



HORVITZ & LEVY LLP

February 8, 2008

07-AP-009

Peter Abrahams
David M. Axelrad
Kris S. Bahr

Peder K. Batalden
Dean A. Bochner
Karen M. Bray

Frederic D. Cohen
Curt Cutting

David S. Ettinger
Adam M. Flake

Andrea M. Gauthier*
Daniel J. Gonzalez

Ellis J. Horvitz*
Loren H. Kraus*

Barry R. Levy*
Jason R. Litt

Kim L. Nguyen
Stephen E. Norris

Bradley S. Pauley
Lisa Perrochet

Alicia A. Pell
John F. Querio

Jeremy B. Rosen
Felix Shafir

Mary-Christine Sungaila
John A. Taylor, Jr.

Margaret S. Thomas
Mitchell C. Tilner

S. Thomas Todd
H. Thomas Watson

Julie L. Woods
Robert H. Wright

*A Professional Corporation
*Of Counsel

15760 Ventura Blvd.
18th Floor
Encino, CA 91436-3000
Tel (818) 995-0800
Fax (818) 995-3157

www.horvitzlevy.com

BY ELECTRONIC MAIL

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, DC 20544

Re: *Proposed Amendment to Fed. R. App. P. 4(a)(4)(B)*

Dear Mr. McCabe:

The Advisory Committee's proposed amendments to the Federal Rules of Appellate Procedure are welcome. I write only because the Committee's proposed amendment to Rule 4(a)(4)(B) carries an unintended consequence.

Under the amended rule, the losing party may appeal from an order resolving one of the tolling motions listed in Rule 4(a)(4)(A). The notice of appeal must be filed within 30 days of the entry of that order. If the district court elects to enter an amended judgment reflecting its order, the losing party's 30-day period to appeal from the amended judgment also runs from the entry of the order. Tethering the time to appeal from the *amended judgment* to the entry of the *order* poses a problem in cases where the amended judgment is not entered until more than 30 days after the entry of the order. In this situation, it is literally impossible for the losing party to file a timely notice of appeal from the amended judgment—the amended judgment will not have come into existence by the time the notice must be filed.

This is not a matter of idle curiosity. I face a comparable issue in a current case. Other litigants will face this issue whenever the district court affords the prevailing party ample time (say, two weeks) to propose an amended judgment and, in turn, allows the losing party ample time (say, another two weeks) to file objections to that proposal, before the district court finally rules on the objections and enters the amended judgment.

Peter G. McCabe
February 8, 2008
Page 2

One solution to this quandary is to delete entirely the language "or a judgment's alteration or amendment upon such a motion" from the amended rule. Frankly, this language appears to be unnecessary. In most cases, the district court does not enter an amended judgment after ruling on tolling motions. In the few cases where the district court does enter an amended judgment, the losing party could file a separate notice of appeal from the amended judgment if the amendment is substantive. Absent the language quoted above, by operation of Rule 4, the losing party could timely file that separate notice of appeal within 30 days of the entry of the amended judgment.

Sincerely,

A handwritten signature in black ink, appearing to read "PKB", with a stylized flourish at the end.

Peder K. Batalden

PKB/klt