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# Rules for Civil Procedure in the United States District Courts: Appellate Procedure

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# THE RULES FOR CIVIL PROCEDURE IN THE UNITED STATES DISTRICT COURTS: C. APPELLATE PROCEDURE

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In so far as the new rules have any relation to appellate procedure, they introduce an entirely new subject. They are different materially from the old rules. The differences, however, are very largely that they eliminate many things we have heretofore had to do. It seems to me, after an examination of these rules in so far as they relate to appellate procedure, that these things may be said of these rules:

First, they are derived very largely, or at least to some extent, from the equity rules and the equity practice.

Second, they evidence a purpose on the part of those who drafted them to make it nearly impossible for a lawyer who wishes to present a case to either the Supreme Court of the United States or the Court of Appeals to fail to do so. If you come before the court with a record showing what was done below, the court will pass on your case and if you have done something that is wrong or omitted something, the appellate court will allow you to correct it. The way seems so plain now to get into the upper courts that it would appear to be difficult for a fool to err. I am anxious to see how they work out in practice.

Third, they relieve the judge of the district court of much unnecessary labor that he has heretofore had, and they put it up to the lawyers to do the things themselves which the judge of the district court has heretofore been called upon to do.

Fourth, they free the practice on appeal from many artificialities and non-essentials which we lawyers have heretofore considered so essential in the practice, but which really are not at all essential.

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It seems to me that from the viewpoint of practice in the federal courts, these rules as to appellate procedure are most desirable, and I see no reason why like rules may not be adopted in our State practice. In fact, not having seen them put into operation, I should think they would be most desirable from any point of view in our State practice.

However, I wish to say this about procedure in both the circuit courts of appeal and in the supreme court of the United States: I have been practicing continuously in the court of appeals for many years, and quite frequently, but not so frequently, of course, in the supreme court of the United States, and in all of those years I have never raised in either court a question of practice, and I have never had a question of practice raised against me in either of those courts. I have found this also in both of those courts: if there be no rule or no statute which covers your situation, the court will very promptly make an order, if you ask it, fully and practically to meet your situation, and if the parties make any stipulation, on any subject almost, both the supreme court and the court of appeals will gladly approve it and make the order accordingly.

So while there is no grave necessity, in my opinion, for the adoption of these new rules, with respect to appellate procedure, I welcome them at least as burden-savers.

You will notice that there are some very desirable things in these rules with respect to notice. For example, they follow our Indiana statutes in the computation of time except where we have intermediate Sundays and holidays, and this concerns our appellate procedure. If your time for the doing of a thing is less than seven days, intermediate Sundays and holidays are eliminated.

Furthermore, the court may enlarge the time fixed by the rules or fixed by an order of the court, with or without notice or without motion, and the limitations, and the only limitations, in the rules on the enlargement of time are that the court may not enlarge the time for appeal and may not enlarge the time for a motion for new trial. This is a valuable addition to the rules. The court may permit an act

to be done after the time has expired, where the failure to act was the result of excusable neglect; and Mr. Cole has mentioned the fact that the rules provide that the power of the court is not affected or limited by the expiration of the term of court. I think that is a very vital rule so that if there be something that you should have done in your case a year before, you may do it now.

I think it applies to appeals if we have anything left over to be done in appeals.

As a step in the taking of appeals, Rule 46 provides that formal exceptions to the rulings or orders of the court are not necessary; but we must not be deceived by that rule, for the same rule provides what will be sufficient, and I take it the rule means this will be required. We must do these things: At the time the ruling or order of the court is made or sought, counsel must make known to the court the action he desires the court to take or his objection to the action and his grounds therefor; but if a party have no opportunity to object to a ruling or order at the time it is made, the absence of an objection is not prejudicial.

Of course, you will have done that where you present a motion in writing. If you state your objections to the action of the court, you must state your grounds therefor, so while the rule apparently is simple, yet it has something to it that we must not overlook.

Now, Rule 50 eliminates a controverted point among the circuits in this respect: the rule provides that a motion for a directed verdict is required to state the specific grounds therefor. I think Judge Woods long ago laid down the rule for the circuit that the motion for a directed verdict must state the grounds therefor.

The Sixth circuit has heretofore held that you don't have to state the grounds for a motion for a directed verdict, while some other of the circuits have held that if you shall fail to state the grounds in your motion for a directed verdict but include them in your assignment of errors, that will take care of your omission.

Under the new rules the assignment of errors has been abolished, except where you go at once from the district court to the Supreme Court of the United States.

Mr. Gilliom has referred to how the practice has been improved with respect to instructions.

To assign an error, that is, to preserve your question on instructions to the jury, when you get into the court of appeals or in the Supreme Court of the United States, the rules provide that the party must object before the jury retires, and he must state distinctly the matter to which he objects, and, here again, state the grounds of his objection. So while the rule is different in form, yet it is the same in substance as the old rule with the exception that you may take your exceptions or make your objections out of the hearing of the jury, which, of course, we all grant is highly desirable.

I am wondering whether under these rules it would be considered necessary to state the grounds of your objection to the court's refusing to give an instruction that you have requested. The rules seem to require that, and until some appellate court shall have spoken on it, if the district court shall refuse to give one of my requested instructions, I shall state to the court the reason why I think he should give the instruction I have requested. I shall be glad to hear what some of my brethren think of that.

Now, another highly desirable rule, from the viewpoint of appellate procedure, is the rule requiring that the court shall make special findings of fact in cases not tried by the jury. Heretofore, as you know, it has been optional, discretionary, with the district court to make special findings of fact, and though the district court may have said he will make special findings of fact, the court may change its mind and refuse to make a special finding of facts, whereupon you are disabled on your appeal.

I think that is why they put in this rule the provision that the court must make a special finding of facts. That takes an important worry off my mind, and I am sure off the minds of all of you.

Another excellent thing in rule 52 is this. Requests for specific findings of fact are not necessary for purposes of review, where your trial is by the court.

Again, it is not necessary to make, in the district court, an objection to the findings, and not necessary to ask the district court to amend its findings.

I lately took up to the court of appeals a case which is now pending in the Supreme Court in which I devoted five days to making my assignments of error, and in which I devoted substantially five days in preparing my objections to special findings, and requests for amendments of them, ten days in one case on those two points! All that labor is now saved under these new rules.

Furthermore, under the new rules, where you have a trial by the court, without a jury, you do not have to move for judgment. On a trial by jury, you still must move for a directed verdict, as I interpret these rules, so look out for that. If any one disagrees with me on that view, I should like to discuss it.

It isn't necessary to go into the matter of staying the judgment on appeal or the giving of bonds, there being nothing particularly new on that, nothing worthy of discussion, except the new rules provide that when you give notice of your appeal you must give bond for your costs, and the rules seem to require that, when you appeal from the district court to the supreme court, you must file a cost bond and a supersedeas bond. I take it you may file a single bond for the two purposes, but the point I wish to make is this: you must, in going from the district court to the supreme court, give the supersedeas and cost bond, while in going to the court of appeals you are required to give only the cost bond, and not the supersedeas. The practice has been precisely the reverse, but whether I am right or wrong in that view is not vital because the Supreme Court of the United States, as you recall, and the circuit courts of appeals, have held many times that your failure to give these bonds does not defeat your appeal; it does not go to the court's jurisdiction, and if you fail to give it in the district court, or if you

have given an insufficient bond, or inadequate security, the court may make an order for an adequate bond after the appeal has been taken, and if you comply with it, you still remain in court. Of course your appeal may be dismissed if you refuse to give it. The rules very expressly point out the provisions of appeal bonds. I think there is one provision in the new rules relating to supersedeas bonds which is very helpful. As I interpret the new rules, you may now, in lieu of a supersedeas bond, give such other security as the court may approve.

I do not think that there has been any provision by statute or by rule for the giving of such other security.

A few months ago, I desired to go from the district court to the court of appeals, and my clients wished to put up $45,000 in cash instead of giving a supersedeas bond in order to save surety fees. I could not satisfy myself that the court had the power to approve or order the deposit of the cash with the clerk, so I talked to the court about it, and the parties promptly stipulated that the cash should be deposited in lieu of the giving of the supersedeas bond. I asked the district court to approve, and the district court did approve the stipulation, and that case went on through to the Supreme Court without any question having been suggested about it.

I think that a party, if he chooses, ought to have the right to make a deposit in cash in lieu of his bond, and under the rule I think you may do it in the circuit court of appeals.

Now, if you are going from the district court to the Supreme Court of the United States, the practice is today substantially what it was before the new rules were adopted; that is to say, you must still file your petition for appeal and your petition must be accompanied by an assignment of errors. The court must make an order allowing the appeal, notwithstanding the court has no discretion to refuse to make the order. There must be a citation issued and served. You must still file the jurisdictional statement. You must file the bond on appeal, and the supersedeas bond, and you

must make up your record in accordance with the rules of the Supreme Court.

Now, if you are going to the circuit court of appeals, and that is where most of us go most of the time, the practice is very much simplified and labor very greatly reduced. The rule (No. 73) very clearly provides that a party may appeal to the court of appeals by filing with the district court a notice of appeal.

As soon as you lodge your notice of appeal with the district court, your appeal is taken, and anything you fail to do after that does not touch the appellate court's jurisdiction.

The notice of appeal is perfectly simple. There could not be anything left out of the notice required under the rule without the thing failing to be a notice at all. The rule provides that the notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken.

That is so simple that a mere novice could prepare the notice.

Then I like the provision for service of the notice of the appeal. There is no chance for a fall-down. The rule provides, as you will recall, that you shall file the notice of appeal with the clerk, and the clerk shall mail copies of the notice to every party to the judgment except the one or ones taking the appeal. If the clerk fails to do that it doesn't affect the validity of the appeal. The rule provides for the giving of notice to the attorney of record, if there be an attorney of record, and it may be given to the party himself only if there is no attorney for him of record.

Now, there is one feature of this rule that I want to call to your attention: this notification by mail to the attorney or to the party is provided by the rule to be sufficient even if the attorney or the party himself may have died prior to the giving of the notification. But don't be deceived into thinking that means that, if some of your parties on the opposite side have died before you give your notice of the appeal, you are safe without doing anything; instead this

provision of the rule relates only to the notification from the clerk.

If you file your notice of appeal with the clerk and everybody is alive, all right. If afterward a death befall one of the appellees, or one who is to be an appellee, and if afterward service of the notice is had on his attorney of record, the appeal is perfected, and your appeal would not be affected by his death, but if there be a death of a party who should be named an appellee before you file the notice of appeal and if you don't comply with the statute to bring in his representative, your appeal will not be perfected.

You will see that the new rules, when you go to the court of appeals, dispense with petitions for appeal, orders allowing appeal, the issue and service of citation, as well as assignments of errors,—a much simplified procedure.

The amount of the appeal bond is fixed by the new rules (No. 73) at $250 and requires no approval by the court. The court does not bother about it at all, but, of course, the court may be asked to require that the amount of the bond be increased, and the insufficiency of it may be brought to the attention of the district court.

Now, there is this new feature in the rules (No. 73) that is new in this jurisdiction: The liability of the surety on the supersedeas bond may be enforced on notice and motion without the necessity for an independent action. The motion, and the notice of the motion, which the district court may prescribe, may be served on the clerk who shall forthwith mail the copies to the surety if his address be known.

Now, I don't know whether Judge Parker is here or not. I think it is in his fourth circuit that this very procedure has been applied or followed where the state statute provides that summary judgment may be taken on notice and motion, the federal district court, under the conformity act, rendering judgment upon the same procedure. I will grant that the new rule provides a very different procedure in this circuit, and I think a very desirable procedure.

Now, it isn't necessary to take your time on the making up of the transcript, because, when you come to do that, you

will want to get the rule out. I know you are all familiar with that. There is no particular difference between the present form and the old forms, except the praecipe and the fact the lawyers make up the record according to the rule of the court.

There is this to be said on the time limit: the record is to be filed in your cases in the Supreme Court of the United States within forty days after the order allowing the appeal, and sixty days in cases in the Pacific Coast and Rocky Mountain States.

In appeals to the circuit court of appeals you may have the time for filing your transcript enlarged to as much as 180 days, but the court has no power to extend the time for the appeal itself. However, I should suppose that without the rule the court before would have had at least such power and maybe a greater power. I am referring only to the enlarging of the time for the filing of the transcript in the circuit court of appeals.

There is a very interesting provision in Rule 74 regarding the subject of parties. Since assignments of error are abolished, you can hardly go wrong on the subject of parties. This rule provides that parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or without severance, any one or more of them may appeal separately or any two or more of them may join in an appeal. This may be a most welcome rule to one who has an appeal on his hands.

I think I said that bills of exception are abolished. They are not abolished. They are just not required. I think they might be permitted. Instead of presenting a bill of exceptions in your common law case, one now need never trouble the judge at all You file two copies of the stenographer's transcript of the evidence or file a narrative statement of the testimony of the witnesses, and if your adversary does not like your narrative, then you have to file the stenographic transcript. The appellate judges seem to like narrative statements. I think if I were an appellate judge I should like them, although I get pretty tired of making

them up. The rules provide that if one asks for the verbatim report of the stenographer, when his adversary wishes to furnish a narrative statement, the extra cost may be levied against the party asking for the stenographic report. The rules also provide that the extra cost may even be taxed against the lawyer who did that thing, so you will see that the lawyers probably will favor the narrative statement. You don't have to take up all the evidence; you may take up a part of it. But if your adversary is not content, he can have what he wants. The whole story is told; nobody can say there is anything lacking.

I should say under the rules you need not take up all of the record proper and you need not take up all of the evidence, but if you elect not to take up the whole record consisting both of the record proper and of the evidence, then you must state the grounds that you will rely upon for your appeal. I imagine that not many cases will go up with the complete record, so that in most appeals we shall have to state our points. But that obviously is much simpler, and much less laborious to the lawyer than to prepare the assignment of errors. I have found it quite difficult in many cases to know how the assignment of errors should be made up. One circuit says one thing, and another says another thing. When Judge Woods was on our Seventh Circuit Court of Appeals he handed down decision after decision holding assignments of errors insufficient, and many nights I have gone to bed with the jitters after having read Judge Woods' decisions on assignment of errors. I am glad indeed that they are out.

Another very excellent thing, which is not so different from what we have in our Indiana State practice, but which we have not had heretofore in the federal practice in our common law actions, but only in our equity cases, is this: you may now, under the new rules, prepare and sign a short and simple statement showing what questions you have, how they arose, and take up the judgment; so that in half a dozen pages you may present your case to the court of appeals, where you might otherwise have a record that would stretch out into the hundred, or several hundred pages. I have used

that procedure in cases on the equity side. Now, the same practice may be followed in common law cases as well as in equity cases. The new rule (No. 76) relating to a condensed statement of your case is substantially the old equity rule, excepting that you don't have to go through the forms that you used to have to go through to get your equity case before the court.

Mr. Gilliom has pointed out to you to what of your appeals these rules are applicable. He has covered that, and I am not going to restate it, but I do want to impress upon you the fact that when you come to take an appeal you must carefully observe the rules (see rule 81) to see whether the rules do apply to your case on appeal.

In conclusion, and by way of repetition, I would say I like these rules very much from the viewpoint of their use on appeals in federal court. I believe experience will demonstrate that they are most desirable and that they will insure our always having our cases before the court and decided upon their merits, and we will save ourselves a tremendous amount of labor, and save the judges tremendous labor. Without having studied the question thoroughly as to whether they should be adopted by our Indiana Supreme Court, it seems to me, in advance of having experienced their operation, that they should be very desirable for use in our state practice, but before any of these rules are adopted by the Supreme Court, I should like very much to see them tried out for a year or so. The proof of the pudding is in the eating. They look good, and I think they are good, but practice is always better than theory.

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