20-AP-E
20-CV-Y

From: Sai
To: RulesCommittee Secretary
Subject: Comment re proposed FRAP Rule 3 amendments, and suggestion for new rule re statements on possible appeals
Date: Monday, August 24, 2020 12:51:36 PM

Dear FRAP and FRCP Committees —

The proposed amendment to Rule 3 seeks to cure a needlessly complicated rule by still more complication.

The current proposed language in proposed (c)(4) / (c)(5) is excessively legalistic and technical. It does not really solve the problem of making notices of appeal simpler and more robust; rather, it's a new source of confusion and a potential trap for those who rely upon it.

Consider, for instance:

1. What, exactly, counts as "merged"?

This isn't a naïve question; I do know the doctrine, roughly speaking. The problem is that this is hardly a straightforward issue — nor one that the average trial litigator will be expert in. It's an appellate technicality that a procedurally aggressive appellee's appellate-specialist counsel will be sure to challenge.

A litigant who wants to ensure that their notice of appeal is bulletproof can take no solace in the proposed (c)(4). Until the court of appeals makes its ruling, there is no truly *reliable* way to know whether an issue is merged or not — and therefore the proposed (c)(4) also cannot be relied on.

A cautious litigant will simply ignore this clause and opt to be verbose, to protect against having to later argue a possible technical defect — the exact opposite of the Committee's stated intent.

Perhaps the Committees will remember their response to my modest proposal that clerks state what's appealable when, including what counts as a "judgment": a great deal of hand-wringing that the *court itself* might make an error. Surely it's harder to determine what's "merged" into a judgment than the bare question of whether an order is one or not. This proposed rule provides no guidance or determination to make that any better.

If you don't even trust the court itself to decide this correctly — as you said in response to my prior proposal — you really should not be making it implicit in a rule that tells litigants "don't worry about this". They will inevitably commit the error of doing so — only to learn that it's an error after it's far too late to correct, and worse yet, that the erstwhile assurance of your new rule is illusory, with no protective power behind it.

If you are to give such an assurance ethically, you must make it both unmistakable in coverage and binding on the courts of appeals. The proposed rule does neither.

2. What does it even mean for a rule to say something is "not necessary", considering that the essential nature of rules is to only make statements of what is either required or permitted?

This necessarily implies an override of some other rule that says or implies it *is* necessary. So, a cautious (or textualist) reader will ask: where is that other rule, and what else does it require? The answer is, again, not at all obvious, and fodder for hyper-technical circuit splits.

The fix is not to add yet another layer of caveats, exceptions to exceptions, or summary restatements of doctrine.

Rather, it's to change the basic rule to be simpler & more permissive in the first place.

I suggest a radical simplification:

Change the rule so that the appellant just has to say "[I/We] appeal" — and the rule's defaults ensure that they are completely covered.

Any indication of appeal should be taken to encompass everything appealable at that time, unless the notice of appeal explicitly *excludes* some appealable matter from the scope. Rather than having to state what's included (and thereby risk a technical failure), one only has to say something extra if one wants to *waive* an issue. Exempting things *not* appealed, or represented parties not joining the appeal, should be the exception.

If filed before final judgment, then it should encompasses everything subject to interlocutory appeal. If filed afterwards (or contemporaneously), then it's everything except matters that can *only* be interlocutorily appealed.

If filed by CM/ECF, it should be a non-document entry. CM/ECF will note the filer and parties represented as always; it should present a list of everything appealable at the time of entry, with all of them selected by default. Click 'submit' and it files a text-only docket entry that says "X appeals everything appealable except Y — which, for convenience, CM/ECF thinks is the following ECF #s: [list]". If filed by paper, it's an ordinary filing whose entire content is literally "[I/We] appeal." and the usual signature block.

To be more specific, I propose the following replacement language (with proposed committee footnotes inlined):

Rule 3. Appeal as of Right—How Taken

…

(c) Filing the Notice of Appeal.

[delete all of (c)(1), replace with following]

(1) (A, B, & C) Abrogated.

(D) The notice of appeal must indicate that the filer is appealing.

[Note: "[I/We] appeal." is sufficient, and should ordinarily be the entire content of the notice of appeal. CM/ECF should offer a non-document entry for this purpose. By default, everything appealable is appealed, by all parties represented by the filer, to the court of appeals with jurisdiction over the court appealed from.]

(E) The notice of appeal may, but ordinarily will not, designate express exceptions.

(i) The notice may designate parties in the case who are represented by the filer, but are not joining the appeal. In the absence of such an exclusion, all such parties are deemed to be taking the appeal.

[Note: A pro se filer represents whomever of themselves, their spouse, and their minor children are parties.
In a class action, whether or not the class has been certified, the class is included if any appealing party is qualified to be a class representative.
If a represented party is joining the appeal in personal but not official capacity, or vice versa, this must be explicitly stated.]

(ii) The notice may designate judgment(s), appealable order(s), or parts thereof which the appealing parties are not appealing. In the absence of such an exclusion, all appealable matters, including all orders that merge for

purposes of appeal, are deemed to be appealed;

[Note: Unless explicitly excluded, a notice of appeal in civil cases includes the final judgment, regardless of the existence of a separate FRCP 58 document, if it is filed after:
(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or
(B) an order described in Rule 4(a)(4)(A).]

(iii) The notice may designate court(s) to which the appeal is taken. In the absence of such a statement, the usual appellate court is the court to which the appeal is taken.

[Note: A court should only be designated in exceptional circumstances, e.g. for direct appeals to the Supreme Court that skip the usual court of appeals; MDLs; or situations where the appeal is to be transferred to a different jurisdiction.]

(F) The clerk, or CM/ECF if all parties receive electronic service, should immediately thereafter make an advisory filing, informing the parties of the defaults under subparagraph (B), i.e.:

[Note: This notice is purely advisory, and has no substantive or procedural effect. The notice should, if possible, be entirely automated by CM/ECF. If any exclusions were designated, this notice should state that the exclusions take precedence over these defaults.]

(i) the parties represented by the person filing the appeal;
(ii) the full list of appealable orders and judgments at the time of the appeal; and
(iii) the usual court of appeal.

(G) If the notice of appeal is filed directly in the court of appeals, it shall be considered as having been properly filed in the originating court, and the clerk shall send a copy to the originating court.

[Note: 28 U.S. Code § 1631 (cure for mistaken filing in court of appeals).]

[delete (c)(2 & 3), and mark them as abrogated (rather than renumbering following paragraphs), so as to not harm the comprehensibility of other sources' references by number. See e.g. abrogated FRAP 11(d).]

[discard proposed (c)(4-6)]

[delete FRAP 12(b) as redundant]

Furthermore, I suggest the following addition, in order to preempt (or at least lessen) a routine source of confusion, paucity of record for review, technicalities, and avoidable litigation:

FRAP 3(c)(1)

(H) Statements on possible appeals.

See FRCP 60.1, which is triggered by the filing of a notice of appeal.

FRCP 60.1 Statements on possible appeals.

The court must:

(a) within 3 days of
  (1) a party's request,
  (2) the filing of a notice of appeal, or
  (3) the filing of any "judgment" under Rule 54;

(b) file a statement addressing, for each prior order not addressed in a prior statement under this rule:
  (1) regardless of whether final judgment has issued:
    (i) whether it is a "judgment" under Rule 54;
    (ii) whether an appeal from it is, or would be, taken in good faith; and

[Note: Element (ii) is based on FRAP 24(a)(3)(A) and (a)(4)(B); see 28 U.S.C. § 1915(a). Nevertheless, it is required under this rule regardless of the IFP status of the parties.]

    (iii) whether it is, or will be, merged into the final judgment; and

  (2) if final judgment has not yet issued:
    (i) whether and when it is appealable, addressing 28 USC §§ 1291 & 1292 at minimum;
    (ii) whether it involves
      (I) a controlling question of law
      (II) as to which there is substantial ground for difference of opinion;
    (iii) whether an immediate appeal would materially advance the ultimate termination of the litigation;
    (iv) whether it is separable from, and collateral to, rights asserted in the action;
    (v) whether it is too important to be denied interlocutory review;
    (vi) whether it is final, and if not, what would convince the court to change its decision; and
    (vii) whether it is effectively reviewable or curable on appeal from final judgment.

[Note: Elements (ii—vii) are based on 28 U.S. Code § 1292(b) and Cohen v. Beneficial Industrial Loan Corp. In circuits whose precedent sets forth further elements for determining interlocutory appealability, the statement must address those elements as well.

The statement is not binding on the court of appeals, and does not affect the standard of review.]

(c) The court may make a statement under this rule sua sponte, e.g. at the same time as it issues an order.

[Note: This is encouraged. Addressing appealability issues contemporaneously would reduce the number of orders in the scope of ¶ (b); give parties immediate notice of whether an order is appealable without the risk of irritating a judge by making an explicit request; ensure that the record reflects the judge's views at the time the order was issued; and remind judges of the need to make a record sufficient for review.]

I suggest that the Committees read about whitelist vs blacklist based defense in computer security, e.g. as used to prevent SQL injections or determine what programs are safe to run. This is fundamentally the same concept, and the proposed rule commits the usual fundamental error: it picks the wrong default, and then tries to fix it by adding more and more caveats.

If you want to make a simple rule that definitively prevents the risk of underinclusion, the answer is simple: make everything included by default, so that action only needs to be taken to *exclude* something from the default scope.

Sincerely,
Sai