07-AP-011

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February 12, 2008

Peter G. McCabe
Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C 20544

Re: Comments on Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Mr. McCabe.

Enclosed are the comments of Public Citizen Litigation Group on the proposed amendments to the Federal Rules of Appellate Procedure. Thank you for your consideration of these comments

Sincerely,

/s/

Brian Wolfman

Public Citizen Litigation Group's
Comments on Proposed FRAP Amendments

Proposed Rule 12.1 (Indicative Rulings)

• We share the concern expressed in the proposed committee note that, because of the potential loss of appellate jurisdiction over the initial appeal (and, thus, the issues raised in that appeal), a remand terminating all appellate proceedings should occur "only when the appellant has stated clearly its intention to abandon the appeal." As the committee explains, that is a serious concern because if the first appeal is terminated, the appellant might be "limited to appealing [only] the denial of the postjudgment motion." The committee note does not say *how* an appellant should express an intent to abandon an appeal, and, moreover, an advisory committee note is not binding. We believe that this problem should be resolved in the Rule itself, by inserting the following as the penultimate sentence of proposed Rule 12.1(b): "The court of appeals shall not dismiss the appeal unless, in the notice referred to in subdivision (a), the appellant expressly requests that the appeal be dismissed."

• The proposed committee note also states that when a motion is filed in the district court during the pendency of an appeal, litigants should "bear in mind" that a separate notice of appeal may be necessary "to challenge the district court's disposition of the motion." We believe that the committee note should remind litigants that an *amended* notice of appeal may be filed in this circumstance. That is a worthwhile reminder because an amended notice of appeal does not require a new filing fee. *See* FRAP 4(a)(4)(B)(iii).

• We have one stylistic suggestion regarding Rule 12.1(a): Change "because of an appeal that has been docketed" to "because an appeal has been docketed."

Proposed Amendment to Rule 4(a)(4)(B)(ii)

We have no quarrel with the proposed wording change. We question, however, whether this subdivision serves a useful purpose. In 1993, Rule 4 was amended to provide that a notice of appeal filed before disposition of one of the "tolling" post-judgment motions becomes effective upon disposition of the motion. FRAP 4(a)(4)(B)(i). That Rule presumes that appellants intend to pursue their initial appeals after disposition of post-judgment motions. That makes sense because the appellee is not prejudice by that presumption, and, if the appellant does not want to pursue the initial appeal after disposition of a post-trial motion, it can simply abandon that appeal.

But why not go further and provide that the original notice of appeal serves as the appellant's appeal from any order disposing of any post-trial motion? To be sure, that order could not have been referenced in the appellant's original notice of appeal, *see* FRAP 3(c)(1)(B), but that "failure" of notice would not prejudice the appellee. After all, because all interlocutory orders are said to merge into the final judgment, and many appealable orders resolve numerous contested issues, Rule 3(c)(1)(B) – which requires only that the notice of appeal designate "the judgment, order, or part thereof being appealed" – does not actually put the appellee or the court on notice of the issues to be raised on appeal. Rather, the appellee generally is put on notice of the issues on appeal when, shortly after an appeal is filed, the appellant states the issues on a form or in some other filing required by the circuit clerk. *Cf.* FRAP 10(b)(3)(A). In any event, it is difficult to see what benefit flows from requiring the appellant to file another notice of appeal (or an amended notice) or what harm is caused by allowing the original notice of appeal to serve as an appeal from the order disposing of a post-judgment motion. In sum, our

amendment would prevent the inadvertent loss of issues on appeal, without harming appellees or the courts.

Proposed Amendments to Rules 4(a)(1)(B)(iv) and 40(a)(1)(D)

In general, we support this amendment. We have one concern about its wording. Assume that an appeal is taken 31 days after judgment is entered by the district court or a petition for rehearing is filed 15 days after judgment is entered by the court of appeals. Assume further that the case is one in which, to quote the proposed Rules, the plaintiff alleges that the defendant is a "a United States officer or employee" and suit has been brought against that officer or employee in his or her individual capacity based on an "act or omission [allegedly] occurring in connection with duties performed on the United States' behalf." What if the court of appeals holds that the act or omission did *not* occur in connection with duties performed on the United States' behalf? Does that mean the court of appeals did not have jurisdiction over the appeal because it was filed late or that the rehearing petition was untimely? We assume that is not the committee's intent, but the Rule could be read that way. And there could be an adverse consequence of reading it that way. If the court finds that the officer or employee was not acting in connection with his or her official duties, the officer or employee might still be held individually liable on some other basis (such as under state common law), and we would not want a situation in which the court felt it lacked power to act on the ground that the appeal or rehearing petition was filed too late. We believe that any ambiguity can be resolved by replacing "occurring in connection" with "alleged to have occurred in connection."

Brian Wolfman – February 12, 2008