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cc:

Subject: FW: Proposed rule on cross appeals

Judge Alito asked me to forward this message to you. Please add it to your agenda book for our upcoming meeting.

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> -----Original Message-----

> From: Douglas.Letter@usdoj.gov [mailto:Douglas.Letter@usdoj.gov]

> Sent: Friday, April 02, 2004 7:33 AM

> To: 'PJSCHILTZ@stthomas.edu'

> Subject: RE: Proposed rule on cross appeals

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> Pat:

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> I had asked Tony Yang, the atty here who had done much
> of the work on the cross-appeals proposal, to look it over
> one final time to see if there were any other technical
> things he saw that needed fixing. Here is the note he sent me:

>

> Doug -

>

> As we discussed, I recommend making three modifications to
> proposed Rule 28.1, two of which address amicus, intervenor,
> and supplemental briefs in cases involving cross-appeals. I
> address each of my suggested modifications in order of their
> appearance in Rule 28.1.

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> First, I suggest adding a sentence to the proposed Committee
> Note to proposed Rule 28.1(b) to clarify that the term
> "appellant" (and "appellee") as used by rules other than
> Rules 28.1, 30, and 34, refer to both the appellant in an
> appeal and the cross-appellant in a cross-appeal (appellee in
> an appeal and cross-appellee in a cross-appeal). This is
> important for numerous rules. For example, Rule 31(c)
> provides that an "appellee" may move to dismiss an appeal of
> the "appellant" fails to file a brief. The potential
> sanction of dismissal should apply to both appellants and
> cross-appellants that fail to file a brief.

>

> I therefore suggest adding the following sentence to the end
> of the proposed Committee Note to proposed Rule 28.1(b): "In
> Rule 31 and all rules other than Rules 28.1, 30, and 34,
> references to an "appellant" refer both to the appellant in
> an appeal and to the cross-appellant in a cross-appeal and
> references to an "appellee" refer to the appellee in the
> appeal and cross-appellee in the cross-appeal. Cf. Rule
> 31(c)." With this modification, the proposed Committee Note
> would read as follows:

>

> Subdivision (b). Subdivision (b) defines who is the
> "appellant" and who is the "appellee" in a case involving a
> cross-appeal. Subdivision (b) is taken directly from former
> Rule 28(h), except that subdivision (b) refers to a party
> being designated as an appellant "for the purposes of this
> rule and Rules 30 and 34," whereas former Rule 28(h) also
> referred to Rule 31. Because the matter addressed by Rule
> 31(a)(1) - the time to serve and file briefs - is now
> addressed directly in new Rule 28.1(f), the cross-reference
> to Rule 31 is no longer necessary. In Rule 31 and all rules
> other than Rules 28.1, 30, and 34, references to an
> "appellant" refer both to the appellant in an appeal and to
> the cross-appellant in a cross-appeal and references to an
> "appellee" refer to the appellee in the appeal and
> cross-appellee in the cross-appeal. Cf. Rule 31(c).

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> Second, I suggest modifying Rule 28.1(d) to incorporate
> current Rule 32(a)(2)'s provisions concerning the color of
> amicus, intervenor, and supplemental briefs.

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> This change is required because proposed Rule 28.1(a)
> provides that Rule 32(a)(2), which currently governs the
> color of such briefs, will not apply in cases in which a
> cross-appeal is filed, except as otherwise provided in
> proposed Rule 28.1. If proposed Rule 28.1 is not modified to
> specify the color of intervenor, amicus, or supplemental
> briefs, no rule will govern this subject for cases involving
> cross-appeals.

>
> Rule 28.1(d) can be modified to fill this void by striking
> the "and" before "the appellee's reply brief" and adding the
> following at the end of the first sentence of Rule 28.1(d):
> "; an intervenor's or amicus curiae's brief, green; and any
> supplemental brief, tan." With this modification, proposed
> Rule 28.1(d) would read as follows:

>
> (d) Cover. Except for filings by unrepresented parties, the
> cover of the appellant's principal brief must be blue; the
> appellee's principal and response brief, red; the appellant's
> response and reply brief, yellow; the appellee's reply brief,
> gray; an intervenor's or amicus curiae's brief, green; and
> any supplemental brief, tan. The front cover of a brief must
> contain the information required by Rule 32(a)(2).

>
> I note that there are other modifications to proposed Rule
> 28.1(d) that can have the same effect (e.g., have a separate
> sentence that states that the color of intervenor's, amicus
> curiae's, and supplemental briefs must be that specified in
> Rule 32(a)(2)), but I believe the above approach is best
> because it sets forth all the applicable rules regarding
> brief color concisely in one place.

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> Third, I suggest modifying the commentary to proposed Rule
> 28.1(e) to clarify the maximum length of amicus curiae briefs
> in cases involving cross-appeals.

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> Rule 29(d) currently sets the maximum length of such briefs
> to be "one-half the maximum length authorized by these rules
> for a party's principal brief." Because proposed Rule
> 28.1(e) provides that the appellee's first brief serves the
> dual function of a principal and response brief and further
> provides an additional five pages/2500 words for such briefs
> beyond that authorized for the appellant's principal brief,
> there is some ambiguity as to the maximum length of an amicus
> curiae's brief that supports the appellee.

>
> This ambiguity can be resolved by adding the following
> sentence at the end of the proposed Committee Note to
> proposed Rule 28.1(e): "For purposes of determining the
> maximum length of an amicus curiae's brief under Rule 29(d),
> the maximum length of a "principal brief" is the maximum
> length specified in subdivision (e) for an appellant's
> principal brief." With this modification, the proposed
> Committee Note would read as follows:

>
> Subdivision (e). Subdivision (e) sets forth limits on the
> length of the briefs filed in a case involving a
> cross-appeal. It is patterned after Rule 32(a)(7), which
> does not specifically refer to cross-appeals. Subdivision

> (e) permits the appellee's principal and response brief to be
> longer than a typical principal brief on the merits because
> this brief serves not only as the principal brief on the
> merits of a cross-appeal, but also as the response brief on
> the merits of the appeal. Likewise, subdivision (e) permits
> the appellant's response and reply brief to be longer than a
> typical reply brief because this brief serves not only as the
> reply brief in the appeal, but also as the response brief in
> the cross-appeal. For purposes of determining the maximum
> length of an amicus curiae's brief under Rule 29(d), the
> maximum length of a "principal brief" is the maximum length
> specified in subdivision (e) for an appellant's principal brief.

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> Very little in the current appellate rules address
> intervenor's, amicus curiae's, and supplemental briefs.
> Indeed, the only rule that addresses all three is Rule
> 32(a)(2), which governs the color of such briefs.

> The only other rule that addresses amicus briefs is Rule 29,
> and the only complication raised by that rule is that
> associated with the length of amicus briefs previously discussed.

> Intervention in petitions for review is governed by Rule
> 15(d), but nothing in this rule pertains to intervenors'
> briefs. Intervention in appeals from district court orders
> and judgments is rare since most parties intervene in
> district court. While state and federal governments may
> intervene as of right in an appeal when the constitutionality
> of a state or federal statute is at issue, see 28 U.S.C.
> 2403; cf. Rule 44, no appellate rule governs such interventions.

> Likewise, no rule other than Rule 32(a)(2) addresses
> supplemental briefs. The particulars for these briefs (other
> than color) are therefore governed by court order.

> In light of the absence of any more existing appellate rules
> for amicus, intervenor, and supplemental briefs, I do not see
> a need for anything more in cases involving a cross-appeal.

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> Just let me know if I can be of further assistance.

> Tony