COMMITTEE NOTES ON RULES—2010 AMENDMENT

Subdivision (b). New subdivision (b) defines the term ''state'' to include the District of Columbia and any commonwealth or territory of the United States. Thus, as used in these Rules, ''state'' includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

Changes Made After Publication and Comment. No changes were made after publication and comment.

Rule 2. Suspension of Rules

On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

The primary purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules. The rule also contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result. Rule 26(b) prohibits a court of appeals from extending the time for taking appeal or seeking review.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

Rule 3. Appeal as of Right—How Taken

(a) FILING THE NOTICE OF APPEAL.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. §1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(b) JOINT OR CONSOLIDATED APPEALS.

(1) When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(c) CONTENTS OF THE NOTICE OF APPEAL.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as ''all plaintiffs,'' ''the defendants,'' ''the plaintiffs A, B, et al.,'' or ''all defendants except X'';

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) SERVING THE NOTICE OF APPEAL.

(1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient despite the death of a party or the party's counsel.

(e) PAYMENT OF FEES. Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

General Note. Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is ''mandatory and jurisdictional,'' *United States v. Robinson*, 361 U.S. 220, 224, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), compliance with the provisions of those rules is of the utmost importance. But the proposed rules merely restate, in modified form, provisions now found in the civil and criminal rules (FRCP 5(e), 73; FRCrP 37), and decisions under the present rules which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules. Illustrative decisions are: *Fallen v. United States*, 378 U.S. 139, 84 S.Ct. 1689, 12 L.Ed.2d 760 (1964) (notice of appeal by a prisoner, in the form of a letter delivered, well within the time fixed for appeal, to prison authorities for mailing to the clerk of the district court held timely filed notwithstanding that it was received by the clerk after expiration of the time for appeal; the appellant ''did all he could'' to effect timely filing); *Richey v. Wilkins*, 335 F.2d 1 (2d Cir. 1964) (notice filed in the court of appeals by a prisoner without assistance of counsel held sufficient); *Halfen v. United States*, 324 F.2d 52 (10th Cir. 1963) (notice mailed to district judge in time to have been received by him in normal course held sufficient); *Riffle v. United States*, 299 F.2d 802 (5th Cir. 1962) (letter of prisoner to judge of court of appeals held sufficient). Earlier cases evidencing ''a liberal view of papers filed by indigent and incarcerated defendants'' are listed in *Coppedge v. United States*, 369 U.S. 438, 442, n. 5, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

Subdivision (a). The substance of this subdivision is derived from FRCP 73(a) and FRCrP 37(a)(1). The proposed rule follows those rules in requiring nothing other than the filing of a notice of appeal in the district court for the perfection of the appeal. The petition for allowance (except for appeals governed by Rules 5 and 6), citations, assignments of error, summons and severance—all specifically abolished by earlier modern rules—are assumed to be sufficiently obsolete as no longer to require pointed abolition.

Subdivision (b). The first sentence is derived from FRCP 74. The second sentence is added to encourage consolidation of appeals whenever feasible.

Subdivision (c). This subdivision is identical with corresponding provisions in FRCP 73(b) and FRCrP 37(a)(1).

Subdivision (d). This subdivision is derived from FRCP 73(b) and FRCrP 37(a)(1). The duty of the clerk to forward a copy of the notice of appeal and of the docket entries to the court of appeals in a criminal case extended to habeas corpus and 28 U.S.C. §2255 proceedings.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

Subdivision (c). The proposed amendment would add the last sentence. Because of the fact that the timely filing of the notice of appeal has been characterized as jurisdictional (See, e.g., *Brainerd v. Beal* (C.A. 7th, 1974) 498 F.2d 901, in which the filing of a notice of appeal one day late was fatal), it is important that the right to appeal not be lost by mistakes of mere form. In a number of decided cases it has been held that so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with. See, e.g., *Cobb v. Lewis* (C.A. 5th, 1974) 488 F.2d 41; *Holley v. Capps* (C.A. 5th, 1972) 468 F.2d 1366. The proposed amendment would give recognition to this practice.

When a notice of appeal is filed, the clerk should ascertain whether any judgment designated therein has been entered in compliance with Rules 58 and 79(a) of the F.R.C.P. See Note to Rule 4(a)(6), infra.

Subdivision (d). The proposed amendment would extend to civil cases the present provision applicable to criminal cases, habeas corpus cases, and proceedings under 28 U.S.C. §2255, requiring the clerk of the district court to transmit to the clerk of the court of appeals a copy of the notice of appeal and of the docket entries, which should include reference to compliance with the requirements for payment of fees. See Note to (e), infra.

This requirement is the initial step in proposed changes in the rules to place in the court of appeals an increased practical control over the early steps in the appeal.

Subdivision (e). Proposed new Rule 3(e) represents the second step in shifting to the court of appeals the control of the early stages of an appeal. See Note to Rule 3(d) above. Under the present rules the payment of the fee prescribed by 28 U.S.C. 1917 is not covered. Under the statute, however, this fee is paid to the clerk of the district court at the time the notice of appeal is filed. Under present Rule 12, the ''docket fee'' fixed by the Judicial Conference of the United States under 28 U.S.C. §1913 must be paid to the clerk of the court of appeals within the time fixed for transmission of the record, ''. . . and the clerk shall thereupon enter the appeal upon the docket.''

Under the proposed new Rule 3(e) both fees would be paid to the clerk of the district court at the time the notice of appeal is filed, the clerk of the district court receiving the docket fee on behalf of the court of appeals.

In view of the provision in Rule 3(a) that ''[f]ailure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal,'' the case law indicates that the failure to prepay the statutory filing fee does not constitute a jurisdictional defect. See *Parissi v. Telechron*, 349 U.S. 46 (1955); *Gould v. Members of N. J. Division of Water Policy & Supply*, 555 F.2d 340 (3d Cir. 1977). Similarly, under present Rule 12, failure to pay the docket fee within the time prescribed may be excused by the court of appeals. See, e. g., *Walker v. Mathews*, 546 F.2d 814 (9th Cir. 1976). Proposed new Rule 3(e) adopts the view of these cases, requiring that both fees be paid at the time the notice of appeal is filed, but subject to the provisions of Rule 26(b) preserving the authority of the court of appeals to permit late payment.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendments to Rule 3(d) are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1989 AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

Note to subdivision (c). The amendment is intended to reduce the amount of satellite litigation spawned by the Supreme Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). In *Torres* the Supreme Court held that the language in Rule 3(c) requiring a notice of appeal to ''specify the party or parties taking the appeal'' is a jurisdictional requirement and that naming the first named party and adding ''et al.,'' without any further specificity is insufficient to identify the appellants. Since the *Torres* decision, there has been a great deal of litigation regarding whether a notice of appeal that contains some indication of the appellants' identities but does not name the appellants is sufficiently specific.

The amendment states a general rule that specifying the parties should be done by naming them. Naming an appellant in an otherwise timely and proper notice of appeal ensures that the appellant has perfected an appeal. However, in order to prevent the loss of a right to

appeal through inadvertent omission of a party's name or continued use of such terms as ''et al.,'' which are sufficient in all district court filings after the complaint, the amendment allows an attorney representing more than one party the flexibility to indicate which parties are appealing without naming them individually. The test established by the rule for determining whether such designations are sufficient is whether it is objectively clear that a party intended to appeal. A notice of appeal filed by a party proceeding *pro se* is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice clearly indicates a contrary intent.

In class actions, naming each member of a class as an appellant may be extraordinarily burdensome or even impossible. In class actions if class certification has been denied, named plaintiffs may appeal the order denying the class certification on their own behalf and on behalf of putative class members, *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); or if the named plaintiffs choose not to appeal the order denying the class certification, putative class members may appeal, *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). If no class has been certified, naming each of the putative class members as an appellant would often be impossible. Therefore the amendment provides that in class actions, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as a representative of the class.

Finally, the rule makes it clear that dismissal of an appeal should not occur when it is otherwise clear from the notice that the party intended to appeal. If a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward.

Note to subdivision (d). The amendment requires the district court clerk to send to the clerk of the court of appeals a copy of every docket entry in a case after the filing of a notice of appeal. This amendment accompanies the amendment to Rule 4(a)(4), which provides that when one of the posttrial motions enumerated in Rule 4(a)(4) is filed, a notice of appeal filed before the disposition of the motion becomes effective upon disposition of the motion. The court of appeals needs to be advised that the filing of a posttrial motion has suspended a notice of appeal. The court of appeals also needs to know when the district court has ruled on the motion. Sending copies of all docket entries after the filing of a notice of appeal should provide the courts of appeals with the necessary information.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Subdivision (a). The amendment requires a party filing a notice of appeal to provide the court with sufficient copies of the notice for service on all other parties.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are generally intended to be stylistic only; in this rule, however, substantive changes are made in subdivisions (a), (b), and (d).

Subdivision (a). The provision in paragraph (a)(3) is transferred from former Rule 3.1(b). The Federal Courts Improvement Act of 1996, Pub. L. No. 104–317, repealed paragraphs (4) and (5) of 28 U.S.C. §636(c). That statutory change made the continued separate existence of Rule 3.1 unnecessary. New paragraph (a)(3) of this rule simply makes it clear that an appeal from a judgment by a magistrate judge is taken in identical fashion to any other appeal from a district-court judgment.

Subdivision (b). A joint appeal is authorized only when two or more persons may appeal from a single judgment or order. A joint appeal is treated as a single appeal and the joint appellants file a single brief. Under existing Rule 3(b) parties decide whether to join their appeals. They may do so by filing a joint notice of appeal or by joining their appeals after filing separate notices of appeal.

In consolidated appeals the separate appeals do not merge into one. The parties do not proceed as a single appellant. Under existing Rule 3(b) it is unclear whether appeals may be consolidated without court order if the parties stipulate to consolidation. The language resolves that ambiguity by requiring court action.

The language also requires court action to join appeals after separate notices of appeal have been filed.

Subdivision (d). Paragraph (d)(2) has been amended to require that when an inmate files a notice of appeal by depositing the notice in the institution's internal mail system, the clerk must note the docketing date—rather than the receipt date—on the notice of appeal before serving copies of it. This change conforms to a change in Rule 4(c). Rule 4(c) is amended to provide that when an inmate files the first notice of appeal in a civil case by depositing the notice in an institution's internal mail system, the time for filing a cross-appeal runs from the date the district court dockets the inmate's notice of appeal. Existing Rule 4(c) says that in such a case the time for filing a cross-appeal runs from the date the district court receives the inmate's notice of appeal. A court may ''receive'' a paper when its mail is delivered to it even if the mail is not processed for a day or two, making the date of receipt uncertain. ''Docketing'' is an easily identified event. The change is made to eliminate the uncertainty.

[Rule 3.1. Appeal from a Judgment of a Magistrate Judge in a Civil Case] (Abrogated Apr. 24, 1998, eff. Dec. 1, 1998)

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The Federal Courts Improvement Act of 1996, Pub. L. No. 104–317, repealed paragraphs (4) and (5) of 28 U.S.C. §636(c). That statutory change means that when parties consent to trial before a magistrate judge, appeal lies directly, and as a matter of right, to the court of appeals under §636(c)(3). The parties may not choose to appeal first to a district judge and thereafter seek discretionary review in the court of appeals.

As a result of the statutory amendments, subdivision (a) of Rule 3.1 is no longer necessary. Since Rule 3.1 existed primarily because of the provisions in subdivision (a), subdivision (b) has been moved to Rule 3(a)(3) and Rule 3.1 has been abrogated.

Rule 4. Appeal as of Right—When Taken

(a) APPEAL IN A CIVIL CASE.

(1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States rep-