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A Few Highlights on Federal Appellate Practice

G. Walter Bowman

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BY G. WALTER BOWMAN*

This paper is written to give the practicing attorney some of the highlights on procedure in taking appeals from the United States district court to the United States circuit court of appeals, and to acquaint the lawyer with the rules, law, and some of the decisions in respect thereto.

An attorney, in taking an appeal, usually goes to the office of the clerk of the United States district court to examine his record before having the same transmitted to the circuit court of appeals. In one instance an attorney was surprised to find no order of enlargement of time within which to file the record of appeal with the circuit court, and remarked, "That is strange. Just before my forty days were up I saw the judge in chambers and asked for an enlargement of time within which to file an appeal and the judge stated that he would grant the time for another forty days".

This was out of the presence of the clerk and the attorney neglected to inform the clerk of such an order. Had the attorney mentioned to the clerk that he had obtained the approval of the court for an order of enlargement the clerk in all probability would have called the attorney's attention to Rule 12 of the circuit court of appeals for the tenth circuit, which recites:

> "The order of enlargement shall be filed with the clerk of this court [circuit court of appeals] and a copy thereof filed with the clerk of the district court, to be included in the transcript of the record."

The attorney then would have found that he would have had to prepare two original orders for the signature of the judge so that the two original orders could have been filed with the clerk of the district court, and then the clerk of the district court, in compliance with the rule of the circuit court could transmit one of the original orders and retain the other original order in the file at the office, to be included with the transcript of the record.

Since the attorney had failed to obtain two duplicate original orders and had failed to file or have the clerk transmit a copy of the order of enlargement of time, the appellee would have had the right to appear

*Of the Denver bar and clerk of the United States district court for the district of Colorado.

in the circuit court of appeals and ask for the dismissal of the cause, as provided in Rule 12 of the circuit court of appeals; which is as follows:

> "If the appellant shall fail to comply with this rule, the appellee may have the cause docketed and the appeal dismissed upon producing a certificate, written in term or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the cause and certifying that such appeal has been taken and the date thereof, and in no case shall the appellant be entitled to docket the case and file the record after the appeal shall have been dismissed under this rule, unless by leave of the court."

In examining the law with reference to a situation of this kind, we find that it has been held that the district court has no authority to extend the time for the filing of the record on appeal upon motion made after the expiration of the period originally prescribed or as extended by previous order.[1]

And the court has also held that an order extending the time for filing the record on appeal taken under advisement by the district court on the fortieth day after filing of the notice of appeal and granted *nunc pro tunc* five days thereafter was void.[2]

It has also been held in an earlier case that the district court may, upon motion, after notice, permit the record on appeal to be filed after the forty-day period prescribed in Rule 73 (g), where the failure to file in time is shown to be due to excusable neglect, but the order extending the time must recite that it was made on motion, after notice, and must contain a finding of excusable neglect, or it is void and the court also found in this case that the failure to file the record on appeal within the time prescribed therefor does not affect the validity of the appeal and the appellate court may, in its discretion, permit the record to be filed at any time.[3]

The appellate courts in later cases have held that after filing notice of appeal, the failure of the appellant to docket the appeal within forty days without obtaining an extension of time or showing excusable neglect is subject to such action as the appellate court may in its discretion take. The court granted the appellee's motion to dismiss the case upon production of a certificate from the clerk of the district court showing the date of the taking of the appeal.[4]

The court has also held that an appeal may be dismissed for fail-

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[1]Bluford v. Canada, 4 Fed. Rules Service, 73 (g) 13, Dept. of Justice Bulletin 105 (W.D. Mo. 1941).

[2]Burke v. Canfield, 111 F. (2d) 526 (Ct. App. D.C., 1940).

[3]Ainsworth v. Gill Glass & Fixture Co., 104 F. (2d) 83 (C.C.A. 3rd, 1939).

[4]U. S. *ex rel* Rempas v. Schlotfeldt, 123 F. (2d) 109, 4 Fed. Rules Service 73 (a) 23, Case 3, Department of Justice Bulletin No. 130 (C.C.A. 7th, 1941).

ure to file the record on appeal in time, although the court has discretion to overlook such irregularities where a meritorious case is presented.[5]

In view of the holdings of the court hereinabove mentioned, it is possible that an attorney who finds himself in this predicament would have two remedies. Either he could file in the district court a motion showing excusable neglect and give notice thereof to the other party or parties to the action, or he could apply by motion to the circuit court of appeals, who might entertain a motion to file out of time, since it is within the discretion of the appellate court to consider an appeal, although the record was not filed within the time prescribed by rule 73 (g) or allowed by the district court.[6]

STEPS TO BE TAKEN IN AN APPEAL IN A CIVIL CASE FROM THE UNITED STATES DISTRICT COURT TO THE CIRCUIT COURT OF APPEALS

Entry of Judgment

First: Examine the records in the office of the clerk of the district court to determine if the docket discloses the entry of the judgment to be appealed from. This is necessary, since Rule 58 provides:

> "The notation of a judgment in the civil docket, as provided by Rule 79 (a) constitutes the entry of the judgment, and the judgment is *not* effective before such entry."

Also, determine whether or not a motion for a new trial has been filed. In the event a motion for a new trial has been filed, there would not be a final appealable judgment until the motion for a new trial has been disposed of.

Notice of Appeal

Second: File with the clerk of the district court a notice of appeal within three months.[7] The notice of appeal shall specify the parties taking the appeal, the judgment, the name of the court to which the appeal is taken, and sufficient copies of the notice of appeal should be filed with the clerk so that he may comply with the rule in mailing copies to all parties.[8]

The requirement that notice of appeal be filed within three months after entry of judgment is mandatory and jurisdictional and if not complied with the appeal must be dismissed.[9]

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[5]Morrow v. Wood, 5 Fed. Rules Service, 73 (a) 11, Case 1 (C.C.A. 5th, 1942).
[6]Johnson v. Wilson, 118 F. (2d) 557 (C.C.A. 9th, 1941).
[7]28 U.S.C.A. Sec. 230, Civ. Rule 73 (a); Piganelli v. Reichard, 123 F. (2d) 957.
[8]Rules of Civil Procedure, 73 (b).
[9]Morrow v. Wood, 5 Fed. Rules Service 73 (a) 11, Case 1 (C.C.A. 5th, 1942). Also see *supra* note 7.

It is the best practice to date the notice of appeal as of the same date it is filed, since the forty-day period for filing the record on appeal begins to run from the date of the filing of the notice, and not from the latest date on which said notice could have been filed.[10] The forty-day period for filing the record on appeal may not be extended by stipulation of the parties,[11] and the filing of a notice of appeal beyond the day permitted by the statute confers no jurisdiction upon the appellate court.[12]

Bond on Appeal

Third: Bond on appeal shall be furnished when required and should be approved by the judge when the rules so provide and filed with the notice of appeal.[13] If the bond is not filed before the action is docketed in the appellate court, an application for leave to file a bond may be made only in the appellate court.[14]. Before obtaining the approval of the judge in the case of corporate surety, you should have the clerk's office examine the records to determine whether the particular surety company has qualified and also whether the agent of the surety has a power of attorney of record as required by statute.[15]

Designation of the Record

Fourth: File with the clerk of the district court after service on the appellee of a copy, a designation of the portions of the record, proceedings and evidence to be contained in the record on appeal. It is to be remembered that the appellee has ten days in which to designate additional portions of the record, proceedings and evidence;[16] therefore the better practice would be to always file the designation of the record within thirty days after the filing of the notice of appeal, so that the appellee is given his statutory ten days in which to file a designation of additional portions of the record. This also gives the clerk's office an opportunity to prepare the record in time for filing.

Statement of Points

If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal.[17]

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[10]Bluford v. Canada, 4 Fed. Rules Service 73 (g) 13, Dept. of Justice Bull. 105 (W.D. Mo. 1941). Also, in re Guanajita Reduction & Mines Co., 29 F. Supp. 789 (D. N.J. 1939).

[11]In re Markham, 5 Fed. Rules Service, 73 (a) 42, Dept. of Justice Bulletin 128 (S.D. N.Y. 1941).

[12]In re Markham, *supra*, note 11.

[13]Rule 73 (c), Rules of Civil Procedure.

[14]Rule 73 (c), Rules of Civil Procedure.

[15]Title 6, U.S.C.A. Sec. 7.

[16]Rule 75 (a), Rules of Civil Procedure.

[17]Rule 75 (d), Rules of Civil Procedure.

The appeal will be dismissed where the appellant fails to file any designation of the record on appeal and where no evidence was contained in the record.[18] An appeal has also been dismissed for failure of the appellant to serve a copy of the designation of the record on appellees, although the same was filed with the clerk, and also for the failure to file and serve a statement of points to be relied on.[19]

The court has held that the appellant's designation of contents of record on appeal, including only certain portions of the transcript, appellees properly requested additional portions of the record as well as two copies of the reporter's transcript as provided by Rule 75 (b) of Civil Rules of Procedure. However, if appellees request inclusion of unessential matter in the record, the court may withhold or impose costs therefor.[20]

Record to Be Abbreviated

All matter not essential to the decision of the questions presented by the appeal shall be omitted.[21]

Stipulation as to Record

Instead of serving designations as above provided, the parties by written stipulation filed with the clerk of the district court may designate the parts of the record, proceedings, and evidence to be included in the record on appeal.[22]

Record to Be Prepared by Clerk

The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties.[23]

Power of Court to Correct Record

It is not necessary for the record on appeal to be approved by the district court or judge thereof, but if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform with the truth.[24]

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[18]McBee v. U. S., 5 Fed. Rules Service, 73 (a) 23, Case 5, 126 F. (2d) 238 (C.C.A. 10th, 1942).

[19]Lopata v. Handler, 121 F. (2d) 938 (C.C.A. 10th, 1941).

[20]*In re* Joshua Hendy Iron Works, 5 Fed. Rules Service 75 (b) 2, Case 2; Dept. of Justice Bulletin No. 146; 2 F.R.D. 244 (N.D. Calif. 1942).

[21]Rule 75 (e) Rules of Civil Procedure.

[22]Rule 75 (c) Rules of Civil Procedure.

[23]Rule 75 (g) Rules of Civil Procedure.

[24]Rule 75 (a) Rules of Civil Procedure. For power of court to strike, see U. S. v. Forness, 5 Fed. Rules Serv. 75 (h) 22, Case 1; 2 F.R.D. 160 (W.D. N.Y., 1941); U. S. v. Forness, 5 Fed. Rules Serv. 52 (a) 11, Case 4, 125 F. (2d) 928 (C.C.A. 2nd, 1942); Treasure Imports, Inc. v. Henry Anders & Sons, Inc., 5 Fed. Rules Serv. 75 (h) 22, Case 3, 127 F. (2d) 3 (C.C.A. 2nd, 1942).

Order as to Original Papers or Exhibits

Whenever the district court is of opinion that original papers or exhibits should be inspected by the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation and return thereof as it deems proper.[25] This rule makes it possible to send with the record the original exhibits which are not susceptible of copying, such as physical exhibits, models, etc.

After Record Is Transmitted to the Circuit Court of Appeals

It is good practice for the attorney to examine the record of appeal after it has been transmitted to the circuit court of appeals, to determine that all portions designated have been included, and particularly the orders and judgments, and as to the orders and judgments determine that the same bears the statement "entered on the docket" and the date thereof, or it is possible that a motion to dismiss might be granted, because of Rule 58 which briefly provides that the judgment is not effective before such entry on the docket.

There seems to be a question as to whether the attorneys designating the record should ask that it contain a notation of the date and entry of all judgments and orders on the docket. The only rule that seems to throw any light on the matter is Rule 75 (g), which has to do with the record to be prepared by the clerk. This provides:

> "* * * but shall always include, whether or not designated, copies of the following: * * * the verdict or the findings of fact and conclusions of law, together with the direction for the entry of judgment thereon; * * * the judgment or part thereof appealed from."

APPEALS IN CRIMINAL CASES IN FEDERAL COURT

The Rules of Practice and Procedure in Criminal Cases, promulgated by the Supreme Court of the United States, of May 7, 1934, can be found under Title 28, United States Code Annotated, Section 723 (c).

Motions in arrest of judgment, or for a new trial, shall be made within three days after the verdict of finding of guilt;[26] except in capital cases a motion for a new trial upon the ground of newly discovered evidence shall be made within sixty days after final judgment.[27]

A motion to withdraw a plea of guilty shall be made in ten days after entry of such plea and before sentence is imposed.

Appeals shall be taken in five days after entry of judgment of conviction, except that where a motion for a new trial has been made within

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[25]Rule 75 (a) Rules of Civil Procedure.
[26]Rule II (2), Sup. Ct. Crim. Rules.
[27]Rule II (3), Sup. Ct. Crim. Rules.

time, then the appeal may be taken within five days after entry of the order denying the motion.[28]

Notice of appeal shall be filed with the clerk of the trial court in duplicate, and a copy shall be served on the United States attorney.[29]

The notice of appeal shall recite the title of the case, that the defendant appeals from the judgment, the names and addresses of the appellant and appellant's attorney, a general statement of the nature of the offense, the date of the judgment, the sentence imposed, and if the appellant is in custody, the prison where appellant is confined, and also a succinct statement of the grounds of appeal.[30]

The docket entries are then prepared by the clerk and forwarded, together with the duplicate notice of appeal, to the clerk of the appellate court, giving it supervision and control of the proceedings on appeal.[31]

At this point, should the appellant change his mind about the appeal, the motion to dismiss will be entertained by the appellate court upon a five-day notice. The appellate court will also, upon a five-day notice, entertain a motion for directions to the trial court.[32]

Preparation of Record on Appeal

Rule VII: The clerk of the trial court shall immediately notify the trial judge of the filing of the notice of appeal, and thereupon the trial judge shall at once direct the appellant or his attorney, and the United States attorney, to appear before him and shall give such directions as may be appropriate with respect to the preparation of the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings. The action and directions contemplated by this rule may be had and given by the trial judge at any place he may designate within the judicial district where the conviction was had.[33]

The clerk's office has attempted to comply with this particular rule by writing a letter to the judge, calling his attention to the appeal, and also stating that if he so directs, the clerk will mail copies of the letter to the respective parties setting the same down for the date mentioned in the letter. It is hoped that when the new rules of criminal procedure are drafted, this procedure will be changed to correspond somewhat with the civil rules with respect to designating the record on appeal.

Rule VIII provides for a record on appeal without bill of excep-

[28]Rule III, Sup. Ct. Crim. Rules.
[29]Rule III, Sup. Ct. Crim. Rules.
[30]Rule III, Sup. Ct. Crim. Rules.
[31]Rule IV, Sup. Ct. Crim. Rules.
[32]Rule IV, Sup. Ct. Crim. Rules.
[33]Rule VII, Sup. Ct. Crim. Rules.

tions, which amounts to a record of the pleadings and judgment to be used in argument before the appellate court.

Bill of Exceptions, except in cases under Rule VIII, shall be settled and filed within thirty days with the clerk of the trial court, unless further time is granted within the thirty-day period. The appellant, within the same time, shall file an

Assignment of Errors,[34] and the clerk of the trial court, upon the filing of the bill of exceptions, shall forthwith transmit them, together with such records as are pertinent to the appeal. Thereafter the appellate court may at any time, on five days' notice, entertain a motion by either party for correction, amplification, or reduction of the record, and may issue directions to the trial court in relation thereto.[34]

From this point on, you are in the hands of the circuit court of appeals for the tenth circuit, and should follow Rule 31 of that court.

APPEALS IN BANKRUPTCY CASES

In preparing an appeal in bankruptcy cases, reference should be made to the Bankruptcy Act, the General Orders in Bankruptcy, the Rules of Civil Procedure, the Bankruptcy Rules of the district court, and the Rules of the circuit court.

Any order or findings of the referee in bankruptcy are subject to review by the United States district judge, as provided in Section 39 (c) of the Bankruptcy Act, and the petition for review should be filed with the referee within ten days from the date of the order or findings unless the time for filing a petition for review is extended by the referee for good cause shown. At the time of the filing of the petition for review, you should also file a praecipe designating the record desired, as provided by our district court Rule 13 in bankruptcy. A copy of the petition for review should be served on the adverse parties represented at the hearing, and the petition must set forth the order complained of and the alleged errors in respect thereto, but the copy of the entire record need not be served.

Section 39 (a) (8) of the Bankruptcy Act provides that the referees shall "prepare promptly and transmit to the clerk certificates on petition for review of orders made by them, together with a statement of questions presented, the findings and orders thereon, the petition for review, a transcript of evidence or a summary thereof, and all exhibits."

The hearing before the district judge is then had on the petition for review, the record made and the findings of the referee, and at this hearing no evidence is taken. In this respect, let me call your attention to General Order 47.

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[34]Rule IX, Sup. Ct. Crim. Rules.

"Unless otherwise directed in the order of reference, the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

An appeal may then be taken from the decision of the district court to the circuit court of appeals, as provided by Sections 24 and 25 of the Bankruptcy Act.

Section 24 of the Bankruptcy Act permits an appeal where the order, decree or judgment involves less than $500.00 only upon allowance thereof by the appellate court.

If the amount involved is more than $500.00, then the appeal should be taken under Section 25 of the Bankruptcy Act.

General Order 36 in Bankruptcy provides:

"Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in civil actions in the courts of the United States, including the Rules of Civil Procedure for the district courts of the United States".

General Order 37 in Bankruptcy gives certain general provisions in appeals.

There seems to be some confusion as to when Section 24 and Section 25 apply. Perhaps the best explanation is contained in ¶4529.001 of Commerce Clearing House Bankruptcy Service, which was taken from the report of the senate committee on the judiciary of May 27, 1938, page 4:

"Appellate Jurisdiction. Sections 24 and 25 should be considered together, section 24 dealing with appellate jurisdiction and section 25 dealing with practice on appeals. This section now practically abolishes the distinction between appeals as of right and appeals by leave of the appellate courts, all appeals in cases involving $500 or more now being as of right and those in cases involving less than that amount being within the discretion of the appellate court. The jurisdiction of the appellate court will extend both to matters of law and of fact, except that in an appeal from a judgment on a jury verdict, the appeal will extend only to matters of law."

The tenth circuit court's Rule 32 on appeals in bankruptcy covers procedure under Section 24 of the Bankruptcy Act.[35]

Section 25A provides that an appeal shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order, or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then within forty days from such entry.

This section does not state, and it is uncertain, who shall give the notice. The clerk of this district court has been mailing the notice to all parties upon the entry of any order or judgment on the theory that since the Rules of Civil Procedure apply in appeals in bankruptcy, the Civil Rule 77 (d) might also apply.

Since the Rules of Civil Procedure should be followed on the appeal, you would serve and file your notice, designation of record, etc., as already outlined.

Section 121 of Chapter 10 of the Bankruptcy Act—the chapter on corporate reorganization—states, regarding appellate jurisdiction:

> "Where not inconsistent with the provisions of this chapter, the jurisdiction of the appellate courts shall be the same as in a bankruptcy proceeding."

And under this section is found in ¶8059 of the Commerce Clearing House Bankruptcy Service an explanatory note which is taken from the report of senate committee on the judiciary, May 27, 1938, page 25:

> "Section 121 makes Section 24 of the Bankruptcy Act, relating to the jurisdiction of the appellate courts in bankruptcy proceedings, applicable as a general matter to appeals under this chapter."

In this regard, the Supreme Court, in a case decided March 11, 1940, *Dickinson v. Cowan*,[36] held that

> "Appeals from orders making or refusing to make allowances of compensation or reimbursement under Chapter X of the Chandler Act may be taken *only* by leave of the Circuit Court of Appeals."

The Supreme Court made a similar ruling on June 6, 1941, in *Reconstruction Finance Corporation v. Prudence Securities Advisory Group*,[37] 311 U. S. 579.

(An appendix of forms on appeal supplemental to this article will be contained in the October issue.)

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[35] See Scott v. Jones, 115 F. (2d) 133 (C.C.A. 10th, 1940), construing this rule.

[36] 309 U. S. 382, 60 S. Ct. 595, 84 L. ed. 819 (1940).

[37] 311 U. S. 579, 61 S. Ct. 331, 85 L. ed. 374 (1941).