National Association of Criminal Defense Lawyers
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February 19, 2020
Submitted online

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Secretary, Committee on Practice & Procedure
Judicial Conference of the United States

AMENDMENTS TO APPELLATE RULES PROPOSED FOR COMMENT, Aug. 2019

Dear Ms. Womeldorf:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed changes to Rules 3(c) and 42(b) of the Federal Rules of Appellate Procedure.

Founded in 1958, NACDL is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. Our association has more than 8000 direct members. Including NACDL's 94 state and local affiliates, in all 50 states, we are able to speak for a combined membership of some 40,000 private and public defenders, along with many academics.

APPELLATE RULE 3(c) and FORMS – THE NOTICE OF APPEAL

The proposed amendments to Appellate Rule 3(c) would clarify that an appeal taken from the final judgment permits appellate review of all prior orders in the case, and that no order other than the judgment need be mentioned in the notice of appeal. The amendment further clarifies that the appellant's gratuitous mention in the notice of one or more of the earlier orders in the case (such as, in a criminal case, the denial of a suppression motion, the conviction or verdict, or an order denying post-trial motions) must not be interpreted as precluding appellate review of other orders. Finally, the amendment would clarify that in a civil case a notice of appeal taken from the denial of a motion covered by Appellate Rule 4(a)(4)(A) – most importantly, a motion under Civil Rule 59(e) – should ordinarily be understood to encompass also the final order that was sought to be reconsidered or amended. NACDL supports these amendments, which are of particular importance in criminal cases. However, we do have two suggestions for improvement and expansion of those reforms.

1. A defendant's notice of appeal in a criminal case is due within 14 days from the entry of the judgment of conviction and sentence. Fed.R.App.P. 4(b). This is less than half the time allowed under Rule 4(a) for filing the notice of appeal in most civil cases. For that reason, it is particularly unlikely that the appellant in a criminal case would intend, by the wording of the notice, to limit the scope of issues that might be raised in their one direct appeal of right. Indeed, as of the time of filing, it is unlikely that the appellant will have a clear idea of what issues ought to be raised. Moreover, as a matter both of professional

ethics and of constitutional right, a notice of appeal must be filed by the defendant's last attorney of record (typically, the lawyer who handled the sentencing) unless the defendant has clearly and expressly asked counsel not to do so with full knowledge and understanding, after proper counseling, of the consequences of that waiver. See *Garza v. Idaho*, 586 U.S. —, 139 S.Ct. 738 (2019); *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *Peguero v. United States*, 526 U.S. 23 (1999). The attorney who has this responsibility may not be the attorney who will be handling the appeal, may likewise not be the same attorney who handled the plea or trial, and in many cases will not be in a position at that time to know what issue or issues would be available or fruitful to advance on appeal. To interpret the notice, by virtue of its wording, as precluding any potentially appealable issue is therefore particularly inappropriate in criminal cases.

2. The new provision designated as Rule 3(c)(5) – limited by its terms to appeals "[i]n a civil case" – is directly pertinent to our members and clients when the appeal arises out of a habeas corpus or § 2255 case, which are deemed to be civil in nature for appellate purposes. *See* Fed.R. §2255 P. 11(b). Habeas petitioners and 2255 movants who avail themselves of Fed.R.Civ.P. 59(e), for example, may then appeal from the denial (or less-than-full granting) of that motion and neglect to mention in their notice of appeal the antecedent "final order." Or, an appellant might mention the underlying order and not the denial of reconsideration. In such cases, it is highly unlikely that anyone would intend to appeal from the denial of reconsideration only, and not from the underlying order, or to exclude from the scope of the appeal any matter raised on reconsideration. The amendment thus comports with fairness, common sense and good practice.

We do question, however, the Committee's choice to make the amended Rule 3(c)(5) apply only in appeals arising out of civil cases. Perhaps, when excluding criminal cases, the committee was thinking of defendants' direct appeals under 28 U.S.C. § 1291 and government sentencing appeals under 18 U.S.C. § 3742(b). In those cases, which constitute the greatest number of criminal appeals, the proposed limitation is understandable, since there are no proper, nonfrivolous motions akin to those listed in Rule 4(a)(4)(A) that can be filed after entry of the judgment in a criminal case. *Cf*. Fed.R.Crim.P. 35(a); Fed.R.App.P. 4(b)(5). On the other hand, there are certain appeals in criminal cases where applying the clarifying principle to be codified in Rule 3(c)(5) would be apt: for example, a defendant's collateral-order appeal of a detention or bail order under 18 U.S.C. § 3145(c) or a defendant's double jeopardy appeal as authorized by *Abney v. United States*, 431 U.S. 651 (1977). Such appeals are often preceded in the district court by a motion for reconsideration. Yet under the terms of the new Rule, the Courts of Appeals may conclude, by application of *expressio unius* – even in Circuits whose previous precedent was consistent with the amended rule but not limited to civil cases – that the notice of appeal now *must* identify both the underlying appealable order and the denial of reconsideration in order to authorize appellate review of the principal order. The same would be true of a government notice of appeal, when the prosecution appeals an order as authorized under 18 U.S.C. § 3731 and Fed.R.App.P. 4(b)(1)(B). To avoid this undesirable result, proposed Rule 3(c)(5) will have to be reworked, perhaps by adding a subparagraph along these lines:

> In a criminal case, a notice of appeal from an appealable order other than the final judgment encompasses both that order and any order denying a timely motion for reconsideration of that order, whether the notice of appeal is filed after entry of the appealable order or after denial of reconsideration.

3. As for the proposed amendments to the suggested forms for a Notice of Appeal, we are pleased to see the striking of the superfluous second "hereby," which should have been deleted at the time of restyling many years ago. Indeed, along the same lines, we would suggest deletion of the first five, entirely uninformative words ("Notice is hereby given that") as well as the self-evident and useless phrases "in the above named case" and "in this action" from both Form 1A and Form 1B. The forms would be more consistent with the style of the rules in general – without any loss of clarity or legal effect – if the notice of appeal simply said: "The defendant, Joan Doe [or other appellant], appeals to the United States Court of Appeals for the [appropriate] Circuit from the final judgment [or "judgment of sentence"] [or other appealable order] entered on [date entered]."

APPELLATE RULE 42(b) – VOLUNTARY DISMISSAL

The proposed amendments to Rule 42(b) are well taken for the reasons discussed in the Committee's report and Note. However, as applied to direct appeals of right taken by criminal defendants, we believe that the new Rule 42(b)(2) (currently, the last sentence of Rule 42(b)) should be strengthened to protect defendants from inappropriate "voluntary" dismissal of their appeals by counsel. A second sentence should be added to this new subsection stating, in words or substance, that:

> In a criminal case, the court must not dismiss a defendant's appeal unless satisfied that the appellant personally has approved the motion to dismiss with full knowledge of the right being waived and the consequences of the dismissal. A written consent to the dismissal signed and affirmed by the appellant personally, articulating the nature of the right being waived and the consequences of that waiver, must be included with any motion of the appellant to dismiss a defendant's direct criminal appeal.

This requirement would be consistent with current practice in many but not all of the Circuits, under the Rule's "terms ... fixed by the court" clause. A signed waiver of this sort is essential to protect the defendant-appellant's Sixth Amendment rights and to prevent motions under Rule 42(b) from being used to evade the constitutional requirements of *Smith v. Robbins*, 528 U.S. 259, 269–84 (2000) (explaining *Anders v. California*, 386 U.S. 738 (1967)), particularly where counsel has not been court-appointed. An amendment of this sort would also serve to minimize the later filing of unnecessary post-conviction challenges to the efficacy of such dismissals of direct appeals.

We thank the Committee for its excellent and valuable work and for this opportunity to contribute our thoughts. NACDL looks forward to continuing our longstanding relationship with the advisory committees as a regular submitter of written comments.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

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