

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Misc. No. 2-03

IN RE: FURTHER REVISION OF THE RULES OF PRACTICE AND PROCEDURE

Before KRAMER, *Chief Judge*, and FARLEY, IVERS, STEINBERG, and GREENE, *Judges*.

ORDER

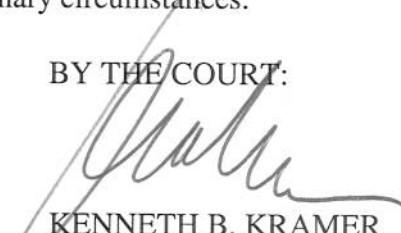
Pursuant to the authority of 38 U.S.C. §§ 7263(b) and 7264(a) and consistent with 28 U.S.C. § 2071(b), the Court has adopted additional changes to the revised Rules of Practice and Procedure (Rules) published on January 15, 2002, in Miscellaneous Order No. 1-03 and becoming effective on February 14, 2003, and July 1, 2003. The Court has benefitted from public comment and from the views of its Rules Advisory Committee subsequent to the publication of the revised rules. Accordingly, it is

ORDERED that the attached amendments to Rules 3(c) & (h), 5, 21(c), 24, 25(a)(3), 26(b), (b)(1), (2), (3), & (5), & (d), 27(e), 28(a), (e), & (i), 32(d) & (i), 35(d)(3) & (g), 39(d), 45(k), and 46.1 are published and will be effective on July 1, 2003. In the interim, practitioners should note this Court's precedential action in *Modlin v. Principi*, __ Vet.App. __, No. 02-268 (Apr. 22, 2003) (per curiam order), regarding Rule 39 applications that do not comply with Rule 32 technical requirements.

Significant changes made by both this order and Miscellaneous Order No. 1-03 are described in the attached updated Practitioners' Notes. Practitioners should especially note that on and after July 1, 2003, any motion to extend time beyond 45 days for a particular filing must be made 14 days in advance of a due date and must be based on extraordinary circumstances.

DATED: May 16, 2003

BY THE COURT:



KENNETH B. KRAMER
Chief Judge

Attachment

RULE 3. HOW TO APPEAL

(c) **Content.** The Notice of Appeal need not conform to Rule 32 and must –

(h) **Translations.** The Court conducts its reviews and deliberations in English. Any document ~~submitted~~transmitted to the Court (including one in the record on appeal) in a language other than English must be accompanied by an English translation that is certified by the translator, pursuant to 28 U.S.C. § 1746, as true and accurate.

RULE 5. STAY OF APPELLATE PROCEEDINGS

(a) **Grounds.**

(1) On its own initiative or on a party's motion, the Court may stay its proceedings when --

(~~1A~~) a motion has been filed for the Board to reconsider or vacate its decision; or

(~~2B~~) a pro bono representation program, operating under a grant or contract made under the authority first provided in Public Law No. 102-229, is conducting case evaluation; or

(~~3C~~) it is otherwise in the interest of judicial efficiency ~~or other good cause is shown, but not for the purpose of negotiating a settlement or remand (see paragraph (2) of this subsection) or of extending the time for making any filing (see Rule 26(b)).~~

(2) ~~In addition, a~~ joint motion for a stay or stays of proceedings, not to exceed ~~90~~60 days in total in a particular case, may be granted to allow the parties to negotiate a settlement or joint remand.

(b) **Effective Date of Stay.** Unless and until the Court grants a motion under this rule, such a motion does not suspend proceedings or interrupt preexisting filing schedules. When a stay expires, the preexisting filing schedule resumes at the point at which it was stayed.

(c) **Continuation of Stay.** Prior to the expiration of a stay, a party may move for continuation of the stay except to the extent that the duration sought is prohibited by subsection (a)(2), above. Such motion must satisfy the requirements of Rule 27(a), but is not governed by Rule 26(b).

(ed) Combined Motions Prohibited. A motion to stay the Court's proceedings may not be combined with ~~a motion to extend time under Rule 26(b) or any other motion, but must be made and fully justified in a separate motion.~~ The Clerk will return any motion that violates this subsection.

RULE 21. EXTRAORDINARY RELIEF

* * * * *

(c) Form and Length of Papers; Number of Copies; Translations. Except by permission of the Court, the requirements in Rule 32 ~~for principal briefs~~ apply to petitions and answers thereto, except that a petition or answer may not exceed 20 pages. An original and three copies must be filed with the Clerk, but the Court may direct that additional copies be furnished. The petition must be captioned: "[Name of Petitioner], Petitioner, v. [Name and Title of Respondent], Respondent." See also Rule 6 (Protection of Privacy). The requirements of Rule 3(h) regarding translations apply to any non-English-language document appended to a petition or an answer.

RULE 24. WAIVER OF FILING FEE

Payment of the filing fee required by Rule 3(e) or Rule 21(a) will be waived, due to financial hardship, in any case where the appellant (or petitioner) submits a declaration of financial hardship and that declaration is accepted for filing. That declaration will be subject to the penalty for perjury pursuant to 28 U.S.C. § 1746, and must either be on Form 4 in the Appendix of Forms or contain the detail called for in that form. If the declaration is found to lack a signature or to be otherwise noncompliant, it will be ~~rejected for filing~~ returned; not later than the time fixed by the notice of returned papers, either the fee must be paid or a new declaration that addresses the deficiencies in the noncompliant declaration must be submitted.

RULE 25. FILING AND SERVICE

(a) Filing.

* * * * *

(3) Confirmation. Confirmation of the filing (but not of the adequacy of the content) of any paper by any means may be obtained by accessing the case docket on the Court's web site (see Rule 3(g)).

RULE 26. COMPUTATION AND EXTENSION OF TIME

(b) Extension of Time. The Court, on its own initiative or on a party's motion for good cause shown, may extend the time set by these rules for doing any act, or may permit an act to be done after the expiration of such time (by granting a motion for leave to file out of time or otherwise), but the Court may not extend the time for filing a Notice of Appeal or an application for attorney fees and expenses. See also Rule 5(a) (joint motion for stays to negotiate settlement or remand). Extensions of time for a total of ~~30~~45 days for any particular filing may be granted for good cause ~~of any nature, including workload.~~ After extensions of time totaling 30 days have been granted for a particular filing, a motion for any further extension based on workload will not be accepted for that particular filing. Any motion to extend the time set by these rules or by an order or notice of the Court beyond a total of 45 days for a particular filing will be granted only for extraordinary circumstances, which do not include workload considerations. In no case will a motion be granted to suspend the Rules (see Rule 2) in order to achieve an extension of time. See also Rule 5(a) (joint motion for stays to negotiate settlement or remand).

(1) *Additional requirements.* ~~Effective July 1, 2003, Any motion to extend time based on extraordinary circumstances (see above) the following additional requirements must be met:~~

- ~~_____ (A) A motion to extend the time set by these rules or by an order or notice of the Court for a particular filing beyond a total of 30 days must be filed not less than 14 days before the date sought to be extended. Any motion filed later than 14 days before the date sought to be extended and not acted upon by the date sought to be extended is denied.~~
- ~~_____ (B) Such a motion must be accompanied by an affidavit or unsworn declaration under penalty of perjury under 28 U.S.C. § 1746 detailing good cause for the extension of time; and~~
- ~~_____ (C) If such a motion is received later than the 14-day deadline provided for by subparagraph (A), the motion will not be accepted unless the affidavit or declaration required by subparagraph (B) also details the extraordinary circumstances that caused the late submission.~~

(2) *Content of motion.* In addition to showing good cause for an extension of time, the motion must state the following:

- (A) The date to be extended;
- (B) the revised date sought;
- (C) the total number of days of extension previously granted to the movant both for the same action and in the merits or attorney-fee-application phase, as applicable, of the case thus far;
- (D) the total number of days of extension previously granted to the other party(ies) in the merits or attorney-fee-application phase, as applicable, of the case; and

(E) a statement in compliance with Rule 27(a)(4).

(3) *Opposition.* Any opposition must be filed with the Clerk not later than 5 days after the non-moving party is served with a copy of that motion to extend time. The Court will treat the motion as unopposed if no opposition is filed within this period; no extension of this period will be granted~~not be extended~~ for any reason.

(5) ~~*Return of motion.* The Clerk will return any motion that violates this rule.~~*Noncompliance.* See Rule 45(k).

(d) Combined Motions Prohibited. A motion to extend time may not be combined with any other motion, ~~but must be made and fully justified in a separate motion.~~ The Clerk will return any motion that violates this subsection. ~~See Rule 5(c).~~

RULE 27. MOTIONS

(e) Prohibited Nondispositive Motions. No more than one subject may be addressed in any nondispositive motion. The Clerk will return any motion that violates this subsection. See also Rules 5(d) and 26(d).

RULE 28. BRIEFS

(a) Appellant's Brief. The Appellant must file a brief which, unless the appellant is self-represented (see subsection (h)), must contain, in the following order, the appropriate division headings and the following separate divisions:

(e) Motions Prohibited. After the initial notice to file a brief has been issued to the appellant (see Rule 11(a)(3)), a motion in lieu of a brief will not be accepted from any party in lieu of a brief required by subsections (a) through (c) of this Rule. A motion may not be included as part of any brief. The Clerk will return any motion that violates this subsection.

(i) **Brief of Self-represented Party.** A self-represented party (but no other party) may ~~file~~submit, without regard to the requirements of Rule 32, an informal brief on the form provided by the Court.

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

(d) **Binding.** All papers, other than the record on appeal, must be attached only at the upper left-hand corner. The record on appeal must be bound at the top.

(i) **Noncompliance.** ~~The Clerk will return papers submitted for filing that are not in compliance with this rule.~~ See Rule 45(k).

**RULE 35. MOTIONS FOR RECONSIDERATION,
OR FOR DECISION BY A PANEL OR BY THE FULL COURT**

(d) **Time for Motion.**

(3) *Initial full-Court consideration.* A motion for initial consideration of a case by the full Court must be filed not later than 30 days after the date on which (A) the appellant's brief was served in an appeal or (B) the petitioner's petition was filed in a petition for extraordinary relief.

(g) **Response; Action on the Motion.** No response to a motion under this rule may be filed unless it is requested by the Court, but a motion for a panel or full-Court decision ordinarily will not be granted without such a request. A motion for reconsideration will be decided by the judge or panel that rendered the decision. A motion for a panel decision will be referred to a panel. A motion for a full-Court decision will be referred to all of the judges. Consideration by the full Court requires the vote of a majority of the judges. ~~The Clerk will return an untimely motion or one that fails to include the statement required by subsection (e):~~

RULE 39. ATTORNEY FEES AND EXPENSES

* * * * *

(d) Supplemental Application.

(1) *General.* Except as provided in paragraphs (2) or (3) of this subsection and in subsection (d), a party whose application described in subsection (a) has been granted in whole or in part may, not later than 20 days after the Court action granting such application, file a supplemental application for attorney fees and other expenses in connection with the defense of such subsection (a) application.

RULE 45. DUTIES OF CLERK

* * * * *

(k) Return of Nonconforming Papers. ~~The Clerk is authorized to return to the author any paper that is not in compliance with these rules. Except where return of a paper is required by these rules for a specific reason (see Rules 5(d), 24, 26(d), 27(e) and 28(e)), if the Court receives any paper that does not conform to these rules, the Clerk will receive, but not file, the paper; however, if it is a jurisdiction-conferring paper, the paper will be filed notwithstanding any other provision of these rules. In every case, the Clerk will promptly notify the party of the defect(s) to be corrected and stay proceedings for a reasonable time in order to permit submission of a conforming paper. Failure to submit such conforming paper in a timely manner may result in the dismissal of the matter.~~

RULE 46.1. SELF-REPRESENTATION

Any appellant, petitioner, or intervenor may be self represented before the Court. A self-represented party must give the Clerk and all other parties written notice (not included in another filing) of any change of his or her address or telephone number. Absent such notice, the mailing of documents to the address most recently provided by that person will be fully effective. See also Rules 25(b)(3) (filing by inmate), 28(h) (informal brief), 32(h) (identification in brief), 33(a) (staff conference), and 45(j) (rules construed liberally for self-represented appellants).

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 both to file a supplement to the record on appeal and to 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 period. 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.