

PRACTITIONERS' NOTES

[The following notes highlight the major changes in practice before the Court made by the current Rules revisions contained in Miscellaneous Orders 1-03 and 2-03; they do not cover all changes, and practitioners are responsible for becoming familiar with all changes in the Rules.]

Rule 3. Rule 3(c) now provides more detail as to the contents of a Notice of Appeal and that correspondence from claimants will be liberally construed in determining the timely filing of a Notice of Appeal.

Rule 3(h) now states that all Court transactions are conducted in English and requires a certified (28 U.S.C. § 1746) English translation whenever a document in a foreign language is filed (including in the record on appeal). The burden of providing the translation is on the party actually transmitting the foreign-language document to the Court.

Rule 5. Rule 5(a) now specifically provides that a unilateral or unopposed motion for a stay cannot be made for the purpose of negotiations or to extend a filing time, and that only a joint motion to stay proceedings can be made to allow time for settlement or remand negotiations (rather than using a motion for an extension under Rule 26). Such a joint motion or motions will not be granted in any case for more than a total of 60 days. The rationale for only allowing joint motions for negotiation is that unless both parties are sufficiently committed to negotiation to sign a joint motion no meaningful negotiation appears likely.

Rule 5(b) points out that a stay becomes effective only when granted and that it merely "freezes" the Court's process. The lifting of the stay resumes the filing timetable at the point where it was interrupted; it does not "restart" the filing timetable.

Rule 5(c) provides that stays are extended by "continuations" and that such continuations are not governed by the more stringent extension requirements of Rule 26(b).

Rule 6. This new Rule recognizes the appellant's or petitioner's right to privacy by requiring that the VA claims number not be put on motions, briefs, or responses (although it is still required to be on the Notice of Appeal so that officials can match the correct VA file with the appellant), and by requesting that it also be redacted from any document filed in connection with such pleadings.

Rule 11. Rule 11(a)(2) now provides that the time for filing the record on appeal starts with the passage of the time for a counter designation/acceptance statement or the service of the counter designation/acceptance statement, whichever is sooner.

Rule 21. Rule 21(c) now requires that petitions and answers meet all format requirements of briefs (Rule 32) and cannot exceed 20 pages. Also, the translation requirement of Rule 3(h) applies to petitions and answers.

Rule 25. Rule 25(a)(3) now notes that confirmation of a filing in the Court (but not of the adequacy of the document filed) can be confirmed by reference to the case docket on the Court's web site (www.vetapp.gov).

Rule 25 (d) now provides that service on another party in a particular case may be by fax if that party agrees thereto in writing (in order to forestall later disputes about service).

Rule 26. Rule 26(b) now limits extensions of time for any particular action to 45 days, as long as there is a showing of good cause (which may include workload considerations). After 45 days of extensions for a particular action have been granted, further extensions for that action will be granted only upon a showing of "extraordinary circumstances" (which may never include workload considerations). Also, a motion to suspend the rules cannot be used to obtain an extension.

Motions based on extraordinary circumstances (i.e., motions for extensions of time beyond 45 days for a particular action) must be filed 14 days in advance of the date to be extended; if filed later and not acted upon by the date sought to be extended, such a motion is denied "by Rule." The reason for this provision is to allow time to refer the motion to a judge and to obtain action thereon.

Rule 26(d) now provides that motions to extend time may not be combined with any other motion.

Rule 27. Rule 27(d) now provides that motions are limited to 20 pages in length.

Rule 27(e) now prohibits the filing of nondispositive motions that address more than one subject (e.g., a motion to both file a supplement to the record on appeal and exceed the page limit for the brief would not be allowed).

Rule 28. Rule 28(e) now prohibits motions in lieu of a brief during the Rule 28 briefing period (which begins with the notice to file the appellant's brief (Rule 11) and extends through the filing of (or running of the time for filing) the appellant's reply brief). This change does not preclude the filing of motions for summary disposition *before or after* this briefing process. It also prohibits including any motion in a brief (including a motion for oral argument, *see* new Rule 34(a)).

Rule 32. Rule 32(b) now adopts a larger typeface size closer to (but not as large as) the Federal Rules of Appellate Procedure typeface standard applied by the Federal Circuit. Suggested typefaces are Times New Roman or Arial @ 13-point (proportional types) or Courier New @ 12-point (monospaced type).

Rule 32(i) now refers to Rule 45(k). Under the latter rule, papers (except for declarations of financial hardship and prohibited motions, which will be returned) that do not conform to these rules will be received (and in limited cases filed) and the submitting party advised of needed corrections; failure to comply may result in dismissal. Besides erroneous typeface, binding down the side is a significant violation.

Rule 34. Rule 34(a) now provides that the time for filing a motion for oral argument is extended to 14 days after the date that the reply brief is due or filed, whichever is sooner.

Rule 34(f) now requires immediate notice to the Clerk of settlement negotiations, and notice of settlement at least 3 days before oral argument is scheduled.

Rule 38. Rule 38 now applies to all filings in the Court.

Rule 39. Rule 39 now provides more guidance on supplemental applications (*see* Rule 39(d)), and sets the

filing date for supplemental applications at 20 days (because the date for otherwise entering judgment is the 21st day after issuance of a disposition). Also, a supplemental application must contain a fees-and-expenses accounting for its own submission (to avoid a potentially endless parade of supplemental applications).

Rule 40. This new Rule establishes new provisions for membership on the Rules Advisory Committee, a body that has provided important service to the Court (and to the bar).

Rule 41. Rule 41(a) now clarifies that a mandate is merely evidence of finality, not a document that creates finality and starts the period for filing an application for attorney fees and expenses; that period starts on the 61st day after judgment is entered, regardless of when the mandate is issued.

Rule 41(b) now addresses applications for attorney fees and expenses; *see* "Judgments and Mandates" below.

Rule 42. Rule 42 now clarifies that "termination" relates only to the merits of an appeal or petition, never to an application for attorney fees and expenses.

Rule 45. Rule 45(k) details the Clerk's responsibility with respect to nonconforming documents submitted to the Court. Unless return is required by another rule, documents will be **received or (in the case of jurisdictional filings) filed, but** not acted upon until a conforming version is submitted, and failure to submit a conforming document may result in dismissal.

Rule 47. Rule 47(a) now allows for ordering expedited proceedings at any stage (not just for briefing), and establishes criteria under which the Court may find good cause, based on exceptional circumstances, for expediting proceedings. It is intended that every effort will be made to decide the case as quickly as possible when an expedited-proceedings motion is granted.

RELATED MATTERS

Judgments and Mandates. Under a change to the Court's Internal Operating Procedures to be effective on the same date as the revision of these Rules, the Court will begin issuing judgments and mandates following dispositive action on petitions and applications for attorney fees and expenses, in the same manner as is done following dispositive action on appeals.

Whenever a petition is dismissed voluntarily (i.e., the petitioner moves to withdraw the petition) or upon the joint motion of the parties, the mandate will be issued as part of the dismissal order, per Rule 41(b) (consent dispositions).

Whenever an application for attorney fees and expenses is granted as uncontested or dismissed voluntarily (i.e., after the parties jointly move to dismiss the application), the mandate will be issued as part of the dispositive order, per Rule 41(b) (consent dispositions).

Additional References. Under "Court News & Announcements," there is posted (1) under the title "Changes Following Comment Period," a clean copy of the September revision (with deletions and additions made as

if all the proposed changes had occurred) with the changes made following the public comment period shown via underlining and strikeout, and (2) under the title "Rules Revision Comparison," a set of the newly adopted Rules per Miscellaneous Order Nos. 1-03 and 2-03 showing the changes from the Rules in effect prior to both revisions.