

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

MISC. NO. 10-07

IN RE: RULES OF PRACTICE AND PROCEDURE

Before GREENE, *Chief Judge*, and KASOLD, HAGEL, MOORMAN,  
LANCE, DAVIS, and SCHOELEN, *Judges*.

**ORDER**

Pursuant to the authority of 38 U.S.C. § 7264(a) and consistent with 28 U.S.C. § 2071(b) and (e), the Court intends to revise Rules 10, 11, and 45 of its Rules of Practice and Procedure (Rules) and to add a new Rule 28.1. After considering the recommendations of the Rules Advisory Committee and the Board of Judges, the proposed changes have been prepared.

The proposed rule on the Designation of the Record before the Agency would replace the current Rule 10 and the current Rule 11(a) and (b). The current Rule 11(c) would be reclassified as a new subsection (g) to the proposed rule on the Designation of the Record before the Agency, and the current Rule 11(d) would be reclassified as a new subsection (h) to the proposed rule on the Designation of the Record before the Agency. The proposed rule on the Joint Appendix to the Briefs would appear as a new Rule 28.1.

The proposed revision to Rule 45(g)(2) would amend current Rule 45(g)(2) to read in its entirety as follows: "vacate the Board's decision and remand the case for action consistent with the terms of the motion;"

Administrative changes would also be made throughout the Rules to replace the phrase "record on appeal" with the phrase "Record before the Agency" or "Joint Appendix", as appropriate.

Public comment on these proposed changes is invited. All comments must be received by the Clerk of this Court at 625 Indiana Avenue, NW, Suite 900, Washington, DC, 20004-2950, on or before May 7, 2007. It is

ORDERED that the attached proposed changes to Rules 10, 11, and 45 and the proposed addition of Rule 28.1 to the Rules of Practice and Procedure are hereby published.

DATED: April 6, 2007

BY THE COURT:

WILLIAM P. GREENE, JR.  
Chief Judge

Attachment

## **RULE 10. DESIGNATION OF THE RECORD BEFORE THE AGENCY**

**(a) Initial Designation.** Not later than 60 days following the Notice of Docketing, the Secretary must:

- (1) copy all materials that were contained in the record before the Secretary and the Board on the date the Board issued the decision from which the appeal was taken;
  - (2) copy any other relevant VA files;
  - (3) prepare a list of any record matter that cannot be duplicated;
  - (4) assemble the materials copied and the list specified in paragraph (3) of this subsection so that the first document is the decision of the Board from which the appeal was taken and paginate such materials consecutively; the assembled document will comprise the Initial Designation;
  - (5) serve a copy of the Initial Designation on the Appellant;
  - (6) file a notice with the Clerk certifying that the Initial Designation has been served;
- and
- (7) file with the Clerk the list specified in paragraph (3) of this subsection.

**(b) Counter Designation.** Not later than 30 days after the Secretary serves the Initial Designation, the Appellant may serve the Secretary with a Counter Designation of materials that are relevant to the appeal and that were omitted from the Initial Designation, including any materials that the Appellant asserts were constructively before the Board; if the Appellant serves a Counter Designation under this subsection, the Appellant must also file with the Clerk a notice specifying the date on which the Counter Designation was served.

- (1) The Appellant must:
  - (A) attach, to any Counter Designation served on the Secretary, copies of any counter-designated materials that are in the Appellant's possession; and
  - (B) specify which counter-designated materials are not in the Appellant's possession.
- (2) The Appellant will be deemed to have accepted the Secretary's Initial Designation if no Counter Designation, or statement that the Appellant accepts the Secretary's Initial Designation, is served within the time allowed.

**(c) Creating the Record before the Agency.** The Secretary must add any materials counter designated by the Appellant to the Initial Designation and number them consecutively beginning with the number following that applied to the last page in the Initial Designation. This assembled document will compose the Record before the Agency.

(1) Within 30 days after the Appellant serves the Secretary with the Counter Designation the Secretary must:

(A) serve a copy of any materials counter designated, with page numbers applied, on the Appellant; and

(B) file with the Clerk, and serve on the Appellant, notice that the Record before the Agency is complete or that there is a dispute about its content.

(2) If no Counter Designation was timely served on the Secretary by the Appellant, then the Secretary must, within 14 days after the Counter Designation was due, file with the Clerk, and serve the Appellant with, notice that the Record before the Agency is complete.

(3) The combined Initial Designation, and Counter Designation if any, becomes the Record before the Agency from which the Joint Appendix will be compiled.

**(d) Disputes.** If any dispute arises as to the preparation or content of the Record before the Agency, the Court, on its own initiative or on motion of any party, will resolve the matter. Any motion must describe the good faith efforts that have been made to resolve the dispute.

**(e) Filing of the Initial Designation, Counter Designation, or Record before the Agency.** The parties are prohibited from filing with the Clerk the Initial Designation, the Counter Designation, or the Record before the Agency unless the Court so orders.

**(f) Postdated Materials.** The Record before the Agency generally may not include material postdating the Board decision on appeal.

**(g) Access of Parties or Representatives to Original Record.**

(1) *Material not subject to a protective order.* After a Notice of Appeal has been filed, the Secretary must permit a party or a representative of a party to inspect and to copy, subject to reasonable regulation by the Secretary, material in the record before the Board.

(2) *Confidential information.* On its own initiative or on a party's motion, the Court may take appropriate action to prevent disclosure of confidential information. See also Rule 48.

**(h) Contingency Planning.** See Rule 37.

### **Rule 28.1. JOINT APPENDIX TO THE BRIEFS**

**(a) Purpose.** The purpose of this rule is to ensure that the Court has before it those documents required to decide the appeal. Procedures for assembling and filing the Joint Appendix differ depending on whether an appellant is represented (subsection (d)) or self-represented (subsection (e)) at the time the reply brief is filed or, if no reply brief is filed, at the time the reply brief was due in accordance with Rule 31(a)(3).

**(b) Disputes.** If any dispute arises as to the preparation or content of the Joint Appendix, the Court, on its own initiative or on motion of any party, will resolve the matter. Any party's motion must describe the good faith efforts that have been made to resolve the dispute.

**(c) Additional Record Material.** The Court may direct the Appellant or the Secretary to file additional record material.

**(d) Represented Appellants.** In any case where the Appellant is represented at the time the Appellant's reply brief is filed or, if no reply brief is filed, when the reply brief was due in accordance with Rule 31(a)(3), the following procedures apply with regard to the preparation, contents, and filing of the Joint Appendix.

(1) *Preparation and Contents.* The Appellant must prepare and file a Joint Appendix to the briefs. The Joint Appendix must be compiled exclusively from the Record before the Agency and must contain:

(A) the Board decision(s) being appealed; and

(B) documents cited in the briefs filed by the parties. Any document cited in a brief must be included in its entirety in the Joint Appendix.

(2) *Arrangement and Pagination of the Joint Appendix.* The Joint Appendix must be arranged and paginated in the same order as the documents occurred in the Record before the Agency. Because certain documents in the Record before the Agency may not be included in the Joint Appendix, this arrangement may result in pages not having consecutive numbers, e.g., page 22 may be followed immediately by page 43.

(3) *Time for Filing.* The Joint Appendix must be filed and served at the time the reply brief is filed and served or if no reply brief is filed, when the reply brief was due in accordance with Rule 31(a)(3).

(4) *Number of Copies.* The Appellant must file an original and three copies of the Joint Appendix with the Clerk and serve one copy of the Joint Appendix on each party.

(5) *Cover.* The cover of the Joint Appendix must be white and must contain the official caption of the appeal.

**(e) Self-represented Appellants.** In any case where the Appellant is self-represented at the time the Appellant's reply brief is filed or if no reply brief is filed, at the time the reply brief was due in accordance with Rule 31(a)(3), the following procedures apply with regard to the preparation, contents, review, and filing of the Joint Appendix.

(1) *Preparation and Contents of the Proposed Joint Appendix.* The Secretary will prepare a Proposed Joint Appendix compiled exclusively from the Record before the Agency. The Proposed Joint Appendix must contain:

(A) the Board decision(s) being appealed; and

(B) documents from the Record before the Agency that were relied upon by the Board in ruling against the Appellant on the issues on appeal to the Court and

any other material from the Record before the Agency that the Secretary considers relevant to the issues on appeal to the Court. Any document cited in a brief must be included in its entirety in the Proposed Joint Appendix.

(2) *Self-represented Appellant's Review of Proposed Joint Appendix.*

(A) Within 21 days after the reply brief is filed or, if no reply brief is filed, within 21 days after the reply brief was due in accordance with Rule 31(a)(3), the Secretary will serve on the Appellant and file with the Clerk a list containing a description of documents that the Secretary proposes will comprise the Joint Appendix with the page numbers of these documents as designated in the Record before the Agency.

(B) Within 14 days after service of the list of the documents that the Secretary proposes to compose the Joint Appendix, the Appellant shall serve on the Secretary a list containing a description of any additional documents relevant to the issues on appeal to the Court that the Appellant deems appropriate for inclusion in the Joint Appendix along with the page numbers of these documents as designated in the Record before the Agency. The Appellant will be deemed to have accepted the Secretary's Proposed Joint Appendix if the Appellant does not serve an additional list of documents within the time allowed.

(3) *Arrangement and Pagination of the Joint Appendix.* The Joint Appendix must be arranged and paginated in the same order as documents appeared in the Record before the Agency. Because certain documents in the Record before the Agency may not be included in the Joint Appendix, this arrangement may result in pages not having consecutive numbers, e.g., page 22 may be followed immediately by page 43.

(4) *Time for Filing.* The Secretary must file the Joint Appendix with the Clerk and serve it on the Appellant within 14 days after the date upon which the self-represented Appellant's list of documents, created after the Appellant's review of the Secretary's Proposed Joint Appendix, is served on the Secretary or if not served was due in accordance with subsection (e)(2)(B).

(5) *Number of Copies.* The Secretary must file an original and three copies of the Joint Appendix with the Clerk and serve one copy of the Joint Appendix on each party.

(6) *Cover.* The cover of the Joint Appendix must be white and must contain the official caption of the appeal.

## **RULE 45. DUTIES OF CLERK**

**(g) Motions.** Unless a case has been assigned to a judge or judges, the Clerk may act on motions, if joint, consented to, or unopposed, that seek to-

(2) vacate the Board's decision and remand the case for action consistent with the terms of the motion;