U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

February 14, 2008

07-AP-014

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

Dear Mr. McCabe:

The United States Department of Justice appreciates this opportunity to comment on proposed amendments to the Federal Rules of Appellate Procedure. As the nation's principal litigator in the federal courts, the Department has a strong and longstanding interest in participating in the rules amendment process, and in sharing with the Committee on Rules of Practice and Procedure its experiences with the rules and describing how its practice could be affected by the proposed amendments.

This letter addresses the Committee's proposed amendments to FRAP 4 and 40, and proposed FRAP 12.1. The Department of Justice is sending a separate letter to the Committee to address the proposed "time computation" amendments.

As explained below, the Department supports the proposed amendments to FRAP 4 and 40 (both of which evolved from proposals by the Department), and, while we support the new proposed FRAP 12.1, we urge an amendment to the draft Committee Note accompanying that rule.

1. The Committee has proposed amendments to FRAP 4(a)(1)(B) and FRAP 40(a)(1) in order to make clear that additional notice-of-appeal and rehearing-petition time limits apply in cases involving "a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." We support both of these changes.

Currently, FRAP 4(a)(1) provides that in a civil case a notice of appeal generally must be filed with the district court within thirty days after the judgment or order appealed from is entered. See FRAP 4(a)(1)(A). However, "[w]hen the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered." FRAP 4(a)(1)(B). This extended time for filing a notice of appeal in cases in which the United States is a party recognizes the Federal Government's need to review the case, determine whether an appeal is warranted, and secure approval from the Solicitor General.

FRAP 40(a)(1) states that "a petition for panel rehearing may be filed within 14 days after entry of judgment," unless this time is altered by court order or local rule. "But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment * * *." Ibid. The forty-five day period, "analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing." Rule 40, Advisory Committee Notes, 1994 Amendment.

Although the extended filing times in FRAP 4 and 40 clearly apply to appeals involving a federal officer sued in his official capacity, neither rule explicitly extends these filing times to appeals in which a United States officer or employee is sued in an individual capacity for actions that occur in the performance of his official duties. As a result, the proper deadline by which to file a notice of appeal or petition for rehearing is an issue that frequently arises in Bivens appeals. Clarification of the rules would allow the Government to utilize the extended filing times intended for appeals in which the United States participates. Currently, out of an abundance of caution, the Government's general practice in Bivens appeals is to file notices of appeal within thirty days or seek extensions of the fourteen-day limit for petitions for rehearing, in order to avoid any possibility of litigation over timeliness.

We note that the same rationale for providing an extended deadline in FRAP 4 and 40 to appeals in which "the United States or its officer or agency is a party" supports an extended deadline for appeals in which the United States may participate because of its representation of an officer or employee sued in his individual capacity. See 28 C.F.R. § 50.15(a) (federal officer or employee sued in individual capacity is eligible for representation when his actions "reasonably appear to have been performed within the scope of the employee's employment" and representation is in the interest of the United States). When a United States officer or employee is sued in his individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States, and the Government decides to provide representation to the officer or employee, the Government, as in any other appeal to which it is a party, requires time to conduct a review of the case, determine whether appeal or rehearing is appropriate, and seek approval from the Solicitor General.

Further, such amendments would maintain consistency between the FRAP and the Federal Rules of Civil Procedure, governing district court matters. FRCP 12(a) sets forth the relevant periods in which a defendant must serve an answer to a complaint in district court. FRCP 12(a) provides that the default period is twenty days, but that, when "[t]he United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity" is the defendant, the period is extended to sixty days. Similar to the current versions of FRAP 4 and 40, FRCP 12, prior to an amendment in 2000, provided that "[t]he United States or an officer or agency thereof" was entitled to sixty days to file an answer; the former version of the rule did not specify whether this extended time to file also applied to a case in which the defendant was a United States

officer or employee sued in his individual capacity for acts performed within the scope of his employment. In the 2000, however, FRCP 12(a)(3)(B) was added to remedy this situation.

FRCP 12(a)(3)(B) now provides that the extended sixty-day period applies to a suit against "[a]n officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States." The rationale for adopting this amendment was that in cases involving a United States officer or employee sued in his individual capacity for actions arising out of the performance of his official duties, "[t]ime is needed for the United States to determine whether to provide representation to the defendant officer or employee." FRCP 12, Advisory Committee Notes, 2000 Amendment. Moreover, "[i]f the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." Ibid.

Therefore, because the Federal Rules of Civil Procedure have been amended to clarify that an extended filing time for the United States, its agencies, or officers should also apply to district court filings in a case involving a United States officer or employee sued in his individual capacity for actions occurring in the performance of his official duties, the proposed amendments to FRAP 4 and FRAP 40 would be consistent with the rules governing the district courts, and will serve important policy interests.

2. Acting on a suggestion originally made by the Solicitor General, the Committee is proposing a new appellate rule setting out a procedure for "indicative rulings" by the district courts. These are tentative rulings issued by the district courts in response to motions after a trial court has lost jurisdiction because of the filing of a notice of appeal. All of the Circuits have established procedures through case law for dealing with such motions, under which a district court can indicate that it would be inclined to grant, for example, a motion under FRCP 60(b) if it still had jurisdiction. We proposed a new FRAP provision to describe and govern this practice because so many practitioners seemed unaware of it.

The Appellate and Civil rules committees ultimately agreed to recommend new provisions in the FRAP and FRCP concerning indicative rulings. As currently framed, proposed FRAP 12.1 is broadly worded, and would appear to cover civil as well as criminal cases. This broad coverage causes concern for the Department, and we therefore urge that the Committee Note for proposed FRAP 12.1 be changed to read as follows, in pertinent part: "Appellate Rule 12.1 is limited to the Civil Rule 62.1 context and to newly discovered evidence motions under Criminal Rule 33(b)(1), as provided in *United States v. Cronic*, 466 U.S. 648, 667 n.42(1984), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. 3582(c)."

We make this proposal after extensive consultations with our criminal law experts within the Justice Department, including in the United States Attorneys' offices throughout the United States. Their broad experience makes clear that the issue of possible indicative rulings legitimately arises

only in the context of FRCrP 33(b)(1) (dealing with motions for a new trial based on newly discovered evidence), FRCrP 35(b) (dealing with motions by the Government for a reduced sentence because of a defendant's substantial assistance), and 18 U.S.C. 3582(c) (dealing with motions for a reduction in sentence from the Director of the Bureau of Prisons or based on a retroactive guidelines amendment); we are not aware of any other types of motions in criminal cases for which an indicative ruling might be appropriate. We are concerned that, without the change to the Committee Note that we are urging, the federal district courts will be swamped with inappropriate motions by prisoners acting pro se who do not understand the limited purposes for which indicative rulings are warranted.

Accordingly, our proposed amendment to the Committee Note would make clear that motions under FRCrP 33(b)(1), FRCrP 35(b), and 18 U.S.C. 3582(c) are covered by the new indicative rulings rule, but that the new rule does not otherwise apply broadly to motions outside the civil context. (Note that there is no reason to include FRCrP 35(a) within the coverage of the new rule because FRAP 4(b)(5) already makes clear that a trial court retains jurisdiction to rule on motions under FRCrP 35(a) (motions to correct clear sentencing errors).) With the change to the Committee Note described above, the Department recommends that FRAP 12.1 be adopted.

Very respectfully,

Paul D. Clement
Solicitor General