

UNITED STATES COURT OF VETERANS APPEALS

Misc. No. 2-96

IN RE:

RULES OF PRACTICE AND PROCEDURE

Before NEBEKER, Chief Judge, and KRAMER, FARLEY,  
MANKIN, HOLDAWAY, IVERS, and STEINBERG, Judges.

O R D E R

Pursuant to the authority of 38 U.S.C. § 7264(a) and consistent with 28 U.S.C. § 2071(b), the Court has determined the need for changes to Rules 3, 4, 11, 21, 25, 27, 28, 29, 31, 32, 33, 36, 41, 45, 46, and 47, and for a new Rule 49, of its Rules of Practice and Procedure. In reaching this determination, the Court has benefited from the views of its Rules Advisory Committee. Accordingly, it is

ORDERED that the attached proposed changes to this Court's Rules of Practice and Procedure are hereby published. It is further

ORDERED that public comment on these changes is invited. Such comment must be submitted to the Clerk of this Court at 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004-2950, by May 31, 1996.

DATED: APR 19 1996

BY THE COURT:



FRANK Q. NEBEKER  
Chief Judge

ATTACHMENT TO USCVA MISCELLANEOUS ORDER NO. 2-96

PROPOSED RULE CHANGES (only affected subsections shown)  
(Added language underlined; deleted language ~~lined through~~)

RULE 4. WHEN TO APPEAL

(a) **Time for Appeal.** To obtain review by the Court of a Board decision, a person adversely affected by that decision must file a Notice of Appeal within 120 days after the date on which the Board mailed notice of the decision to the last known address of the appellant and the appellant's authorized representative, if any. A Notice of Appeal shall be deemed to be received:

(1) on the date of its legible postmark, affixed by the United States Postal Service (not including a postage-metered date imprint other than one affixed by the United States Postal Service) on the cover in which the Notice is posted, if the mailing is properly addressed to the Court and is mailed; or

(2) on the date of its receipt by the Clerk, if it does not bear a legible postmark affixed by the United States Postal Service, or it is delivered or sent by means other than United States mail, including facsimile.

But see Rule 25(b)(3) as to an incarcerated appellant.

(b) **Notice of Docketing.** \* \* \*

(c) **Copy of Board Decision.** Within 30 days after the date of the Clerk's Notice of Docketing, the Secretary shall file and serve a ~~certified~~ copy of the Board's decision, showing the date the decision was mailed, and shall report the filing date of any motion for its reconsideration, and the date and nature of any action on such a motion.

*[Reason: Certification is unnecessary at this stage; record on appeal, containing BVA decision, will be certified. Other changes for clarification.]*

\* \* \*

RULE 10. DESIGNATION OF THE RECORD ON APPEAL

(a) **Designation.** \* \* \*

(b) **Counter Designation.** Within 30 days after the Secretary serves the designation of the record on appeal, the appellant shall file with the Clerk and serve on the Secretary:

(1) a counter designation of any additional material which was before the Secretary and the Board and which the appellant considers relevant to the appeal; or

(2) a statement that the appellant accepts the content of the record as designated by the Secretary. See also Rule 11(c).

Failure of the appellant to do either will be conclusive of the appellant's acceptance of the record as designated by the Secretary. ~~Within 14 days after the filing of the counter designation, the Secretary shall serve on the appellant a copy of those materials identified in the counter designation which are not already in the possession of the appellant.~~

*[Reason: Copy of counter designated material is unnecessary.]*

(c) **Disputes.** \* \* \*

(d) **Irrelevant Materials.** \* \* \*

RULE 11. TRANSMISSION OF THE RECORD ON APPEAL

(a) **Transmission of the Record.** The Secretary shall retain the original claims file. Within 30 days after the appellant's counter designation or statement was served or, if not served, was due under Rule 10, the Secretary shall transmit to the Clerk, as the record on appeal, in this order, ~~an original and three copies~~ two certified copies of:

- ~~(1) a table of contents of the documents transmitted;~~
- (21) a certified photocopy of the Board's decision being appealed ~~showing the date it was mailed to the appellant, and the docket entries prepared by the Board;~~ and
- (32) ~~a certified copy of the designated record,~~ all documents agreed or ordered to be part of the record on appeal, assembled in chronological order, with pages consecutively numbered (e.g., R-1, R-2, etc.).

The record on appeal shall be paginated and preceded by a table of contents describing each document in the record. A copy of the record on appeal shall be served on all parties when the record is transmitted. The Court may direct that additional copies be transmitted.

*[Reason: To provide for prompt transmission of the record when appellant promptly files and serves a counter designation or alternative statement. Additional copies of record are required only rarely for panel or en banc cases. BVA docket entry, which was the source of BVA archive control number, is unnecessary when BVA decision can be cited by page of the record. Certification of subparts of record is unnecessary, but BVA decision should be a photocopy and not a computer printout. Page numbering methodology is left to Secretary's discretion. Greater detail in table of contents permits precise record citation in briefs.]*

(b) **Supplementation of Transmitted Record.** If a party believes any additional part of the claims file before the Secretary and the Board is relevant to an issue on appeal, the party, within 30 days after the record on appeal has been filed with the Clerk, may cause file a motion to supplement the record ~~to be enlarged or supplemented by serving notice on all other parties of~~ , identifying the additional parts of the record material to be transmitted. The Secretary shall then supplement the record on appeal by transmitting to the Clerk a certified copy, and three additional copies, of such supplemental record, assembled in chronological order and consecutively numbered (e.g., SR-1, SR-2, etc.) and shall serve a copy on the appellant. A party who believes additional material sought by another party is clearly beyond the scope of matters relevant to the appeal may, within 14 days after service of the motion to supplement, file a motion to limit the contents of the supplemental record an opposition to the motion. The motion shall describe describing the good faith efforts made to resolve the dispute. Within 14 days after the motion is decided, the Secretary shall transmit to the Clerk two certified copies of such supplemental record, assembled in chronological order, paginated, and accompanied by a table of contents, and shall serve a copy on the appellant. Unless the Court orders otherwise, supplementation of the record does not extend the time for filing the appellant's either party's brief.

*[Reason: To conform to Court practice. Supplementation is accomplished by motion, and not at a party's direction. Time limit for transmission is added, and copy requirements are reduced as in Rule 11(a).]*

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

\* \* \*

## RULE 21. EXTRAORDINARY RELIEF

(a) ~~Mandamus or Prohibition;~~ **Petition; Service and Filing.** ~~A petition for a writ of mandamus or of prohibition~~ A party desiring extraordinary relief must be made by filing file a petition with the Clerk with proof of service on the respondent(s), on any other party at interest, and on the Secretary. The petition must contain:

- (1) a statement of the precise relief sought;
- (2) a statement of the facts necessary to understand the issues presented by the petition;
- (3) a statement of the reasons why the petition should be granted, including why the petitioner has a clear and indisputable right to the writ and why there are inadequate alternative means to obtain the relief sought; and
- (4) copies of any order or decision or parts of the record necessary to understand the petition.

Upon receipt of the \$50.00 filing fee (unless waived pursuant to Rule 24), the Clerk shall docket the petition and submit it to the Court.

**(b) Action on the Petition. \* \* \***

~~(c) Other Extraordinary Relief. Application for extraordinary relief other than that provided for in subsection (a) of this rule must be made by petition filed with the Clerk with proof of service on the parties named as respondents. No response may be filed by any respondent unless ordered by the Court. Proceedings on such an application will follow, so far as is practicable, the procedures in subsections (a) and (b) of this rule.~~

**(dc) Form and Length of Papers; Number of Copies. \* \* \***

[Reason: To eliminate meaningless distinctions between different types of extraordinary relief.]

\* \* \*

**RULE 25. FILING AND SERVICE**

**(a) Filing.** All papers required or permitted to be filed in this Court must be filed with the Clerk. Filing may be accomplished by mail addressed to the Clerk. Any paper except a brief may be filed by facsimile (fax) sent to the Clerk at (202) 501-5848 if it is:

- (1) preceded by a cover sheet showing the sender's name, address, and telephone and fax numbers; the case number and caption; and the number of pages being sent; and
- (2) not more than ten 8½"x11" pages long, excluding the cover sheet but including any supporting documents and the certificate of service, with each page numbered. A paper may not be split into multiple transmissions to avoid this page limit.

The sender bears the risk of fax transmission. Court personnel will not provide a confirmed copy, and the sender need not telephone the Court to verify receipt. If all or part of a transmission is illegible, the Court may direct the sender to provide a legible copy by mail.

[Reason: To accommodate an accepted and reliable technology by eliminating requirements for follow-up original and rarely-needed additional copies. Cover sheet requirement provides means of checking transmission completeness. Page limit helps prevent monopoly of Court fax machines.]

**(b) Timeliness.**

- (1) ~~Facsimile Filing. Filing of a copy of all papers, except briefs, may be accomplished by facsimile addressed to the Clerk at (202) 501-5848, but only if the original papers and the required number of copies are received by the Clerk within 10 days after the time fixed for filing. However, if a Notice of Appeal or a motion to waive the filing fee has been filed by facsimile, there is no requirement to file an original copy~~

~~with the Clerk. See Rules 3 and 24. A paper may be sent at any time. A paper received by the Clerk before 7:00 a.m. on a business day is considered received on the preceding business day. But see Rule 4(a) concerning Notice of Appeal.~~

- (2) Other Papers. All papers other than those filed by facsimile must be received by the Clerk or deposited in the night box within the time specified for filing. See Rule 45. But see Rule 4(a) concerning Notice of Appeal.
- (3) Incarcerated Appellant. A paper filed by an unrepresented appellant confined in an institution is timely filed if deposited in the institution's internal mail system within the time specified for filing, accompanied by evidence showing the date of deposit and stating that first-class postage has been prepaid.

[Reason: Fax time standard accommodates appellants in Western U.S. Provision for incarcerated appellants conforms to policy in Fed.R.App.P. 25 implementing Houston v. Lack, 487 U.S. 266 (1988).]

(c) **Service of All Papers Required.** ~~Copies of all papers~~ A copy of any paper filed by any party or amicus ~~and not required by these rules to be served by the Clerk~~ must, at or before the time of filing, be served by a party or amicus on all other parties and amici to the appeal. Service on a represented party or amicus must be made on the representative.

[Reason: No papers are served by the Clerk.]

(d) **Manner of Service. \* \* \***

(e) **Proof of Service.** ~~Papers~~ A paper presented for filing must contain an acknowledgement of service by the person served, showing that person's mailing address, or a statement certified by the person who made service (see sample on reverse side of Form 1), showing the date and manner of service and the names and addresses of the persons served. Proof of service may appear on or be attached to the ~~papers~~ filed. The Clerk may permit papers to be filed without proof of service but ~~shall~~ may require such proof to be filed promptly thereafter.

[Reason: To conform to Court practice.]

\* \* \*

#### RULE 27. MOTIONS

(a) **Content of Motions; Response.** Unless another form is required by these rules, an application for relief must be made by filing a motion, with proof of service (see Rule 25(~~e~~)) on all other parties. The motion must:

- (1) contain or be accompanied by any material required by any of the rules governing such a motion;
- (2) state with particularity the specific grounds on which it is based;
- (3) describe the relief sought;
- (4) describe the steps taken to contact the other party to determine whether the motion is opposed; and
- (5) indicate if whether the motion is ~~unopposed~~ and, if so, whether the moving party has been advised that a response in opposition will be filed.

Motions should not be accompanied by proposed implementing orders. If a motion is supported by briefs, affidavits, or other papers, they must be served and filed with the motion. Any party may file a response or opposition to a motion within 14 days

after service of the motion, but motions authorized by Rule 8 (Stay or Injunction Pending Appeal) may be acted upon after reasonable notice of the motion to all parties, and the Court may shorten or extend the time for responding to any motion.

[Reason: To correct cross-reference. To expedite processing of motion when it is opposed without response.]

(b) **Motions for Procedural Orders. \* \* \***

(c) **Form and Length of Papers; Number of Copies.** Except by permission of the Court, the form, and length, and copy requirements in Rule 32 for principal briefs apply to motions and responses thereto. ~~An original and three copies of all such papers must be filed with the Clerk, but the Court may require that additional copies be furnished.~~

[Reason: To consolidate all such information in Rule 32.]

#### **RULE 28. BRIEFS**

(a) **Appellant's Brief. \* \* \***

(b) **Secretary's Brief. \* \* \***

(c) **Reply Brief. \* \* \***

(d) **References to the Record. \* \* \***

(e) **Reproduction of Materials.** If determination of the issues requires the study of superseded statutes, rules, regulations, or other material unpublished authorities, relevant parts must be reproduced in the brief or in an appendix at the end, ~~or they may be supplied to the Court in pamphlet form.~~ Documents in the record on appeal may not be reproduced in or attached to the brief.

[Reason: To clarify that only superseded or unpublished materials need be reproduced, and that record material may not be reproduced.]

~~(f) **Length of Briefs.** Except by permission of the Court, or as limited by Rule 47 (Expedited Briefs), the principal briefs may not exceed 25 pages and reply briefs may not exceed 15 pages, not counting the table of contents, the table of cases, statutes, and other authorities, and any appendix containing statutes, rules, regulations, etc.~~

[Reason: To consolidate all such information in Rule 32.]

~~(g) **Multiple Appellants. \* \* \***~~

~~(h) **Citation of Supplemental Authorities. \* \* \***~~

~~(i) **Brief of Unrepresented Appellant. \* \* \***~~

~~(j) **Citation of Nonprecedential Authority.** Neither single-judge actions and unpublished orders or judgments nor other actions of the Court which have not been published in the Veterans Appeals Reporter are not to shall be cited as precedent. A party may refer to such actions of this Court only when the binding or preclusive effect of that action, rather than its quality as precedent, is relevant. In that event, the party shall include, in an appropriately labeled addendum to the brief, a copy of the action cited therein. The addendum may be bound together with the brief; if bound separately, it shall be filed and served concurrently with and in the same number of copies as the brief itself.~~

[Reason: To conform to Court's intent when this no-citation rule was adopted.]

#### **RULE 29. BRIEF OF AN AMICUS CURIAE**

(a) ~~Time; Argument.~~ A brief of an amicus curiae ~~may be filed by any interested person or entity.~~ The brief must be filed within the time allowed the party whose position it supports unless the Court permits later filing, in which event the Court will specify the time limit for an opposing party's answer response. A motion of an amicus curiae will be permitted to participate in the oral argument will be granted only for extraordinary reasons at the invitation of the Court.

[Reason: To delete unnecessary language from first sentence. To conform last sentence to Court practice.]

(b) **Form and Content.** An amicus brief must comply with Rules 28(a)(1), (5) and (6); 28(d), (e), ~~(f)~~, (g) and (i); and ~~31(b)~~32 and state which party the amicus supports and the interest of the amicus. The brief should avoid repeating the parties' briefs and should focus on the points not made or not emphasized in them.

[Reason: To conform to recommended changes to Rules 28, 31, and 32.]

\* \* \*

#### RULE 31. FILING AND SERVICE OF BRIEFS

(a) **Time Limits.** \* \* \*

~~(b) Number of Copies.~~ The original and three copies of each brief must be filed with the Clerk, unless the Court orders otherwise, and one copy of each brief must be served on each party.

[Reason: To consolidate all such information in Rule 32.]

~~(b)~~ **Effect of Failure to File.** \* \* \*

#### RULE 32. FORM OF BRIEFS, APPENDICES, AND OTHER PAPERS

(a) **Format.** \* \* \*

(b) **Type; Spacing.** The type or print must be at least 11 points with horizontal spacing (pitch) of no more than 11 characters per inch, for both text and footnotes. Text must be double spaced (except that motions and responses under Rule 27(b) may be single spaced), with no more than three lines of type per inch, but quotations more than two lines long and footnotes may be single spaced. The parties may not use photo reproduction that reduces print size smaller than the size required by this rule. This subsection does not apply to pages of an appendix that are legible, unreduced photocopies of documents of record.

[Reason: Procedural motions are frequent but relatively short, and single spacing saves paper and facsimile resources.]

(c) **Covers.** \* \* \*

(d) **Binding.** \* \* \*

(e) **Caption.** \* \* \*

(f) **Page Numbers.** \* \* \*

(g) **Page Limits and Number of Copies.** Except by permission of the Court or as limited by Rule 47, principal briefs may not exceed 25 pages and reply briefs may not exceed 15 pages, not counting the table of contents; the table of ~~eases, statutes, and other authorities~~ citations; and any appendix containing superseded statutes, rules, and regulations, etc and unpublished authorities. An original and three copies of all papers must be filed with the Clerk, but the Court may require that additional copies be furnished. But see Rule 25 concerning fax filings.

[Reason: To consolidate page limit and copy requirements for all papers.]

(h) **Identification of Proponent.** The signature, printed names, addresses, and telephone numbers of all the representatives of record (see Rule 46(d)(1)) and of all parties without representatives an unrepresented party must appear on a briefs or other documents being filed with the Clerk.

[Reason: To conform to federal practice. Cross-reference makes clear that all representatives of a party need not sign a paper.]

### RULE 33. PREHEARING APPEAL CONFERENCE

(a) **Participation.** The Court may direct the representatives and parties without representatives to participate in a ~~prehearing~~ conference, in person or by telephone, to ~~consider simplification of the issues and such other matters as may help the Court resolve the case~~ address any matter that may aid in the disposition of the proceedings, including the content of the record, simplification of the issues, and the possibility of settlement. The Court ~~will~~ may enter an appropriate order to control future proceedings.

This rule does not prevent the parties from discussing settlement or agreeing to dismiss the appeal at any time before argument or submission of the case.

[Reason: To conform to 1994 changes in Federal Rules of Appellate Procedure, tailored to this Court's practice.]

(b) ~~Use of Contents.~~ ~~Unless the parties agree to the contrary in writing, nothing that occurs during prehearing conferences may be used in argument or pleadings before any court.~~ Nondisclosure to Judges. Statements made during a conference may not be disclosed to a judge of the Court as having been made during a conference unless the parties agree in writing to such disclosure. This subsection does not apply to a conference which has failed to resolve a dispute about the content of the record on appeal.

[Reason: Conforms to current Court practice and to predominant practice in federal courts using conferencing. To resolve a Rule 10 dispute, the Court must know the parties' positions.]

\* \* \*

### RULE 36. ENTRY OF JUDGMENT

~~Upon receipt of an opinion, the Clerk shall send copies to all parties. The Clerk shall enter the judgment will be entered after the time allowed in Rule 35(d) has expired unless otherwise ordered by the Court. Entry of the judgment begins the 60-day time period for any appeal to the United States Court of Appeals for the Federal Circuit. On the date judgment is entered, the Clerk shall send copies of the judgment to all parties.~~

[Reason: To consolidate Clerk's duties in Rule 45.]

\* \* \*

### RULE 41. ISSUANCE OF MANDATE; STAY OF MANDATE

(a) **Date of Issuance.** The mandate of this Court will issue 60 days after the date of entry of judgment pursuant to Rule 36 unless the time is shortened or extended by order. A certified copy of the judgment and a copy of the ~~opinion of the Court's disposition of the appeal~~ if any, will constitute the mandate. If a timely Notice of Appeal to the United States Court of Appeals for the Federal Circuit is filed with the Clerk, the mandate will issue in accordance with 38 U.S.C. § 7291(a).

[Reason: The Court also disposes of appeals by memorandum decision or order.]

(b) **Mandate in Consented Dismissal or Remand.** \* \* \*

\* \* \*



**RULE 45. DUTIES OF CLERK**

- (a) **General Provisions. \* \* \***
- (b) **The Docket; Calendar; Other Records Required. \* \* \***

(c) **Notice of ~~Orders~~ Court Actions.** Immediately upon issuance of an opinion, memorandum decision, or order, or entry of judgment ~~an order~~, the Clerk shall ~~serve~~ send a copy on to each party to the proceeding, together with a copy of any opinion respecting the order, and shall note the date of ~~service~~ issuance in the docket.

*[Reason: To add Clerk's duty removed from Rule 36, conform to change in Rule 41(a), and eliminate confusion about "service" by the Court.]*

- (d) **Custody of Records and Papers. \* \* \***
- (e) **Court Seal. \* \* \***
- (f) **Schedule of Fees. \* \* \***
- (g) **Motions. \* \* \***
- (h) **Construction of Rules in Self-Representation Cases. \*\*\***

**RULE 46. REPRESENTATION**

- (a) **Admission of Attorneys to Practice. \* \* \***
- (b) **Admission of Non-Attorney Practitioners to Practice. \* \***

(c) **Appearance in a Particular Case.** On motion and upon a showing of good cause, the Court may permit any attorney or a non-attorney representative to appear before the Court for the purposes of a particular case. See also Rule 8 of the Rules of Admission and Practice.

*[Reason: To alert representatives that they are subject to Court's disciplinary rules even if appearing in only one case.]*

- (d) **Appearance, Withdrawal, and Change of Address.**
  - (1) **Appearance. \* \* \***
  - (2) **Withdrawal.** A representative, other than a government attorney who has been properly replaced, may not withdraw, ~~leaving the client unrepresented,~~ without the Court's permission upon motion and written notice to the client and all other parties who have appeared. The motion must describe the current or last known address or addresses of the client and the efforts made to notify the client of the motion to withdraw. The authority and duty of the representative will continue until he or she is relieved by order of the Court. Permission to withdraw may be granted subject to such conditions as the Court considers appropriate. This paragraph will not apply when a representative, without taking any other action, files a Notice of Appeal on behalf of an appellant under Rule 3(f).

*[Reason: Follows Federal Circuit rule that substitution, as well as mere withdrawal, of appellant's counsel requires Court permission.]*

**RULE 47. EXPEDITED PROCEEDINGS**

(a) **Motion and Order ~~for~~ Brief.** On motion of a party for good cause shown, by on written agreement of the parties, or on its own initiative, the Court may order that any matter before the Court be expedited briefing of a case. ~~Such motion or agreement must be filed not later than 10 days before the last day for filing the record on appeal.~~

*[Reason: In a case appropriate for expedited consideration, current record development process, which could consume 120 days after notice of docketing, may be unreasonable.]*

(b) **Filing and Service of Briefs Papers.** ~~If expedited consideration is ordered, the Expedited proceedings will be scheduled as directed by the Court. Unless otherwise ordered, the appellant's principal brief must shall be served and filed within 25 days after the date on which the record on appeal is of the Clerk's notice that the record on appeal has been filed. The Secretary's brief must shall be served and filed within 15 days after service of the appellant's brief. Any reply brief must shall be served and filed within 10 days after service of the Secretary's brief.~~

*[Reason: To permit ad hoc scheduling of record development, briefing, or any other part of the proceedings. To make language on briefing schedule consistent with Rule 31(a).]*

(c) **Table of Contents, Form and Length of Briefs.** Briefs filed under this rule must comply with Rules 28 ~~(Briefs)~~ and 32, except that principal briefs must be limited to 10 pages, reply briefs must be limited to five pages, and a table of ~~eases~~ authorities is not required.

(d) **Supplementation of the Transmitted Record.** ~~If expedited consideration is proceedings are ordered, any notice of additional relevant parts motion for supplementation of the record on appeal to be transmitted must be served and filed within 25 days after the date on which the Clerk notifies the parties that the record on appeal has been filed before the date on which the appellant's brief is due. See also Rule 11(b). Such supplementation shall does not extend the time for filing any brief.~~

*[Reason: To make language consistent with Rule 11(b).]*

#### **RULE 49. COMPLAINTS AGAINST JUDGES**

Rules for the processing of complaints of judicial misconduct or disability have been adopted by the Court pursuant to 28 U.S.C. § 372(c). Copies are available from the Clerk on request.

*[Reason: To implement a March 1994 resolution of the Judicial Conference of the United States. The Court adopted its rules in 1992.]*