United States v. Blodgett, 709 F.2d 608 (9th Cir. 1983).

At its meeting on April 27, 1988, the Advisory Committee on Appellate Rules agreed on the need to amend Rule 4(b) of the Federal Rules of Appellate Procedure to permit and set the time for cross-appeals in criminal cases. Now that the Congress has authorized government appeals of sentences, the absence of a cross-appeal rule, similar to the rule for civil appeals, can create an unintended trap. For example, a defendant sentenced to probation might elect to forgo an appeal, rather than take an appeal and risk provoking an appeal by the government that might result in an increased sentence. The defendant therefore lets the 10-day period for appeal expire. However, the government can then take its appeal from the sentence because its 30-day period for appeal has not expired. At that point, the defendant cannot, under the present rule, notice a cross-appeal, as a party could do in a civil case.

The Committee proposes to permit either side to notice an appeal within the current time periods but measured not only from the entry of judgment but also from the entry of the other side's notice of appeal. Specifically, the proposal is to amend F.R.A.P. 4(b) to read as follows:

1           (b) Appeals in criminal cases. -- In a criminal case  
2 the notice of appeal by a defendant shall be filed in the  
3 district court within 10 days after the entry of (i) the  
4 judgment or order appealed from or (ii) a notice of appeal  
5 by the government. A notice of appeal filed after the  
6 announcement of a decision, sentence or order but before  
7 entry of the judgment or order shall be treated as filed  
8 after such entry and on the day thereof. If a timely motion  
9 in arrest of judgment or for a new trial on any ground other  
10 than newly discovered evidence has been made, an appeal from  
11 a judgment of conviction may be taken within 10 days after  
12 the entry of an order denying the motion. A motion for a  
13 new trial based on the ground of newly discovered evidence  
14 will similarly extend the time for appeal from a judgment of  
15 conviction if the motion is made before or within 10 days  
16 after entry of the judgment. When an appeal by the  
17 government is authorized by statute, the notice of appeal by  
18 the government shall be filed in the district court within  
19 30 days after the entry of (i) the judgment or order  
20 appealed from or (ii) a notice of appeal by any defendant.  
21 A judgment or order is entered within the meaning of this  
22 subdivision when it is entered in the criminal docket. Upon  
23 a showing of excusable neglect the district court may,  
24 before or after the time has expired, with or without motion  
25 and notice, extend the time for filing a notice of appeal  
26 for a period not to exceed 30 days from the expiration of  
27 the time otherwise prescribed by this subdivision.

The Advisory Committee believes that the need to make these changes in F.R.A.P. 4(b) quickly makes it appropriate to have them informally called to the attention of the Senate and House Judiciary Committees, which are currently considering a series of technical amendments necessitated by the sentencing guidelines legislation, rather than being forwarded through the more formal rule-amending process.

Also enclosed are the minutes of our Committee's last meeting (April 27, 1988) and a Table of Agenda Items. The Table of Agenda Items has been updated since our meeting and shows the current status of the items.

Rule 6 Appeals in bankruptcy cases from final judgments and orders of district courts or of bankruptcy appellate panels

1 (a) Appeal from a judgment, order or decree of a  
2 district court exercising original jurisdiction  
3 in a bankruptcy case.

4 An appeal to a court of appeals from a final  
5 judgment, order or decree of a district court  
6 exercising jurisdiction pursuant to 28 U.S.C.  
7 §1334 shall be taken in identical fashion as  
8 appeals from other judgments of the district  
9 court in civil actions.

10 (b) Appeal from a judgment, order or decree of a  
11 district court or bankruptcy appellate panel  
12 exercising appellate jurisdiction in a bank-  
13 ruptcy case.

14 (1) Applicability of other rules. All provi-  
15 sions of these rules are applicable to an  
16 appeal to a court of appeals pursuant to 28  
17 U.S.C. §158(d) from a final judgment, order  
18 or decree of a district court or bankruptcy  
19 appellate panel exercising appellate juris-  
20 diction pursuant to 28 U.S.C. §158(a) or  
21 (b), except that:

22 (i) Rules 3.1, 4(a)(4), 4(b), 5.1, 9, 10,  
23 11, 12(b), 13-20 and 22-23 are not  
24 applicable;

25 (ii) the reference in Rule 3(c) to "Form 1  
26 in the Appendix of Forms" shall be  
27 read as a reference to Form 5; and

28 (iii) when the appeal is from a bankruptcy  
29 appellate panel, the term "district  
30 court" as used in any applicable  
31 rule, means "appellate panel."

32 (2) Additional rules. In addition to the rules  
33 made applicable by subsection (b)(1) of  
34 this rule, the following rules shall apply  
35 to an appeal to a court of appeals pursuant  
36 to 28 U.S.C. §158(d) from a final judgment,  
37 order or decree of a district court or of a  
38 bankruptcy appellate panel exercising  
39 appellate jurisdiction pursuant to 28  
40 U.S.C. §158(a) or (b):

41 (i) Effect of motion for rehearing on  
42 time for appeal. If a timely motion

43  
44  
45  
46  
47  
48  
49  
50

for rehearing under Bankruptcy Rule 8015 is filed in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties shall run from the entry of the order denying the rehearing or the entry of the subsequent judgment.

51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74

(ii) The Record on Appeal. Within 10 days after filing the notice of appeal, the appellant shall file with the clerk possessed of the record assembled pursuant to Bankruptcy Rule 8006, and serve on the appellee, a statement of the issues to be presented on appeal and a designation of the record to be certified and transmitted to the clerk of the court of appeals. If the appellee deems other parts of the record necessary, he shall, within 10 days after service of the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included. The record, redesignated as provided above, plus the proceedings in the district court or bankruptcy appellate panel and a certified copy of the docket entries prepared by the clerk pursuant to Rule 3(d) shall constitute the record on appeal.

75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94

(iii) Transmission of the record. When the record is complete for purpose of the appeal, the clerk of the district court or the appellate panel, shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court or of the appellate panel shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the

95 court of appeals. A party must make  
96 advance arrangements with the clerk  
97 for the transportation and receipt of  
98 exhibits of unusual bulk or weight.  
99 All parties shall take any other  
100 action necessary to enable the clerk  
101 to assemble and transmit the record.

102 (iv) Filing of the record. Upon receipt  
103 of the record, the clerk of the court  
104 of appeals shall file it and shall  
105 immediately give notice to all  
106 parties of the date on which it was  
107 filed.

Form 5. Notice of Appeal to a Court of Appeals from a Judgment  
or Order of a District Court or a Bankruptcy Appellate Panel

United States District Court For the . . . . .  
District of .....

In re )  
 )  
....., )  
Debtor )  
 ) File No. ....  
....., )  
Plaintiff )  
 )  
v. )  
 )  
....., )  
Defendant )

Notice of Appeal to  
United States Court of Appeals  
for the ..... Circuit

....., the plaintiff [or defendant  
or other party] appeals to the United States Court of Appeals for  
the ..... Circuit from the final judgment [or order or decree]  
of the district court [or bankruptcy appellate panel] for the  
district of ....., entered in this case on  
....., 19.... [here describe the judgment, order, or  
decree].....

The parties to the judgment [or order or decree] appealed  
from and the names and addresses of their respective attorneys  
are as follows:

.....  
.....

Dated.....

Signed.....  
Attorney for Appellant

Address:.....  
.....

Two other changes would need to be made to properly integrate this rule with the rest of the appellate rules:

1. Rule 1 - insert after "United States Tax Court" the following: "; in appeals from bankruptcy appellate panels;"
2. Rule 3(a) -- delete "by allowance" from the last sentence of subsection a.

Rule 26. Computation and extension of time

1 (a) Computation of Time. -- In computing any period of  
2 time prescribed or allowed by these rules, by an order of  
3 court, or by any applicable statute, the day of the act,  
4 event, or default from which the designated period of time  
5 begins to run shall not be included. The last day of the  
6 period so computed shall be included, unless it is a  
7 Saturday, a Sunday, or a legal holiday, ~~in which event the~~  
8 ~~period extends until the end of the next day which is not a~~  
9 ~~Saturday, a Sunday, or a legal holiday.~~ or, when the act to  
10 be done is the filing of a paper in court, a day on which  
11 weather or other conditions have made the office of the  
12 clerk of the court inaccessible, in which event the period  
13 runs until the end of the next day which is not one of the  
14 mentioned days. When the period of time prescribed or  
15 allowed is less than 7 days, intermediate Saturdays,  
16 Sundays, and legal holidays shall be included in the  
17 computation. As used in this rule "legal holiday" includes  
18 New Year's Day, Birthday of Martin Luther King, Jr.,  
19 ~~Washington's Birthday~~ Presidents' Day, Memorial Day,  
20 Independence Day, Labor Day, Columbus Day, Veterans Day,  
21 Thanksgiving Day, Christmas Day, and any other day appointed  
22 as a holiday by the President or the Congress of the United  
23 States. It shall also include a day appointed as a holiday  
24 by the state wherein the district court which rendered the  
25 judgment or order which is or may be appealed from is  
26 situated, or by the state wherein the principal office of  
27 the clerk of the court of appeals in which the appeal is  
28 pending is located.



**Rule 26.1 Disclosure of Affiliates**

1 Any non-governmental party to a civil or bankruptcy  
2 case or agency review proceeding and any non-governmental  
3 corporate defendant in a criminal case shall file a  
4 statement identifying all parent companies, subsidiaries  
5 (except wholly-owned subsidiaries), and affiliates of  
6 such corporation. The statement shall be filed with a  
7 party's main brief or upon filing a motion in the  
8 court of appeals, whichever first occurs, unless required  
9 by local rule to be filed earlier. The statement shall  
10 be included in front of the table of contents in a  
11 party's main brief even if the statement was  
12 previously filed.

**Committee Note**

The purpose of this rule is to assist judges in making a determination of whether they have any interests in any of a party's related corporate entities that would disqualify the judges from hearing the appeal. The committee believes that this rule represents minimum disclosure requirements. If a circuit wishes to require additional information, a circuit is free to do so by local rule. However, the committee requests the circuits to consider the desirability of uniformity and the burden that varying circuit rules creates on attorneys who practice in many circuits.

## Rule 27. Motions

1 (a) Content of motions; response~~-reply~~. -- Unless another  
2 form is elsewhere prescribed by these rules, an application  
3 for an order or other relief shall be made by filing a  
4 motion for such order or relief with proof of service on all  
5 other parties. The motion shall contain or be accompanied  
6 by any matter required by a specific provision of these  
7 rules governing such a motion, shall state with  
8 particularity the grounds on which it is based, and shall  
9 set forth the order or relief sought. If a motion is  
10 supported by briefs, affidavits or other papers, they shall  
11 be served and filed with the motion. Any party may file a  
12 response in opposition to a motion other than one for a  
13 procedural order [for which see subdivision (b)] within 7  
14 days after service of the motion, but motions authorized by  
15 Rules 8, 9, 18 and 41 may be acted upon after reasonable  
16 notice, and the court may shorten or extend the time for  
17 responding to any motion.

Rule 45. Duties of clerks

1           (a) General provisions. -- The clerk of a court of  
2 appeals shall take the oath and give the bond required by  
3 law. Neither the clerk nor any deputy clerk shall practice  
4 as an attorney or counselor in any court while continuing in  
5 office. The court of appeals shall be deemed always open  
6 for the purpose of filing any proper paper, of issuing and  
7 returning process and of making motions and orders. The  
8 office of the clerk with the clerk or a deputy in attendance  
9 shall be open during business hours on all days except  
10 Saturdays, Sundays, and legal holidays, but a court may  
11 provide by local rule or order that the office of its clerk  
12 shall be open for specified hours on Saturdays or on  
13 particular legal holidays other than New Year's Day,  
14 Birthday of Martin Luther King, Jr., ~~Washington's Birthday~~  
15 Presidents' Day, Memorial Day, Independence Day, Labor Day,  
16 Columbus Day, Veterans Day, Thanksgiving Day, and Christmas  
17 Day.