104th Congress, 1st Session – – – – – – – – – – – – – – House Document 104–66

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE THAT HAVE BEEN ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2072

MAY 2, 1995.—Referred to the Committee on the Judiciary and ordered to be printed

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 27, 1995

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code. To maintain uniformity between revised and unrevised Rules, the Court has edited the amendments transmitted to the Supreme Court by the Judicial Conference of the United States to use the word "shall" in a consistent manner.

The rules are accompanied by an excerpt from the report of the Judicial Conference of the United States' Committee on Rules of Practice and Procedure and that Committee's Advisory Committee Notes. In order to minimize confusion, a footnote noting the changes made by the Supreme Court has been added to the marked-up version of the proposed amendments that accompanies the Advisory Committee Notes.

Sincerely,

William H. Rehnquist

Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, D.C. 20515

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 27, 1995

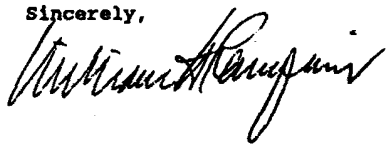
Honorable Gilbert S. Merritt, Chair
Executive Committee
Judicial Conference of the United States
Washington, DC 20544

Dear Chief Judge Merritt:

With appreciation for the Judicial Conference's submission of proposed amendments to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Bankruptcy Procedure, and the Federal Rules of Appellate Procedure, I am pleased to inform you that the Court has in major part approved and forwarded the proposed changes to Congress. We did, however, alter the proposed amendments to the Rules in two respects: To maintain uniformity between revised and unrevised Rules, we restored the "shalls" edited out during the revision process and edited the remainder for consistency. In addition, we restored the word "made" to the last sentence of Fed. R. Civ. P. 83(a)(1), to keep that Rule consistent with Fed. R. Crim. P. 57(c).

In the revision of the Supreme Court Rules now in progress, we are giving consideration to the appropriate use of "shall." As just observed, we think it sound that terminology changes in the Federal Rules be implemented in a thoroughgoing, rather than a piecemeal, way.

Sincerely,



cc: The Honorable Alicemarie H. Stotler, Chair
Committee on Rules of Practice and Procedure

Ralph L. Mecham
Conference Secretary

SUPREME COURT OF THE UNITED STATES

Thursday, April 27, 1995

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 4, 8, 10, and 47.

[See infra., pp. _____ _____ _____.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 1995, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4. Appeal as of Right - When Taken

(a) *Appeal in a Civil Case.*

* * * * *

(4) If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(C) to alter or amend the judgment under Rule 59;

(D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(E) for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4

measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

* * * * *

Rule 8. Stay or Injunction Pending Appeal

* * * * *

(c) *Stay in a Criminal Case.*-- A stay in a criminal case shall be had in accordance with the provisions of Rule 38 of the Federal Rules of Criminal Procedure.

Rule 10. The Record on Appeal

(a) *Composition of the Record on Appeal.*-- The record on appeal consists of the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court.

(b) *The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered.*

(1) Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 4(a)(4), whichever is later, the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

* * * * *

Rule 47. Rules of a Court of Appeals

(a) *Local Rules.*

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to a party or a lawyer regarding practice before a court shall be in a local rule rather than an internal operating procedure or standing order. A local rule shall be consistent with -- but not duplicative of -- Acts of Congress and rules adopted under 28 U.S.C.

§ 2072 and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. The clerk of each court of appeals shall send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) *Procedure When There Is No Controlling Law.* -- A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 2, 1994

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to Rules 4, 8, 10, and 47 of the Federal Rules of Appellate Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Appellate Procedure.

Ralph

L. Ralph Mecham

Enclosures

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
SEPTEMBER 1994

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

I. Amendments to the Federal Rules of Appellate Procedure.

A. Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules of Procedure submitted proposed amendments to Appellate Rules 4, 8, 10, 47, and 49* together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in October 1993, and a public hearing was held immediately before the committee's meeting in April 1994.

The proposed amendment to Rule 4 (Appeal as of right - When taken) is one of a series of proposed amendments to the Appellate Rules and Bankruptcy Rules that conform the rules to proposed changes to the Civil Rules, which establish a uniform time within which to file certain postjudgment motions. The amendment to Rule 4 would extend the time for filing an appeal until after disposition of a postjudgment motion that is filed no later than 10 days after entry of judgment.

The proposed change to Rule 8 (Stay or injunction pending appeal) amends the cross-reference to Criminal Rule 38 to account for a later reorganization of that rule. The proposed amendments to Rule 10 (The record on appeal) conforms the rule to recent changes in Appellate Rule 4(a)(4). When a postjudgment motion suspends a previously filed notice of appeal, the 10-day period for ordering a transcript begins to run upon entry of the order disposing of the motion.

The amendments to Rule 47 (Rules by courts of appeal) are part of a package of proposed uniform amendments to the Appellate Rules, Bankruptcy Rules, Civil Rules, and Criminal Rules. The changes would provide that: (a) local rules must be numbered consistent with any uniform numbering system prescribed by the Judicial Conference, and (b) a nonwillful violation of a local rule imposing a requirement of form may not be sanctioned in any way that would cause the party to lose rights. The amendments to the rule would also require that all general directions regarding practice before the court be set out in local rules rather than in internal operating procedures or standing orders.

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* The Standing Committee did not approve the proposed amendments to Rule 49 for submission to the Judicial Conference.

All the advisory committees were asked by your committee to collaborate on drafting a uniform provision in each set of rules that would authorize the Judicial Conference to make purely technical corrections and conforming amendments to the rules directly, without submitting them to the Supreme Court and the Congress. Serious reservations and concerns were expressed by some of the advisory committees regarding the need and validity of this proposed authority. In light of those concerns, your committee decided not to approve the relevant uniform amendments, including proposed amendments to Rule 49 (Technical amendments).

The proposed amendments to the Federal Rules of Appellate Procedure, as recommended by your committee, appear in *Appendix A* together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve proposed amendments to Appellate Rules 4, 8, 10, and 47 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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

Agenda F-19
(Appendix A)
Rules
September 1994

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

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: May 27, 1994

The Advisory Committee on Appellate Rules submits the following items to the Standing Committee on Rules:

I. Action Items

A. Proposed amendments to Federal Rules of Appellate Procedure 4(a)(4), 8, 10, 47, and 49,* approved by the Advisory Committee on Appellate Rules at its April 25 and 26 meeting. The Advisory Committee requests that the Standing Committee approve these amended rules and forward them to the Judicial Conference.

The proposed amendments were published in November 1993. A public hearing was scheduled for March 14, 1994 in Denver, Colorado, but was rescheduled for April 25. None of the testimony dealt with any of the rules that the Advisory Committee requests be sent to the Judicial Conference. The Advisory Committee has reviewed the written comments and, in some instances, altered the proposed amendments in light of the comments.

- Part A(1) of this Report summarizes the proposed amendments.
- Part A(2) includes the text of the amended rules.
- Part A(3) is the GAP Report, indicating the changes that have occurred since publication.
- Part A(4) summarizes the comments.

* * * * *

*The Standing Committee did not approve the proposed amendment to Rule 49 for submission to the Judicial Conference.

SUMMARY OF PROPOSED RULE AMENDMENTS TO BE FORWARDED TO THE JUDICIAL CONFERENCE

1. An amendment to Rule 4(a)(4) is proposed. The amendment is intended to clarify the procedure for a party who wants to obtain review of an alteration or amendment of a judgment upon disposition of a posttrial motion. The party may file a notice of appeal, or, if the party filed a notice of appeal prior to disposition of the motion, the party may amend the previously filed notice. Under changes to Rule 4(a)(4) that became effective on December 1, 1993, a previously filed notice of appeal ripens into an operative notice of appeal upon disposition of the posttrial motion but only as to the judgment or order specified in the original notice of appeal. Appeal from the disposition of the motion requires either amendment of the previously filed notice or the filing of a notice of appeal.

   In addition Rule 4(a)(4) is amended to conform to amendments to Fed. R. Civ. P. 50, 52, and 59. Civil Rules 50, 52, and 59 were previously inconsistent with respect to whether postjudgment motions must be filed or merely served no later than 10 days after entry of judgment. As a consequence Rule 4(a)(4) said that such motions must be "made" or "served" within the 10-day period in order to extend the time for filing a notice of appeal. Civil Rules 50, 52, and 59, are being amended to require "filing" no later than 10 days after entry of judgment. Consequently, Rule 4(a)(4) is being amended to require "filing" of a postjudgment motion within the same period in order to extend the time for filing a notice of appeal.

2. A technical amendment to Rule 8(c) is proposed. The amendment conforms subdivision (c) to previous amendments to Fed. R. Crim. P. 38.

   Subdivision 8(c) currently provides that a stay in a criminal case shall be had in accordance with the provisions of Rule 38(a). When Rule 8(c) was adopted, Criminal Rule 38(a) established procedures for obtaining a stay of execution when the sentence in question was death, imprisonment, a fine, or probation. Criminal Rule 38 was later amended and it now treats each of those topics in a separate subdivision. The proper cross-reference is to all of Criminal Rule 38, so the reference to subdivision (a) is deleted.

3. An amendment to Rule 10(b)(1) is proposed to conform that paragraph to the amendments to Rule 4(a)(4). The purpose of this amendment is to

suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 4(a)(4).

4. Amendments to Rule 47 are proposed. These amendments, and the proposed Rule 49, are the result of collaborative efforts by the chairs and reporters of the various advisory committees. The amendments to Rule 47 require that local rules be consistent not only with the national rules but also with Acts of Congress and that local rules be numbered according to a uniform numbering system. The amendments further require that all general directions regarding practice before the court be in local rules rather than internal operating procedures or standing orders. The amendments also state that a nonwilful violation of a local rule imposing a requirement of form may not be sanctioned in any way that will cause the party to lose rights. The amendments further allow a court to regulate practice in a particular case in a variety of ways so long as any such orders are consistent with federal law.

* * * * *

GAP REPORT
CHANGES MADE AFTER PUBLICATION

1. There were no comments on the proposed amendment of Rule 4(a)(4), and no changes have been made.

2. There were no comments on the proposed amendment of Rule 8, and no changes have been made.

3. There was one comment on the proposed amendment of Rule 10, but it resulted in no change in the proposed amendment.

   The purpose of the amendment is to suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made that suspends a filed notice of appeal under Rule 4(a)(4). The commentator suggested that counsel be required to notify the court reporter when there is no need to proceed with preparation of the transcript because the appeal is suspended or dismissed pending disposition of the postjudgment motion. The Advisory Committee did not add such a requirement, believing that the party bearing the cost of production of the transcript will inform the court reporter.

4. There were three comments on the proposed amendment of Rule 47 and the Advisory Committee recommends several changes in Rule 47. The changes on pages 11 and 12 are indicated by the shading.

   a. At its February meeting, the Advisory Committee on Bankruptcy Rules recommended a change in that part of the rule dealing with sanctions for violation of a local rule imposing a requirement of form. The published rule said that no sanction that would cause a party to lose rights should be imposed for a "negligent" failure to comply with such a local rule. The Bankruptcy Committee recommended that "negligent" be changed to "nonwilliful." The Advisory Committee on Appellate Rules recommends an identical change found at line 23 of the amended rule.

   b. Two of the commentators expressed concern about that in some circuits "internal operating procedures" (I.O.P.'s) are used like local rules and directly affect a party's dealings with the court.

Because directions concerning practice and procedure should be in local rules and not I.O.P.'s, the Advisory Committee recommends the addition of a sentence to 47(a)(1), requiring that generally applicable directions regarding practice before a court must be in a local rule rather than an I.O.P. or standing order. The new sentence is at lines 5-8.

The civil, bankruptcy, and criminal versions of this rule do not contain a parallel sentence. During prior discussions, the other committees were apparently satisfied that the language of subdivision (b) provides a strong incentive for a court to use local rules whenever possible rather than internal operating procedures or standing orders. Subdivision (b) states that "no sanction or other disadvantage may be imposed" for noncompliance with a requirement that is not contained in the federal rules or local rules unless the violator has "actual notice of the requirement."

The issue is different in courts of appeals than in district courts because a court of appeals judge does not sit solo in a courtroom. Indeed, the panel of three is constantly reconstituted and, for that reason, practice is uniform within a circuit. Standing orders are not a problem in the courts of appeals. It is far more likely in a court of appeals that all general directives could be placed in local rules. The inappropriate use of internal operating procedures rather than local rules is a problem. A practitioner who examines the local rules, but not the internal operating procedures, may be caught unaware of a practice requirement buried in the internal operating procedures. Furthermore, the procedures for promulgation of local rules is not applicable to the development of internal operating procedures.

The Advisory Committee believes that the situation in the courts of appeals is sufficiently dissimilar to that in the district courts to justify different treatment in the rule.

e. The Advisory Committee also recommends changing subdivision (b), if the new sentence discussed above is approved.

As published, subdivision (b) authorizes general regulation of practice by means other than rules. The published rule does not limit such regulation to entry of an order in a particular case. The

published rule states that a court may not sanction failure to comply with a non-rule requirement "unless the alleged violator has been furnished in the particular case with actual notice of the requirement." That limitation applies to regulation by standing order or some other similar means.

If, as recommended by the Advisory Committee, a sentence is added to rule (a) requiring that all general directions regarding practice must be in rules, there is no need for the sanctions limitation in (b). The only type of non-rule regulation permitted would be by order in a particular case, in which instance there is actual notice. So, the Advisory Committee recommends deletion of the sanctions limitation and amendment of the first sentence, lines 24 through 26, to make it clear that it is referring to orders in individual cases.

d. The Committee Notes have been altered to conform to the changes recommended above. The altered portion of the comments are shaded for easy identification.
In addition to the conforming changes, the Advisory Committee voted to add a new sentence to the Notes. The sentence states, "It is the intent of this rule that a local rule may not bar any practice that these rules explicitly or implicitly permit." It may be found at lines 3 through 5 of the Committee Note.

5. The only comment on Rule 49 was that the delegation of authority to the Judicial Conference to make technical amendments might be better made by amending the Rules Enabling Act. The Advisory Committee has made no changes in the proposed Rule 49.

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 4. Appeal as of Right - When Taken

1 (a) *Appeal in a Civil Case.*

2 * * * * *

3 (4) If any party ~~makes~~ files a timely
4 motion of a type specified immediately below, the time
5 for appeal for all parties runs from the entry of the
6 order disposing of the last such motion outstanding.
7 This provision applies to a timely motion under the
8 Federal Rules of Civil Procedure:

9 (A) for judgment under Rule 50(b);

10 (B) to amend or make additional findings of fact
11 under Rule 52(b), whether or not granting the motion
12 would alter the judgment;

13 (C) to alter or amend the judgment under Rule
14 59;

15 (D) for attorney's fees under Rule 54 if a district
16 court under Rule 58 extends the time for appeal;

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*New matter is underlined, matter to be omitted is lined through. In its April 27, 1995 transmittal of the amendments to Congress the Supreme Court substituted the word "shall" for the word "must" throughout the amendments.

17 (E) for a new trial under Rule 59; or

18 (F) for relief under Rule 60 if the motion is

19 ~~served~~ filed ~~within~~ no later than 10 days after the entry

20 of judgment.

21 A notice of appeal filed after announcement or

22 entry of the judgment but before disposition of any of

23 the above motions is ineffective to appeal from the

24 judgment or order, or part thereof, specified in the

25 notice of appeal, until the ~~date of the~~ entry of the order

26 disposing of the last such motion outstanding. Appellate

27 review of an order disposing of any of the above motions

28 requires the party, in compliance with Appellate Rule

29 3(c), to amend a previously filed notice of appeal. A

30 party intending to challenge an alteration or amendment

31 of the judgment ~~shall~~ must file ~~an~~ a notice, or amended

32 notice, of appeal within the time prescribed by this Rule

33 4 measured from the entry of the order disposing of the

34 last such motion outstanding. No additional fees will be

35 required for filing an amended notice.

* * * * *

Committee Note

Subdivision (a). Fed. R. Civ. P. 50, 52, and 59 were previously inconsistent with respect to whether certain postjudgment motions had to be filed or merely served no later than 10 days after entry of judgment. As a consequence Rule 4(a)(4) spoke of making or serving such motions rather than filing them. Civil Rules 50, 52, and 59, are being revised to require filing before the end of the 10-day period. As a consequence, this rule is being amended to provide that "filing" must occur within the 10 day period in order to affect the finality of the judgment and extend the period for filing a notice of appeal.

The Civil Rules require the filing of postjudgment motions "no later than 10 days after entry of judgment" -- rather than "within" 10 days -- to include postjudgment motions that are filed before actual entry of the judgment by the clerk. This rule is amended, therefore, to use the same terminology.

The rule is further amended to clarify the fact that a party who wants to obtain review of an alteration or amendment of a judgment must file a notice of appeal or amend a previously filed notice to indicate intent to appeal from the altered judgment.

Rule 8. Stay or Injunction Pending Appeal

* * * * *

1 (c) *Stays in a Criminal Cases.*-- ~~Stays~~ A stay in a
2 criminal cases shall be had in accordance with the
3 provisions of Rule 38~~(a)~~ of the Federal Rules of
4 Criminal Procedure.

Committee Note

Subdivision (c). The amendment conforms subdivision (c) to previous amendments to Fed. R. Crim P. 38. This amendment strikes the reference to subdivision (a) of Fed. R. Crim. P. 38 so that Fed. R. App. P. 8(c) refers instead to all of Criminal Rule 38. When Rule 8(c) was adopted Fed. R. Crim. P. 38(a) included the procedures for obtaining a stay of execution when the sentence in question was death, imprisonment, a fine, or probation. Criminal Rule 38 was later amended and now addresses those topics in separate subdivisions. Subdivision 38(a) now addresses only stays of death sentences. The proper cross reference is to all of Criminal Rule 38.

Rule 10. The Record on Appeal

1 (a) *Composition of the Record on Appeal.*-- The
2 record on appeal consists of the ~~The~~ original papers and
3 exhibits filed in the district court, the transcript of
4 proceedings, if any, and a certified copy of the docket
5 entries prepared by the clerk of the district court, ~~shall~~
6 ~~constitute the record on appeal in all cases.~~
7 (b) *The Transcript of Proceedings; Duty of*
8 *Appellant to Order; Notice to Appellee if Partial Transcript*
9 *is Ordered.*
10 (1) Within 10 days after filing the notice of
11 appeal or entry of an order disposing of the last timely
12 motion outstanding of a type specified in Rule 4(a)(4),
13 whichever is later, the appellant ~~shall~~ must order from
14 the reporter a transcript of such parts of the proceedings
15 not already on file as the appellant deems necessary,
16 subject to local rules of the courts of appeals. The order

17 ~~shall~~ must be in writing and within the same period a
18 copy ~~shall~~ must be filed with the clerk of the district
19 court. If funding is to come from the United States
20 under the Criminal Justice Act, the order ~~shall~~ must so
21 state. If no such parts of the proceedings are to be
22 ordered, within the same period the appellant ~~shall~~ must
23 file a certificate to that effect.

* * * * *

Committee Note

Subdivision (b)(1). The amendment conforms this rule to amendments made in Rule 4(a)(4) in 1993. The amendments to Rule 4(a)(4) provide that certain postjudgment motions have the effect of suspending a filed notice of appeal until the disposition of the last of such motions. The purpose of this amendment is to suspend the 10-day period for ordering a transcript if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 4(a)(4). The 10-day period set forth in the first sentence of this rule begins to run when the order disposing of the last of such postjudgment motions outstanding is entered.

Rule 47. Rules ~~by~~ of a Courts of Appeals

1 (a) *Local Rules.*

2 (1) Each court of appeals ~~by action of~~

3 acting by a majority of ~~the circuit~~

4 its judges in regular active service

5 may, after giving appropriate public

6 notice and opportunity for

7 comment, ~~from time to time~~ make

8 and amend rules governing its

9 practice. A generally applicable

10 direction to a party or a lawyer

11 regarding practice before a court

12 must be in a local rule rather than

13 an internal operating procedure or

14 standing order. A local rule must

15 be ~~not~~ inconsistent with -- but not

16 duplicative of -- Acts of Congress

17 and ~~these~~ rules adopted under 28
18 U.S.C. § 2072 and must conform to
19 any uniform numbering system
20 prescribed by the Judicial
21 Conference of the United States.
22 The clerk of each court of appeals
23 must send the Administrative
24 Office of the United States Courts
25 a copy of each local rule and
26 internal operating procedure when
27 it is promulgated or amended. ~~In~~
28 ~~all cases not provided for by rule,~~
29 ~~the courts of appeals may regulate~~
30 ~~their practice in any manner not~~
31 ~~inconsistent with these rules.~~
32 ~~Copies of all rules made by a court~~
33 ~~of appeals shall upon their~~

34 ~~promulgation be furnished to the~~
35 ~~Administrative Office of the~~
36 ~~United States Courts.~~
37 (2) A local rule imposing a
38 requirement of form must not be
39 enforced in a manner that causes a
40 party to lose rights because of a
41 nonwillful failure to comply with
42 the requirement.
43 (b) *Procedure When There Is No Controlling*
44 *Law.* -- A court of appeals may regulate
45 practice in a particular case in any manner
46 consistent with federal law, these rules,
47 and local rules of the circuit. No sanction
48 or other disadvantage may be imposed for
49 noncompliance with any requirement not
50 in federal law, federal rules, or the local

51 circuit rules unless the alleged violator has

52 been furnished in the particular case with

53 actual notice of the requirement.

Committee Note

Subdivision (a). This rule is amended to require that a generally applicable direction regarding practice before a court of appeals must be in a local rule rather than an internal operating procedure or some other general directive. It is the intent of this rule that a local rule may not bar any practice that these rules explicitly or implicitly permit. Subdivision (b) allows a court of appeals to regulate practice in an individual case by entry of an order in the case. The amendment also reflects the requirement that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat national rules and Acts of Congress.

The amendment also requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of

form. The proscription of paragraph (2) is narrowly drawn -- covering only violations that are not willful and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form.

Subdivision (b). This rule provides flexibility to the court in regulating practice in a particular case when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. § 2072, and with the circuit's local rules.

The amendment to this rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such a directive, unless the alleged violator has been furnished in a particular case with actual notice of the requirement. There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular court unless the party or attorney has actual notice of those requirements.

○