16-AP-B

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Via email: Rebecca_Womeldorf@ao.uscourts.gov

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Re: Advisory Committee on Appellate Rules
Agenda Item 16-AP-A (tab 5) for April 5-6, 2016, Meeting in Denver, CO

Dear Ms. Womeldorf:

The National Association of Criminal Defense Lawyers encourages the Advisory Committee on Appellate Rules to give serious consideration to the suggestion on your April 2016 agenda to extend to 30 days from the present 14 the time for filing a defendant's notice of appeal in a federal criminal case. (This period is measured not from the date of sentencing but from the date when the written judgment is entered on the docket, which might be the sentencing day but is often anywhere from a day or two to a few weeks later.) There are many reasons why this idea has merit beyond those noted in the Reporter's memorandum.

Most convictions in criminal cases result not from trials but from guilty pleas. In those cases, most issues that might give rise to an appeal (in other words, issues not waived by the plea itself) emerge in the sentencing process. Defendants who are dissatisfied with the outcome of their cases, that is, with the sentence, often raise the question of whether they should appeal. But criminal defendants generally have little idea of what may constitute legitimate grounds for appeal. The decision whether to file an appeal is therefore one that requires attorney-client counseling. And in our experience, a defendant who has just been sentenced is ordinarily in no emotional or psychological condition to have a sober and realistic discussion with counsel – at least not immediately after sentencing, and even assuming the U.S. Marshal does not whisk the defendant away before counsel even has a chance to speak with him or her – about what those grounds may be, and often not until at least several days later. At that point, particularly if the defendant is detained, arranging time for a visit (or even an office appointment for clients who are not detained) can take a few more days. And defendants who have retained counsel frequently consider changing lawyers at this point – a move that is often wise, since appellate practice is very different specialty from trial lawyering, and in any event a fresh perspective on any case can be beneficial. But finding appropriate new counsel can take time. In addition, for counsel who are retained, whether such counsel are continuing with a case or newly entering, a new retainer or other fee agreement must be negotiated and then arrangements made for

payment. This, too, is not ordinarily something that can be accomplished quickly and easily. A period of more than 14 days is often needed to complete these tasks responsibly.

It may be the case that these tasks are ordinarily accomplished within the 14-day period, and thus untimely notices are rare. But that is a function of necessity and does not mean the decisions were made with appropriate deliberation and consultation. Unless there are compelling reasons for limiting the period to notice an appeal to 14 days, and we do not believe there are, increasing the time for a defendant to notice a criminal appeal to 30 days, the same time allowed the government (and to parties in most civil cases), would achieve these benefits without any countervailing cost.

Just as most cases are resolved by plea, so most pleas are entered pursuant to plea agreements. And plea agreements in federal cases often contain appeal waiver clauses. No appeal waivers, however, are without exceptions, either by their terms, by case law (typically allowing appeals to avoid a "miscarriage of justice"), or as a result of how the waiver clause was explained during the change-of-plea colloquy. Similarly, the waiver clause may not be enforceable, to the extent that the defendant did not understand it, or enter into it knowingly and intelligently. Whether counsel remains the same or is new to the case, advising a client about whether colorable grounds to appeal may exist notwithstanding the appeal waiver provision of the plea agreement is a painstaking process. Moreover, the attorney who negotiated the plea, including the terms of the appeal waiver (or at least recommended accepting it) may have a conflict of interest or other ethical problem in now suggesting ways of avoiding or defeating that waiver. In our experience, very few defendants understand the implications of these waivers until they are explained (again) by counsel after sentencing. A misjudgment by counsel in this respect can even result in the appearance of a violation by the defendant of an important undertaking in the plea agreement, risking an accusation of breach. Again, a decision to appeal in the teeth of a waiver clause is thus one that must be made carefully, not hastily. It may be necessary for new counsel (or even a lawyer continuing in the case) to order a transcript of the plea and sentencing in order to give this advice properly, which will alone take at least seven days. Moreover, if new counsel is entering the case, the process of becoming even minimally familiar with a record, in order then to advise on the risks and potential benefits of taking an appeal, is necessarily even more of a time-consuming challenge. And of course, in the minority of cases where there has been a trial, many (but not all) of these same concerns apply, and those that do are magnified.

The present rule permits problems such as we have outlined to be dealt with in either of two ways, both of which are inferior to the idea of simply increasing the appeal period to 30 days. First, the defendant *pro se*, the clerk of the court at the defendant's request, or an attorney could simply file a notice of appeal within the current 14-day window, and then undertake the consultations and make the decisions described above after that. The disadvantage of this method is that it generates responsive action by and thus places burdens on the clerk of the district court and more significantly the clerk of the court of appeals to transmit the electronic record and docket the appeal (with the triggering of attendant deadlines and obligations) that are not known to be necessary. It also requires the payment of a filing fee, in non-IFP cases, an expense which the client should not have to bear until the decision to appeal is really made. The filing of a notice of appeal by counsel (either "old" or new), also creates an expectation and ethical obligation to pursue the appeal to its end, under the rules of most circuits, regardless of whether

payment arrangements have been made. This can place counsel in a very unfair or even untenable position with the client.

The second, and also unsatisfactory alternative is to file a motion under FRAP 4(b)(4) for an extension of time to appeal, invoking whichever of the considerations already mentioned as may apply (or any other) as the required "good cause." But since most of the pertinent circumstances underlying the claim of "good cause" involve the private attorney-client consultation process, as well as the attorney's thought process and work product, it is not appropriate to have to divulge and explain them to the judge, and especially not to the government, in a formal motion, especially one that is publicly filed. Moreover, the drafting and filing of such a motion is time-consuming for counsel and demands a prompt investment of time and attention from the district court that would be rendered unnecessary if the time period for filing a notice of appeal were longer. Filing an extension motion also requires that counsel (if new to the case) enter an appearance, which in turn creates, by the rules of most district courts (which rarely allow special appearances in criminal cases), an expectation of serving from that point forward as counsel of record. Again it is unlikely that counsel will have been properly paid to justify making (or even risking) that commitment.

The final advantage, of some value although not an overriding one, is that a 30-day period would provide uniformity between the civil and criminal rules, and between the defendant and the government in criminal cases. This would reduce the number of inadvertent errors in calendaring the filing deadline, particularly by non-specialist counsel. In our view, any reform that simplifies the structure of the system and minimizes the risk of inadvertent error due to mental lapses of counsel are all to the good.

For these reasons, we commend to the Committee's attention for its favorable consideration and publication for comment the proposal to change the time for a defendant to appeal in a criminal case to 30 days from the entry of judgment.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

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