Changes to Federal Rules Clarify Procedural Questions for Appeals

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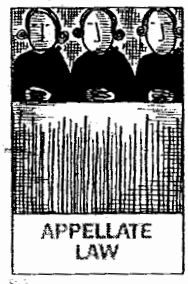
The first and most important step in any appeal is the timely filing of a notice of appeal. Without complying with this jurisdictional prerequisite, there is no appeal. See, e.g., *Browder v. Director, Department of Corrections.*, 434 U.S. 256, 264 (1978). Federal Rule of Appellate Procedure 4(a)(6) is one of only a handful of rules that may help the unfortunate practitioner who fails to file a timely notice of appeal.



Accordingly, upcoming amendments to Rule 4(a)(6) that take effect Dec. 1 are worth knowing about.

Ordinarily a litigant in federal court has 30 days to file a notice of appeal (or 60 days if the federal government is a party). Federal Rule of Appellate Procedure 4(a)(1)(A)(B). The time to file this jurisdictionally significant document begins to run with the District Court's entry of the order or judgment to be appealed.

Rule 4(a)(6) permits a District Court to reopen (that is, extend) the time for filing a notice of appeal when a party fails to receive proper notice of entry. See, e.g., *Arai v. American Bryce Ranches Inc.*, 316 F.3d 1066 (9th Cir. 2003) ("Rule 4(a)(6) was adopted to soften the harsh penalty of losing one's right to appeal due to the government's malfeasance in failing to notify a party of a judgment.").

The rule currently provides that a District Court may reopen the time for filing a notice of appeal for 14 days if three conditions are met: (1) a motion seeking relief is filed within seven days after the moving party receives notice of entry of the appealable judgment or order (or 180 days after entry, if no notice is received); (2) the District Court finds that the moving party was entitled to notice of entry, but did not receive notice from the court or any party within 21 days after entry; and (3) the court finds no prejudice would result from allowing the filing of an otherwise tardy notice of appeal.

The rule's current formulation has been an invitation to confusion. The circuits have split as to whether written or oral notice is required to trigger the seven-day period under Rule 4(a)(6)(A). See Report of Advisory Committee on Appellate Rules, Federal Rule of Appellate Procedure 4(a)(6) advisory committee's note at 4-6 (May 22, 2003).

For example, in *Nguyen v. Southwest Leasing & Rental Inc.*, 282 F.3d 1061 (2002), the 9th U.S. Circuit Court of Appeals held that although "oral communication of entry of judgment alone is ordinarily insufficient to trigger the time periods running under Rule 4(a)(6)," the court did not completely close the door on oral notice.

Instead, the court held that "the quality of the communication must rise to the functional equivalent of written notice to satisfy Rule 4(a)(6)'s notice requirement. This means that the notice must be specific, reliable, and unequivocal." In reaching this conclusion, the *Nguyen* court specifically noted that Rule 4(a)(6) did not require that the moving party receive notice of entry pursuant to Federal Rule of Civil Procedure 77(d), which requires the District Court clerk to serve notice of entry on the parties upon entry of an order or judgment.

In most other circuits, however, only written notice could trigger Rule 4(a)(6)(A)'s seven-day period. See, e.g., *Bass v. United States Department of Agriculture*, 211 F.3d 959 (5th Cir. 2000); see also Federal Rule of Appellate Procedure 4(a)(6) advisory committee's note at 5-6.

Similarly, Rule 4(a)(6)(B) does not clearly define what constitutes notice of entry. This subsection was revised in 1998 to omit reference to Rule 77(d). Thus, under the post-1998 formulation, "*some* kind of notice, in addition to Civil Rule 77(d) notice, precluded a party [from seeking relief under Rule 4(a)(6).]" Federal Rule of Appellate Procedure 4(a)(6) advisory committee's note at 4 (italics in original).

The rule, however, does not explain what type of notice was required, which has been "an invitation for litigation, confusion, and possible circuit splits." Federal Rule of Appellate Procedure 4(a)(6) advisory committee's note at 4; see also *American Boat Company Inc. v. Unknown Sunken Barge*, 2005 U.S. App. LEXIS 17208 (8th Cir. Aug. 16, 2005) (discussing Federal Rule of Appellate Procedure 4(a)(6) motion in context of e-mail notification from District Court).

The amendments to Rule 4(a)(6) effective this December are designed to end this confusion. Back in May 2003, the Advisory Committee on Appellate Rules proposed amending Rule 4(a)(6) to accomplish three goals: to organize the rule more logically; to clarify what type of "notice" will preclude a party from later seeking relief under the rule; and to clarify the type of "notice" that triggers the seven-day period for bringing a motion to reopen under the rule.

Amended Rule 4(a)(6) will permit a District Court to reopen the time to file an appeal for 14 days if the following three conditions are satisfied: (1) the court finds that the moving party did not receive notice of the entry under Federal Rule of Civil Procedure 77(d) of the judgment or order sought to be appealed within 21 days after entry; (2) the moving party files a motion to reopen within 180 days after entry of the judgment or order or within seven days after the moving party receives or observes written notice of the entry from any source, whichever is earlier; and (3) the court finds that no party would be prejudiced.

Thus, amended Rule 4(a)(6)(A) — previously Rule 4(a)(6)(B) — clarifies that a District Court may reopen the time to file an appeal only if the moving party did not receive notice under Rule 77(d), which requires the District Court clerk to serve notice of entry under Federal Rule of Civil Procedure 5(b). Similarly, amended Rule 4(a)(6)(B) — previously Rule 4(a)(6)(A) — makes clear that only written notice of entry triggers the seven-day period for moving to reopen the time to appeal.

The amendments to Rule 4(a)(6) benefit practitioners by clarifying important procedural questions with jurisdictional import. The amended rule should quell confusion about what type of notice triggers the rule and permits a motion to reopen.

That said, while resolving when a motion to reopen must be filed, the amendments to Rule 4(a)(6) do not alter the standard for obtaining relief under the rule. Even if a movant satisfies all the requirements of Rule 4(a)(6), a District Court still retains discretion to deny a motion to reopen. See *Arai*.

The *Arai* court did not enumerate what factors a District Court could or should consider in exercising its discretion. The *Arai* decision does explain, however, that a District Court may not consider the merits of the underlying appeal in deciding a motion to reopen.

Similarly, in deciding a Rule 4(a)(6) motion, a District Court may not consider "excusable neglect" — that is, whether the moving party's actions were "reasonable" in not learning of the entry of judgment or order. See *Nunley v. City of Los Angeles*, 52 F.3d 792 (9th Cir. 1995).

Finally, Rule 4(a)(6) remains the exclusive means for a District Court to reopen the time to appeal due to lack of notice of entry of a judgment or order. See *In re Stein*, 197 F.3d 421 (9th Cir. 1999). A District Court has no authority to grant relief under any other rule, including motions for relief from judgment or order pursuant to Federal Rule of Civil Procedure 60(b). Consequently, Rule 4(a)(6) is the only possible remedy for a missed deadline, making an understanding of its provisions essential for any practitioner.

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