

TITLE 38—APPENDIX

RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES COURT OF VETERANS APPEALS

(Effective May 1, 1991, as amended to January 4, 1995)

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Rule 1. Scope of Rules

(a) **Scope.** These rules govern practice and procedure before this Court to review decisions of the Board of Veterans' Appeals (Board), and in applications for other relief which this Court or one of its judges is competent to give.

(b) **Rules not to Affect Jurisdiction.** These rules do not extend or limit the jurisdiction of this Court as established by law.

Rule 2. Suspension of Rules

To expedite a decision, or for other good cause shown, this Court may suspend the application of any of these rules in a particular case and may order proceedings in accordance with its direction, but the Court may not extend the time for filing a Notice of Appeal.

Rule 3. How to Appeal

(a) **Filing.** An appeal will be taken by filing a written Notice of Appeal with the Clerk within the time allowed by Rule 4(a). A Notice of Appeal may be filed by facsimile sent to the Clerk of the Court at (202) 501-5848. Failure of an appellant to take any step under these rules after the timely filing of a Notice of Appeal may be grounds for such action as the Court deems appropriate, which may include dismissal of the appeal.

(b) **Service.** The appellant shall serve on the Secretary of Veterans Affairs (Secretary), and any other party to the proceedings before the Board, a copy of the Notice of Appeal. See Rule 25.

(c) **Content.** The Notice of Appeal shall:

- (1) name the party or parties taking the appeal;
- (2) designate the Board decision appealed from; and
- (3) include the addresses of the appellant(s) and of any representative.

Form 1 in the Appendix of Forms is a suggested form of Notice of Appeal. An appeal will not be dismissed for informality of the Notice of Appeal.

(d) **Joint or Consolidated Appeals.** If more than one person is entitled to appeal from a decision of the Board and their interests make joinder practicable, they may file a joint Notice of Appeal or may join in an appeal after filing separate timely Notices of Appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the Court on its own initiative or on motion of a party.

(e) **Payment of Fees.** Upon the filing of any separate or joint Notice of Appeal from a decision of the Board, each appellant shall include

with the Notice of Appeal a \$50.00 nonrefundable filing fee payable to "U.S. Court of Veterans Appeals." If an appellant believes the payment of the fee will impose a financial hardship, the appellant may request a waiver of the fee by including with the Notice of Appeal a motion and affidavit on the form prescribed at Form 4 in the Appendix of Forms. See Rule 24. If the Court grants the motion, the fee will be waived. If the motion is denied by the Court, the fee must be received by the Court within the time set by the Court's order or the appeal will be dismissed. If a facsimile Notice of Appeal is filed, the filing fee or motion to waive the fee must be received by the Court within 14 days after the facsimile was sent.

(f) Limited Appearance. The filing of a Notice of Appeal alone, or the filing of a motion to stay proceedings to permit evaluation of a case for possible representation, by a representative, will not amount to an appearance under Rule 46 by that representative if the Notice of Appeal or the motion contains the statement "This is a limited appearance."

(As amended June 14, 1994, eff. Aug. 1, 1994.)

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.

(b) Notice of Docketing. The Clerk shall mail a Notice of Docketing to all parties advising them of the date when the Clerk received the Notice of Appeal.

(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, the filing date of any motion for its reconsideration, and the date and nature of any action on such a motion.

(As amended June 14, 1994, eff. Aug. 1, 1994; Nov. 7, 1994.)

Rule 5. Suspension of Appellate Proceedings

The Court may suspend proceedings after an appeal has been filed under Rule 4: (1) on motion by the appellant seeking reconsideration by the Board; or (2) by motion of the Secretary for reasons of confession of error, by specifying the error below and the proceedings or remedy

deemed to be appropriate on remand. The Court, on its own initiative, may also suspend appellate proceedings. See also Rule 28(b)(2).

Rules 6 and 7. (Reserved)

Rule 8. Stay or Injunction Pending Appeal

A party requesting immediate action by the Court to stay or enjoin an action by the Secretary or the Board pending an appeal to the Court shall do so by filing a motion and serving a copy of the motion on all other parties by an expedited method (including express mail, overnight delivery, facsimile or other printed electronic transmission, or hand delivery). The motion will not be accepted by the Clerk unless a Notice of Appeal has been filed. The motion must state the reason for the relief requested and the facts relied on. If the facts are subject to dispute, the motion must be supported by affidavits or other sworn statements or copies thereof. The motion normally will be considered by a panel of three or more judges of the Court, but in exceptional cases the motion may be acted on by a single judge pending consideration by a panel.

Rule 9. (Reserved)

Rule 10. Designation of the Record on Appeal

(a) Designation. Within 60 days after the date of the Clerk's Notice of Docketing, the Secretary shall file with the Clerk and serve on the appellant a designation of all material in the record of proceedings before the Secretary and the Board that was relied upon by the Board in ruling against the appellant on the issues listed by the Board and any other material from the record which the Secretary considers relevant. The Secretary shall serve on the appellant a copy of those materials and a list of any record matter which cannot be duplicated.

(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.

(c) Disputes. If any difference arises as to the content of the record on appeal, the Court, on its own initiative or on motion of a party, shall resolve the matter. The motion of a party shall describe the good faith efforts that have been made to resolve the dispute.

(d) Irrelevant Materials. The parties should take note that the record on appeal may not in-

clude materials not relevant to the issues on appeal.

(As amended June 14, 1994, eff. Aug. 1, 1994.)

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 counterdesignation or statement 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 of:

- (1) a table of contents of the documents transmitted;
- (2) a certified copy of the Board's decision showing the date it was mailed to the appellant, and the docket entries prepared by the Board; and
- (3) a certified copy of the designated record, assembled in chronological order, with pages consecutively numbered (e.g., R-1, R-2, etc.).

A copy of the record on appeal shall be served on all parties when the record is transmitted.

(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 the record to be enlarged or supplemented by serving notice on all other parties of the additional parts of the record 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 file a motion to limit the contents of the supplemental record. The motion shall describe the good faith efforts made to resolve the dispute. Unless the Court orders otherwise, supplementation of the record does not extend the time for filing the appellant's brief.

(c) **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 shall permit a party or a representative of a party to inspect and to copy material in the record before the Board. Such inspection and copying shall be subject to reasonable regulation by the Secretary.

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

(As amended June 14, 1994, eff. Aug. 1, 1994.)

Rule 12. Docketing the Appeal; Filing the Record on Appeal

(a) **Docketing the Appeal.** Upon receipt of the Notice of Appeal, the Clerk shall enter the appeal upon the docket under the appellant's name, identified as appellant, unless otherwise ordered by the Court.

(b) **Filing the Record or Supplemental Record.** Upon receipt of the record on appeal, the Clerk shall file it and notify all parties when appellant's brief is due. See Rules 31 and 47.

(As amended June 14, 1994, eff. Aug. 1, 1994.)

Rules 13 and 14. (Reserved)

Rule 15. Intervention

A party who was allowed to intervene before the Board may proceed before the Court as an intervenor without filing a motion, but shall serve on all parties and file with the Clerk, within 60 days after the date of the Clerk's Notice of Docketing in accordance with Rule 4(b), a notice of intent to intervene. A person who did not intervene before the Board and who desires to intervene before the Court in a proceeding initiated by a Notice of Appeal or a petition for extraordinary relief shall serve on all parties and file with the Clerk, within 30 days after the filing of a petition for extraordinary relief or within 60 days after the date of the Clerk's Notice of Docketing in accordance with Rule 4(b), a motion for permission to intervene. The motion must contain a concise statement of the interest of the moving person or party and the grounds upon which intervention is sought and should advise the Court of opposition to the motion, if any. A motion for permission to intervene beyond this time limit will be granted only in extraordinary circumstances.

(As amended June 14, 1994, eff. Aug. 1, 1994.)

Rules 16 to 20. (Reserved)

Rule 21. Extraordinary Relief

(a) **Mandamus or Prohibition; Petition; Service and Filing.** A petition for a writ of mandamus or of prohibition must be made by filing 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.** Unless the Court concludes that the petition should be denied, it will order the respondent(s) to file an answer to the petition within a time fixed by the order. The order shall be served by the Clerk on the named respondent(s), on the Secretary, and on any other party at interest. Two or more respondents may answer jointly. Any respondent who does not desire to appear in the proceeding may so advise the Clerk and all parties by letter, but such action will not amount to agree-

ment that the petition should be granted. The Clerk shall notify the parties of the time limits for the filing of any briefs, and of the date of any oral argument. The proceeding will be given preference by the Court. The petition may be acted upon after reasonable notice of its filing to all parties.

(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.

(d) Form and Length of Papers; Number of Copies. Except by permission of the Court, the form and length requirements in Rule 32(g) for principal briefs apply to petitions and responses thereto. 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 entitled: “[Name of Petitioner], Petitioner v. [Name and Title of Respondent], Respondent.”

(As amended June 14, 1994, eff. Aug. 1, 1994.)

Rules 22 and 23. (Reserved)

Rule 24. Waiver of Filing Fee

An appellant who is unable, because of financial hardship, to pay the filing fee required by Rule 3(e) or Rule 21(a) may request a waiver of the payment of the fee by submitting a motion to waive the filing fee, on the form prescribed at Form 4 in the Appendix of Forms.

If the Court grants the motion, the payment of the filing fee will be waived. If the motion is denied by the Court, the Clerk shall promptly transmit to the appellant notice of the Court's order denying the motion; the fee must be paid within 14 days from the date of the Court's order.

(As amended June 14, 1994, eff. Aug. 1, 1994.)

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.

(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.

(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.

(c) Service of All Papers Required. Copies of all papers 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.

(d) Manner of Service. Service may be personal or by mail. Personal service includes delivery of the copy to a responsible person at the office of the representative or the office or home of a party without a representative. The Secretary's representative is the General Counsel, Department of Veterans Affairs.

(e) Proof of Service. Papers 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 require such proof to be filed promptly thereafter.

(As amended June 14, 1994, eff. Aug. 1, 1994; Nov. 7, 1994.)

Rule 26. Computation and Extension of Time

(a) Computation of Time. In computing any period of time prescribed by these rules, by an order of Court, or by any applicable statute, the day of the event from which the time begins to run will not be included. The last day of the period will be included, unless it is a Saturday, a Sunday, or a legal holiday; in that case, the period extends until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. As used in this rule, “legal holiday” means New Year's Day, Birthday of Martin Luther King, Jr., Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President or Congress. A “legal holiday” also includes a day on which the Clerk's Office has been closed by direction of the Chief Judge. Notice of such action will be posted publicly, if circumstances permit, and placed on a recording for telephone callers.

(b) Extension of Time. The Court, on its own initiative or on motion of a party for good cause shown, may extend the time prescribed by these rules for doing any act, or may permit an act to be done after the expiration of such time, but the Court may not extend the time for filing a Notice of Appeal.

(c) Additional Time After Service by Mail. Wherever a party is required or permitted to do an act, other than the filing of a Notice of Appeal, within a prescribed period after service of a paper on that party by another party and the paper is served by mail, 3 days will be added to the prescribed period. Whenever such paper is served by the Secretary in a jurisdiction other than a state, the District of Columbia, Puerto Rico, or the Virgin Islands, 30 additional days will be added to the prescribed period. Except as provided in Rule 35(d), additional time is not

added to the periods prescribed in orders and notices issued by the Court.

(As amended June 14, 1994, eff. Aug. 1, 1994.)

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(d)[(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 the motion is unopposed.

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.

(b) Motions for Procedural Orders. Notwithstanding subsection (a) of this rule, motions for procedural orders, including any motion for an extension of time under Rule 26(b), may be acted on at any time, without awaiting a response, and, by rule or order of the Court, motions for certain procedural orders may be disposed of by the Clerk. Any party adversely affected by such an action may, by motion, request that the Court reconsider, vacate, or modify the action within 10 days after the action is announced.

(c) Form and Length of Papers; Number of Copies. Except by permission of the Court, the form and length 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.

(As amended June 14, 1994, eff. Aug. 1, 1994.)

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain the appropriate headings and, in this order:

- (1) a table of contents, with page references;
- (2) a table of cases (alphabetically listed), statutes, and other authorities cited, with references to the page of the brief where they are cited, unless the case is expedited under Rule 47;
- (3) a statement of the issues;
- (4) a statement of the case, showing briefly the nature of the case, the course of proceedings, the result below, and the facts relevant to the issues, with appropriate references to the record;

(5) an argument, beginning with a summary, and containing the appellant's contentions with respect to the issues and the reasons for them, with citations to the authorities and parts of the record relied on; and

(6) a short conclusion stating the precise relief sought.

(b) Secretary's Brief.

(1) The Secretary's brief must conform to the requirements of subsection (a) of this rule, but a statement of the issues or of the case need not be made unless the Secretary is dissatisfied with the appellant's statement.

(2) If the Secretary wishes to confess error as to any issue or issues raised by appellant, but not as to all the issues raised, and the relief the Secretary deems appropriate as to the confession of error is different from that sought by the appellant, the Secretary shall include a statement of concession in the brief and identify the relief thereunder that is deemed appropriate.

(c) Reply Brief. The appellant may file a brief in reply to the Secretary's brief. No further briefs may be filed except with the Court's permission.

(d) References to the Record. References in the briefs to the record must be to the pages as transmitted by the Secretary. Commonly understood abbreviations may be used.

(e) Reproduction of Materials. If determination of the issues requires the study of statutes, rules, regulations, or other material, 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.

(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.

(g) Multiple Appellants. In cases involving more than one appellant, including consolidated cases, any number may join in a single brief, and any appellant may adopt by reference any part of the brief of another. Appellants may similarly join in reply briefs.

(h) Citation of Supplemental Authorities. When pertinent and significant authorities come to the attention of a party after the party's brief has been filed or after oral argument but before the decision, a party shall promptly advise the Clerk, by letter, with a copy to all other parties, setting forth the citations. If the authority is not readily available in a Reporter system, the party shall provide the Clerk with a copy. The letter must refer to the page of the brief or to a point argued orally to which each citation pertains, and the letter must state without argument the reasons for the supplemental citations. Any response must be made promptly and must be similarly limited.

(i) Brief of Unrepresented Appellant. An unrepresented appellant may file an informal brief on the form prescribed by the Court. All other briefs must conform to the requirements of these rules.

(j) Citation of Nonprecedential Authority. Single-judge actions and unpublished orders or judgments of this Court are not to 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.

(As amended June 14, 1994, eff. Aug. 1, 1994.)

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. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.

(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); 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.

(As amended June 14, 1994, eff. Aug. 1, 1994.)

Rule 30. (Reserved)

Rule 31. Filing and Service of Briefs

(a) Time Limits. Except in cases covered by Rule 47 (Expedited Briefs), the appellant shall serve and file a brief within 30 days after the date of the notice from the Clerk that the record has been filed. The Secretary shall serve and file a brief within 30 days after service of the appellant's brief. The appellant may serve and file a reply brief within 14 days after service of the Secretary's brief, but, except for good cause shown, any brief must be filed at least 3 days before argument. Service must be pursuant to Rule 25 (Filing and Service).

(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.

(c) Effect of Failure to File. If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, the Court, on its own initiative or on motion by the Secretary, may dismiss the appeal. If the Secretary fails to file a brief or other response, the Court may take appropriate action.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Format. Briefs, appendices, and other papers must be printed or typewritten, and may be produced by any copying process that produces a clear black image on white opaque paper, and onion skin paper is not permitted except for pa-

pers sent by international mail. Pages must be letter size (8½ by 11 inches), with margins at least one inch wide from all edges, and with type or print on only one side of the page.

(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, 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.

(c) Covers. Covers are not required on briefs or appendices but, if used, they should be blue for the appellant, red for the Secretary, green for an amicus curiae or an intervenor, gray for any reply brief and white for an appendix if separate from the brief. See Form 2 (Sample Brief Cover).

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

(e) Caption. A paper addressed to the Court must contain a caption setting forth the name of this Court, the Court's case number when assigned, the title of the case, the Department of Veterans Affairs claims file number, and a brief title indicating the purpose of the paper.

(f) Page Numbers. Pages must be numbered in the center of the bottom margin, using Arabic numerals for the pages subject to the page limitation and lower case Roman numerals for the table of contents, tables of citations, and any appendix containing statutes, rules, and regulations.

(g) Page Limits. 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 cases, statutes, and other authorities; and any appendix containing statutes, rules, regulations, etc.

(h) Identification of Proponent. The names, addresses, and telephone numbers of all representatives and of all parties without representatives must appear on briefs or other documents being filed with the Clerk.

(As amended June 14, 1994, eff. Aug. 1, 1994.)

Rule 33. Prehearing 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. The Court will 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.

(b) Use of Content. 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.

(As amended June 14, 1994, eff. Aug. 1, 1994.)

Rule 34. Oral Argument

(a) **In General.** Oral argument will be allowed only when ordered by the Court and will be held where and when the Court orders. The Court may order oral argument on its own initiative or on the motion of a party filed with that party's principal brief. The appellant may also request that oral argument be held in a location other than Washington, D.C.

(b) **Notice of Argument; Postponement.** The Clerk shall advise all parties whether oral argument is to be heard, and, if so, where and when, and the time to be allowed each side. Where possible, the Clerk will schedule oral argument so as to minimize inconvenience to appellants or their representatives. A request for postponement of the argument or for the allowance of additional time must be made by motion filed reasonably in advance of the date fixed for argument.

(c) **Order and Content of Argument.** The appellant may open and conclude the argument. A party will not be permitted to read at length from briefs, records, or authorities. In argument on motions, the movant may open and conclude the argument.

(d) **Non-appearance of Parties.** If any party fails to appear to present argument, the Court will hear argument by any appellant who is present, and may hear argument by any other party who is present. If no party appears, the case will be decided on the briefs and the record on appeal unless the Court orders otherwise.

(e) **Use of Physical Exhibits at Argument; Removal.** A party who intends to use physical exhibits other than documents shall arrange with the Clerk to have them placed in the courtroom on the date of the argument before the Court convenes. After the argument, the party shall remove the exhibits unless the Court otherwise directs. If the exhibits are not reclaimed within a reasonable time after notice is given by the Clerk, they will be disposed of by the Clerk.

(f) **Motions.** Oral argument normally is not granted on motions.

(g) **Oral Argument.** Oral argument will be held as announced by the Chief Judge. The announcement will indicate the composition of the panel, although there is no guarantee that the panel on the argument date will be identical to that announced since a judge may be recused from a case or, for a number of reasons, may be unavailable.

Rule 35. Motions for Reconsideration, for Panel Review, or for Consideration or Review by the Full Court

(a) **Motion for Reconsideration.** A party in a case decided by a single judge may move for reconsideration by the single judge. A party in a case decided by a panel may move for reconsideration by the panel. Such a motion must be made within 14 days after the date of the decision of which reconsideration is being requested. If such a motion is filed, judgment will not be entered until the motion is acted upon. A party in a case decided by the full Court may move for

reconsideration by the full Court. However, the filing of such a motion will not postpone the entry of judgment. A motion for reconsideration of the full Court's denial of review of a panel decision will not be entertained.

(b) **Motion for Panel Review.** A party in a case decided by a single judge may move for review by a panel of the Court. A party in a case decided by a panel may move for review by the full Court. If such a motion is filed, judgment will not be entered until the motion is acted upon.

(c) **Motion for Consideration or Review by the Full Court.** A party may move for initial consideration of a case, or for review of a panel decision in a case, by the full Court. Such motions are not favored and ordinarily will not be granted except when such action is necessary to secure or maintain uniformity of the Court's decisions or to resolve a question of exceptional importance. A motion for direct review by the full Court of a single-judge decision is not permitted. The filing of a motion for review by the full Court will not postpone the entry of judgment.

(d) **Time for Motion.** A motion, whether separate or in the alternative, for single-judge reconsideration or panel review of a single-judge decision must be made within 14 days, plus the additional time allowed in Rule 26(c), after the date of the initial single-judge decision. A motion, whether separate or in the alternative, for panel reconsideration or full Court review of a panel decision (including panel denial of review) must be made within 14 days, plus the additional time allowed in Rule 26(c), after the date of the initial panel decision. A motion for initial consideration of a case by the full Court must be made not later than the date on which the Secretary's brief is first due.

(e) **Content of Motion.** A motion for reconsideration or review must state the points of law or fact which the party believes the Court has overlooked or misunderstood, and must contain an argument in support of the party's position. A motion for full Court consideration or review must state (1) how such action will secure or maintain uniformity of the Court's decisions or (2) what question of exceptional importance is involved, and must contain an argument in support of the party's position.

(f) **Form; Length; Number of Copies.** Except by permission of the Court, a motion (including any memorandum or brief filed in support thereof) under this rule may not exceed 15 pages and must otherwise comply with Rules 25, 27 (except that the motion need not indicate whether it is opposed) and 32. A motion for consideration or review by the full Court must be filed in an original and 7 copies.

(g) **Response; Action on the Motion.** No response to a motion under this rule may be filed unless requested by the Court, but a motion for review ordinarily will not be granted without such a request. Except by permission of the Court, a response (including any memorandum or brief filed in support thereof) may not exceed 15 pages. A motion for oral argument will not be permitted. A motion for reconsideration will be decided by the judge or panel which rendered the decision. A motion for review of a single-judge

decision will be referred to a panel. A motion for review of a panel decision will be referred to all of the judges. Consideration or review by the full Court requires the vote of a majority of the judges, but such a vote need not be taken unless a judge requests it. The Clerk may return an untimely motion or one which fails to include the statement required by subsection (e) of this rule.

(As amended June 14, 1994, eff. Aug. 1, 1994.)

Rule 36. Entry of Judgment

Upon receipt of an opinion, the Clerk shall send copies to all parties. The Clerk shall enter the judgment 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.

(As amended Feb. 1, 1993; June 1, 1993, eff. Oct. 29, 1992; Mar. 11, 1994; June 14, 1994, eff. Aug. 1, 1994.)

Rule 37. (Reserved)

Rule 38. Frivolous Appeals

If the Court determines that an appeal is frivolous, it may enter such order as it deems appropriate.

Rule 39. Attorney Fees and Expenses

(a) **Time for filing.** An application pursuant to 28 U.S.C. §2412 for award of attorney fees and other expenses in connection with an appeal must be filed with the Clerk within 30 days after this Court's judgment becomes final. See also 28 U.S.C. §2412(d)(2)(G) and 38 U.S.C. §7291(a).

(b) **Content.** The application, in an original and three copies with proof of service on the Secretary, must be captioned with the name and docket number of the proceeding in this Court for which an award is sought. It must include:

- (1) a statement that the applicant is a prevailing party and is eligible to receive an award;
- (2) identification of the specific position or positions of the Secretary that the applicant alleges were not substantially justified; and
- (3) an itemized statement from the applicant's attorney as to each type of service which was rendered, describing:
 - (A) the nature of the service;
 - (B) the actual time expended for which a fee is sought;
 - (C) the rate at which fees are computed; and
 - (D) the amount sought;

and an itemized statement of expenses for which reimbursement is sought.

(c) **Response.** Within 30 days after service of the application, the Secretary shall file and serve a response, stating which elements of the application are not contested and explaining the Secretary's position on those elements which are contested.

(d) **Reply.** Within 30 days after service of the Secretary's response, the applicant may file and serve a reply addressing those matters contested by the Secretary.

(e) **Appendices.** The parties shall file as appendices to the application, response, and reply those relevant papers which are not already before the Court.

(Added Feb. 1, 1993; amended June 1, 1993, eff. Oct. 29, 1992; Mar. 11, 1994.)

Rule 40. (Reserved)

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, 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).

(b) **Mandate in Consented Dismissal or Remand.** An order on consent dismissing or remanding a case will also constitute the mandate.

(As amended June 14, 1994, eff. Aug. 1, 1994.)

Rule 42. Voluntary Dismissal

If the parties sign and file with the Clerk an agreement that the proceeding be dismissed, the Clerk shall enter the case dismissed. An appeal may be dismissed on motion of the appellant upon terms requested by the appellant, agreed upon by the parties, or fixed by the Court. An appellant may, at any time before appellant's brief is filed, withdraw an appeal in writing without filing a motion.

Rule 43. Substitution of Parties

(a) Death of a Party.

(1) *Before Notice of Appeal.* If a party entitled to appeal dies before filing a Notice of Appeal, the Notice of Appeal may, to the extent permitted by law, be filed within the time limit in Rule 4 by the personal representative of the deceased party's estate, by any other appropriate person, or, if there is no such person, by the party's representative of record before the Board.

(2) *After Notice of Appeal.* If a party dies after a Notice of Appeal is filed or while a proceeding is pending in this Court, the personal representative of the deceased party's estate or any other appropriate person may, to the extent permitted by law, be substituted as a party on motion by such person or by any party. If no such person exists, any party may suggest the death on the record and proceedings will then be as the Court directs.

(b) **Substitution for Other Causes.** If substitution of a party in this Court is necessary for any reason other than death, the Court may order it on motion of any party or on its own initiative.

(c) **Public Officers; Death or Separation from Office.**

(1) *Naming as Party.* The Secretary must be described as the appellee by name and by official title. Any public officer who is a respondent must be described by official title rather than by name; but the Court may require that the name of the public officer be added.

(2) *Death or Separation.* When a public officer is a party in an official capacity and during the proceedings dies, resigns, or otherwise ceases to hold office, the proceedings are not stopped, and the public officer's successor is automatically substituted as a party. Proceedings following the substitution must be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties will be disregarded.

(As amended June 14, 1994, eff. Aug. 1, 1994; Sept. 23, 1994.)

Rule 44. Judicial Conference

(a) **Purpose.** Pursuant to 38 U.S.C. §7286, there shall be convened, at such time and place as the Chief Judge designates, a conference to consider the business of the Court and to recommend means of improving the administration of justice within the Court's jurisdiction.

(b) **Committee.** The Chief Judge will appoint a Judicial Conference Planning Committee to plan and conduct the conference. The Planning Committee may appoint such subcommittees as may be necessary to assure the efficient operation of the conference.

(c) **Attendance.** The Chief Judge presides at the conference. All persons admitted to practice before the Court, and such other persons as are designated by the Chief Judge, may be members of and participate in the conference.

(d) **Registration Fee.** Each member of the conference shall pay a registration fee in an amount fixed by the Court to defray expenses of the conference. The Chief Judge may excuse the payment of the fee in individual cases. These fees shall be maintained in a bank account which shall be known as the "CVA Judicial Conference Fund." Money from this account shall be disbursed by the Clerk at the direction of the Chief Judge to defray conference expenses. Any excess shall be used to pay future conference-related expenses.

(e) **Responsibility of the Clerk.** The Clerk shall be responsible for receipt and disbursement of conference funds, for all conference records and accounts, and for conference staff support, and shall perform such other duties pertaining to the conference as may be directed by the Chief Judge.

(f) **Delegation.** The Chief Judge may delegate any or all of his responsibilities to another judge of the Court.

(Added June 14, 1994, eff. Aug. 1, 1994.)

Rule 45. Duties of Clerk

(a) **General Provisions.** The Clerk shall take the oath required by law. Neither the Clerk nor any deputy clerk may practice as an attorney or counselor in any court while continuing in office. The Court will be deemed always open for the purpose of filing any proper paper, of issuing

and returning process, and of making motions and orders. The office of the Clerk, with the Clerk or a deputy clerk in attendance, will be open during business hours on all days except Saturdays, Sundays, and legal holidays (as defined in Rule 26(a)) from 9:00 a.m. to 4:00 p.m. A night box will be available at the entrance to the Public Office from 4:00 p.m. to 6:00 p.m. on such business days.

(b) **The Docket; Calendar; Other Records Required.** The Clerk shall:

(1) maintain a docket containing a record of all papers filed with the Clerk, and all process, orders, and judgments;

(2) maintain an index of cases contained in the docket;

(3) prepare, under the direction of the Court, a calendar of cases submitted or awaiting argument; and

(4) keep such other books and records as may be required by the Court.

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

(d) **Custody of Records and Papers.** The Clerk shall have custody of the records and papers of the Court. The Clerk shall not permit any original record or paper to be taken from the Clerk's custody except as authorized by the United States Supreme Court, the United States Court of Appeals for the Federal Circuit, or this Court. Original papers transmitted as the record on appeal will be returned upon disposition of the case. The Clerk shall preserve copies of briefs and appendices and other printed papers filed.

(e) **Court Seal.** The Clerk shall be the custodian of the seal of the Court. The seal will appear as ordered by the Court. The seal will be the means of authentication of all records and certificates and process issued from this Court.

(f) **Schedule of Fees.** The Clerk shall maintain in the Public Office a schedule of fees approved by the Court.

(g) **Motions.** The Clerk may act on motions, if consented to or unopposed, that seek to:

(1) dismiss an appeal or an application for extraordinary relief with or without prejudice to reinstate it;

(2) remand a case;

(3) reinstate a case that was dismissed for failure to comply with the rules;

(4) extend the time for taking any action required or permitted by the rules or an order of the Court, unless the motion is made after the time limit has elapsed;

(5) consolidate appeals;

(6) withdraw or substitute an appearance; or

(7) correct a brief or other paper.

(h) **Construction of Rules in Self-Representation Cases.** The Clerk shall liberally construe the rules as they apply to appellants representing themselves.

Rule 46. Representation

(a) **Admission of Attorneys to Practice.**

(1) *General.* A person of good moral character and repute who has been admitted to practice in

the Supreme Court of the United States, or the highest court of any state, the District of Columbia, or a territory, possession, or commonwealth of the United States, and is in good standing therein, may be admitted to the bar of this Court upon application.

(2) *Application.* An attorney at law may be admitted to the bar of the Court upon filing with the Clerk a completed application accompanied by the prescribed fee (payable by check or money order) and a current certificate from the clerk of the appropriate court showing that the applicant is a member in good standing of the bar of one of the courts named in subparagraph (1). A current court certificate is one executed within three months preceding the date of the filing of the application.

(b) Admission of Non-attorney Practitioners to Practice. A non-attorney of good moral character and repute

(1) under the direct supervision of an attorney admitted to the bar of the Court, or

(2) employed by an organization which is chartered by Congress, is recognized by the Secretary of Veterans Affairs for claims representation, and provides a statement signed by the organization's chief executive officer certifying to the employee's:

(A) understanding of the procedures and jurisdiction of the Court and of the nature, scope, and standards of its judicial review; and

(B) proficiency to represent appellants before the Court

may be admitted to practice before the Court upon filing with the Clerk a completed application accompanied by the prescribed fee (payable by check or money order). In making the certification in subparagraph (2), the chief executive officer should be aware that knowledge of and competence in veterans law and the administrative claims process does not in and of itself connote competence in appellate practice and procedure.

(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.

(d) Appearance, Withdrawal, and Change of Address.

(1) *Appearance.* No attorney or non-attorney practitioner may participate in any proceedings in any case unless that individual has entered an appearance. The signing of a pleading or motion, or the physical appearance at oral argument, by an attorney or non-attorney practitioner constitutes an appearance by that individual as the representative in the case. The appearance must be accompanied by filing and service on all parties of a written statement that the representative is representing a designated client or clients, giving the name, address, and telephone number of the representative, and signed by him or her. See sample Notice of Appearance at Form 3 in the Appendix of Forms. In the case of a non-attorney practitioner, the name, address, and signature of the responsible supervising attorney (subparagraph (b)(1) of this rule) or the

identification of the employing organization (subparagraph (b)(2) of this rule) must appear on each paper filed with the Court. Appearances may not be made in the name of a law firm or other organization. If a party is represented by more than one individual, one shall be designated as the representative of record for the purpose of receipt of papers sent by the Court and served by other parties.

(2) *Withdrawal.* A representative 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).

(3) *Change of address.* Each representative and each party appearing on his or her own behalf has a continuing duty to notify the Clerk and all other parties of any change of address or telephone number. Absent such notice, service of documents at the most recently provided address of that representative or party will be fully effective.

(e) Fee Agreement. A representative who enters an appearance (other than a limited appearance) must file a copy of a fee agreement or a statement indicating that the appellant is being represented without charge to the appellant. If the fee agreement provides for direct payment out of past due benefits under 38 U.S.C. §5904, a copy must be served on the Secretary.

(f) Appearance by Law Students.

(1) An eligible law student, with the written consent of the appellant and the attorney of record, who must be a member of the bar of the Court, may appear in this Court.

(2) An eligible law student may participate in the preparation of briefs and other documents to be filed in this Court, but such briefs or documents must be signed by the attorney of record. The student may also participate in oral argument with leave of the Court, but only in the presence of the attorney of record. The attorney of record shall assume personal professional responsibility for the law student's work and for supervising the quality of his or her work. The attorney should be familiar with the case and prepared to supplement or correct any written or oral statement made by the student.

(3) In order to make an appearance pursuant to this rule, the student must:

(A) be duly enrolled in a law school approved by the American Bar Association;

(B) have completed legal studies amounting to at least four semesters, or the equivalent if studies are scheduled on other than a semester basis;

(C) be certified by the dean of the law school as being of good character and competent legal ability. This certification must be filed

with the Clerk and may be withdrawn at any time by the dean, upon written notice to the Clerk, or by the Court, without notice of hearing and without any showing of cause;

(D) be introduced by the attorney of record in the case;

(E) neither ask for nor receive any compensation or remuneration of any kind for his or her services from the person on whose behalf such services are rendered, but this will not prevent an attorney, legal aid bureau, law school, a state, or the United States from paying compensation to the eligible law student, nor will it prevent any agency from making such charges for its services as it may otherwise properly require;

(F) certify in writing that he or she has read and is familiar with the code of professional responsibility or rules of professional conduct in effect in the state or jurisdiction in which the student's law school is located.

(g) Self-representation. Any appellant may appear and present his or her own case before the Court.

(As amended Sept. 19, 1991, eff. Oct. 1, 1991; June 14, 1994, eff. Aug. 1, 1994.)

APPENDIX TO RULE 46

RULES OF ADMISSION AND PRACTICE

(Effective Aug. 1, 1992)

Rule 1. Standards of Professional Conduct

(a) Disciplinary Action. For misconduct as defined in paragraph (b) below, or for failure to comply with these Rules or any rule or order of this Court, and after notice and opportunity to be heard, any person admitted to practice before this Court may be reprimanded (publicly or privately), suspended from practice before this Court, disbarred, or subjected to such other disciplinary action as the circumstances may warrant. The term disbarment includes the prohibition of a non-attorney from practice before the Court.

(b) Misconduct. Acts or omissions by any person admitted to practice before this Court, individually or in concert with any other person or persons, which violate any Code of Professional Responsibility or other officially-adopted body of disciplinary rules applicable to the conduct of the person constitute misconduct. The Code of Professional Responsibility adopted by this Court is the Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983, and such amendments thereto adopted by such House. The Model Rules, except as otherwise provided by specific rule of this Court, shall apply to the conduct of all persons admitted to practice before this Court.

Rule 2. Committee on Admission and Practice

(a) The Committee. The Court shall appoint a standing committee of three members to be known as the Committee on Admission and Practice. Each member shall be a member of the bar of this Court and shall be appointed to serve

for a term of three years (except that, of the three members first appointed after the effective date of these Rules, one shall be appointed for a term of one year and one shall be appointed for a term of two years). A member is eligible for reappointment to one additional term. Each member may serve until a successor has been appointed. If a member holds over after the expiration of the term for which that member was appointed, the period of the member's hold-over shall be treated as part of the term of his or her successor. The Court may revoke any appointment at any time. In the case of any vacancy, the successor appointed shall serve the unexpired term of his or her predecessor. The Court shall designate one of the members of the Committee to serve as Chair.

(b) Confidentiality. Except to the extent reasonably necessary to carry out its responsibilities and unless otherwise ordered by the Court, the Committee shall treat in confidence the referral to it of a grievance or an application for admission, its consideration of such matter, and its report to the Court.

(c) Admissions.

(1) The Court may refer to the Committee an application for admission to practice before the Court whenever that application or other available information raises a question as to whether the applicant is qualified for admission under the standards set forth in Rule 46(a) and (b) of the Rules of Practice and Procedure of this Court.

(2) Upon referral by the Court of any such application for admission, the Committee shall take such action as is appropriate, subject to any special instructions from the Court, and shall report its findings and recommendations to the Court. The Committee shall provide the applicant with a copy of its findings and recommendations if the Committee recommends denial of the application.

(3) In considering applications for admission referred to it by the Court, the Committee may solicit relevant information from the applicant or from others, hold hearings, and take testimony under oath. In addition, the applicant may submit to the Committee any information that he or she deems to be relevant, and shall be entitled to be represented by counsel.

(4) The applicant shall have the burden of establishing by clear and convincing evidence that he or she has the requisite character and qualifications necessary for admission and shall cooperate with the Court and the Committee in their consideration of the application.

(d) Grievances.

(1) A panel of the Court may refer to the Committee any accusation or suggestion of misconduct on the part of any person admitted to practice before the Court, or any failure to comply with these Rules or any rule or order of this Court, for such investigation, hearing, and report as the Court deems advisable. Any such matter shall be referred to in these Rules as a grievance, and the person to whom the grievance relates shall be referred to as the respondent.

(2) Upon referral by the Court of any grievance, the Committee shall take such action as is

appropriate, subject to any special instructions from the Court, and shall report its findings and recommendations to the Court. In such matters, the Committee shall be guided by Rule 1 of these Rules.

(3) The Committee shall consider each grievance referred to it and, if in its opinion further action is warranted, it shall serve a statement thereof on the respondent by certified mail, return receipt requested, addressed to the last office address filed with the Clerk. The respondent shall file with the Chair of the Committee, within 30 days after the mailing date of the statement, an answer subscribed and sworn to under oath. The Chair of the Committee, upon good cause shown, may extend the time to answer. (4) If the Committee concludes after investigation and review that a hearing is unnecessary because (A) the facts are not in dispute, (B) sufficient evidence to support the grievance is not present, (C) there is pending another proceeding against the respondent, the disposition of which in the judgment of the Committee should be awaited before further action is considered, or (D) a hearing is otherwise not warranted under the circumstances presented, the Committee shall report to the Court its recommendation for disposition of the matter.

(e) Hearings by the Committee.

(1) The Committee may sit as a fact-finding body and, upon reasonable notice to the respondent, may hold hearings on the grievance.

(2) The respondent shall be entitled to representation by counsel. The respondent may submit to the Committee all relevant information he or she deems appropriate and may request that the Committee consider the testimony of witnesses.

(3) The persons who may be present at the hearing are the members of the Committee, the respondent, the respondent's counsel, if any, and a witness providing testimony.

(4) At the respondent's request and expense, the hearing will be recorded.

(5) The Committee shall report its findings and recommendations to the Court. A copy of its finding and recommendations shall be forwarded simultaneously to the respondent.

(f) Duty of Respondent to Cooperate. It shall be the duty and responsibility of the respondent and his or her counsel to cooperate with the Committee. If a respondent fails to respond to the Committee, the Committee may recommend to the Court that discipline be imposed.

(g) Show Cause Order or Hearing by the Court. Upon receipt of the Committee's finding that misconduct occurred, the Court may issue an order requiring the respondent to show cause why discipline should not be imposed. The Court may invite the Committee or any person admitted to practice before the Court to reply to the respondent's answer to the show cause order or to pursue the grievance against the respondent at a show cause hearing.

Rule 3. Members of the Bar and Non-Attorney Practitioners Convicted of Crimes

(a) Suspension from Practice. Upon the filing with this Court of a certified copy of a judgment of conviction demonstrating that any person ad-

mitted to practice before the Court has been convicted of a serious crime, as defined in paragraph (f) below, in any court of the United States, of the District of Columbia, or of any state, territory, commonwealth, or possession of the United States, the Clerk shall enter an order immediately suspending that person, regardless of the pendency of any appeal, until further order of the Court. The Clerk shall immediately serve a copy of such order upon the person by certified mail, return receipt requested, addressed to the last office address filed with the Clerk. Upon good cause shown, the Court may set aside such order when it appears in the interest of justice to do so.

(b) Referral for Serious Crime. Upon the filing of a certified copy of a judgment of conviction for a serious crime of a person who is admitted to practice before this Court, the Court may refer the matter to the Committee for a recommendation to the Court on the extent of the final discipline to be imposed as a result of the conduct resulting in the conviction, provided that the recommendation for final discipline shall not be made until all appeals from the conviction are concluded.

(c) Referral for Other Crime. Upon the filing of a certified copy of a judgment of conviction of a person admitted to practice before this Court for a crime not constituting a "serious crime", the Court may refer the matter to the Committee for a recommendation to the Court for any appropriate action.

(d) Proof of Crime. In any disciplinary proceedings instituted against a person admitted to practice before this Court based upon a conviction, a certified copy of a judgment of conviction of such person for a crime shall be conclusive evidence of the commission of that crime.

(e) Reversal of Conviction. A person admitted to practice who is suspended under the provisions of this Rule shall be reinstated immediately upon the filing of a certificate demonstrating that the underlying conviction of a serious crime has been reversed, but the reinstatement shall not terminate any disciplinary proceeding then pending against the person in this Court. In any such proceeding, evidence relating to the conduct which resulted in the conviction may be considered despite the reversal of the conviction.

(f) Definition of Serious Crime. The term "serious crime" includes any felony and also includes any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime in the jurisdiction where the judgment was entered, involves moral turpitude, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime".

Rule 4. Discipline Imposed by Other Courts or Any Other Governmental Entities

(a) Initial Action. Upon the filing of a certified or exemplified copy of a judgment or order demonstrating that a person admitted to practice before this Court has been disciplined for profes-

sional misconduct by another court or any other governmental entity, this Court may refer the matter to the Committee for recommendation for any appropriate action, or may issue a notice directed to the attorney or non-attorney practitioner containing—

(1) a copy of the judgment or order from the other court or entity; and

(2) an order to show cause directing that the attorney or non-attorney practitioner inform this Court within the time specified of any claim by the attorney or non-attorney practitioner, predicated upon the grounds set forth in paragraph (c) below, that the imposition of the identical discipline by this Court would be unwarranted and the reasons therefor.

(b) Deferral of Discipline. In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this Court may be deferred until such stay expires.

(c) Final Action. After consideration of the response called for by the order issued pursuant to paragraph (a) above or after expiration of the time specified in the order, this Court will impose the identical discipline unless the respondent demonstrates, or this Court is satisfied that—

(1) the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(2) there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this Court could not, consistent with its duty, accept as final the conclusion on that subject;

(3) the imposition of the same discipline by this Court would result in grave injustice; or

(4) the misconduct warrants substantially different discipline.

When this Court determines that any of these elements exists, it shall enter such other order as it deems appropriate.

(d) Proof of Misconduct. Except as provided in paragraph (c) above, a final adjudication in another court or any other governmental entity that an attorney or nonattorney practitioner has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this Court.

(e) Referral to Committee. This Court may at any stage ask the Committee to make recommendations to the Court for appropriate action in light of the imposition of professional discipline by another court or other governmental entity.

Rule 5. Disbarment on Consent or Resignation in Other Courts

Any attorney admitted to practice before this Court who is disbarred on consent or resigns from the bar of any other court of the United States or the District of Columbia, or from the bar of any state, territory, commonwealth, or possession of the United States while an investigation into allegations of misconduct is pending, shall, upon the filing with this Court of a certified or exemplified copy of the judgment or order accepting such disbarment of consent or resignation, be disbarred.

Rule 6. Disbarment on Consent While Under Disciplinary Investigation or Prosecution

(a) Consent to Disbarment. Any person admitted to practice before this Court who is the subject of an investigation into, or a pending proceeding involving, allegations of misconduct may consent to disbarment from practicing before this Court, but only by delivering to this Court an affidavit stating that he or she desires to consent to disbarment and that—

(1) the consent is freely and voluntarily rendered; the person is not being subjected to coercion or duress; and the person is fully aware of the implications of so consenting;

(2) the person is aware that there is a presently pending investigation or proceeding involving allegations that there exists grounds for his or her discipline, the nature of which shall be specifically set forth;

(3) the person acknowledges that the material facts so alleged are true or that he or she has no defense to the allegations; and

(4) the person so consents because he or she knows that if a grievance were predicated upon the matters under investigation, or if the proceeding were prosecuted, the person could not successfully interpose a defense.

(b) Order of Disbarment. Upon receipt of the required affidavit, the Clerk shall enter an order disbarring the person.

(c) Confidentiality. An order disbarring on consent a person admitted to practice before this Court shall be a matter of public record. However, the affidavit required under the provisions of this Rule shall not be publicly disclosed or made available for use in any other proceeding except upon order of this Court.

Rule 7. Reinstatement

(a) After Disbarment or Suspension. A former practitioner before this Court who is suspended for a definite period shall automatically be reinstated at the end of the period of suspension upon the filing with the Clerk of an affidavit of compliance with the provisions of the suspension order. Any person who is suspended indefinitely or disbarred may not resume practice before this Court until reinstated by order of this Court. A suspension may be directed to run concurrently with a suspension mandated by another court, in which event the person shall be eligible for reinstatement in this Court when that suspension expires, and will automatically be reinstated upon filing with the Clerk an affidavit indicating that the period of suspension has run and that person has been reinstated by the other court. A former practitioner before the Court who has been disbarred may not file a petition for reinstatement until 12 months have elapsed following the date of the order of disbarment.

(b) Hearing on Application. Petitions for reinstatement by a disbarred or indefinitely suspended former practitioner before this Court under this Rule shall be filed with the Clerk. Upon receipt of the petition, the Clerk shall promptly refer the petition to the Committee, which shall assign the matter for prompt hearing before the Committee. At the hearing the

petitioner shall have the burden of demonstrating by clear and convincing evidence that he or she possesses the moral and professional qualifications required for admission to practice before this Court and that the petitioner's resumption of practice before this Court will not be detrimental to the integrity and standing of the bar or to the administration of justice. The Committee shall make its recommendation to the Court, which may adopt its findings, schedule a hearing on the matter, or take such other action as it deems appropriate.

(c) Conditions of Reinstatement. If the petitioner is found by the Court to be unfit to resume practice before this Court, the petition will be dismissed. If the petitioner is found fit to resume such practice, the petitioner will be ordered reinstated. Reinstatement may be conditional upon the payment of all or part of the costs of the proceedings, and upon the making of partial or complete restitution to parties harmed by the misconduct which led to the suspension or disbarment.

(d) Successive Petitions. No petition for reinstatement under this Rule may be filed within one year following an adverse decision upon a petition for reinstatement filed by or on behalf of the same person.

Rule 8. Persons Specially Admitted

Whenever a person applies to be admitted or is admitted to practice before this Court for purposes of a particular proceeding (pro hac vice) under Rule 46(c) of the Rules of Practice and Procedure of this Court, the person shall be deemed thereby to have conferred disciplinary jurisdiction upon this Court for any alleged misconduct of that person arising in the Court, in the course of, in the preparation for, or in connection with such proceedings.

Rule 9. Proceedings Where a Person is Declared to be Mentally Incompetent or is Alleged to be Incapacitated

(a) Persons Declared Mentally Incompetent. Where a person who is admitted to practice before this Court has been judicially declared incompetent or involuntarily committed to a mental hospital, the Court, upon proper proof of the fact, shall enter an order suspending such person from practicing before the Court effective immediately and for an indefinite period until further order of the Court. A copy of such order shall be served upon the person, his guardian, and the Director of the mental health hospital in such a manner as the Court may direct.

(b) Persons Alleged to be Incapacitated. Whenever it appears to the Court that a person who has been admitted to practice may be incapacitated by reason of mental infirmity or illness or because of the use of drugs or intoxicants, the Court may take or direct such action as it deems necessary or proper to determine whether the person is so incapacitated, including the examination of the person by such qualified medical experts as the Court shall designate, and including reference of the matter to the Committee. Failure or refusal to submit to such examination shall be prima facie evidence of incapac-

ity. If the Court concludes that the person is incapacitated and should not be permitted to continue to practice before the Court, it shall enter an order suspending the person for an indefinite period and until further order of the Court. The Court may provide for such notice to the respondent of proceedings in the matter as is deemed proper and advisable and may appoint an attorney to represent the respondent if the respondent is without representation.

(c) Claim of Disability During Disciplinary Proceedings. If during the course of disciplinary proceeding the respondent contends that he or she is suffering from a disability by reason of a mental or physical infirmity or illness or because of the use of drugs or intoxicants, and that this disability makes it impossible for the respondent to make an adequate defense, the Court shall enter an order immediately suspending the respondent from continuing to practice before this Court until a determination is made of the respondent's capacity to continue to practice in a proceeding instituted in accordance with the provisions of paragraph (b) above.

(d) Application for Reinstatement. Any former practitioner before this Court suspended for incompetency or mental illness or because of the use of drugs or intoxicants may apply to the Court for reinstatement once a year or at such shorter intervals as the Court may direct in the order of suspension. The application will be granted by the Court upon a showing by clear and convincing evidence that the person's disability has been removed and that he or she is fit to resume the practice before this Court. The Court may take or direct actions as it deems necessary or proper to make a determination of whether the person's disability has been remedied, including a direction for an examination of the person by qualified medical experts designated by the Court. The Court may direct that the expenses of such an examination be paid by the applicant. Where a person has been suspended because of a judicial declaration of incompetence or involuntary commitment to a mental hospital and has thereafter been judicially declared to be competent, the Court may dispense with further evidence and direct the reinstatement of the person upon such terms as are deemed proper and advisable.

(e) Waiver of Physician-Patient Privilege. The filing of an application for reinstatement by a former practitioner before this Court who has been suspended for disability shall constitute a waiver of any doctor-patient privilege with respect to any treatment of the person during the period of his disability for the condition underlying the suspension. The person may be required to disclose the name of every psychiatrist, psychologist, physician, and facility by whom or in which the person has been examined or treated since his or her suspension for the condition underlying the suspension, and may be required to furnish the Court with written consent for such psychiatrists, psychologists, physicians, or facilities to divulge such information or records as may be requested by the medical experts designated by the Court.

Rule 10. Duty of all Persons Admitted to Practice to Provide Notice of Convictions or Discipline by Other Courts or Agencies

If any person admitted to practice before this Court (a) is subjected to public discipline for professional misconduct; (b) is indicted or charged with a felony or serious crime as defined in Rule 3(f); (c) is convicted of a felony or misdemeanor; (d) is disbarred on consent; or (e) resigns from the bar of any court while an investigation into an allegation of misconduct is pending, the person shall so notify the Clerk of this Court and all clients whom the person represents in matters before this Court and the adverse parties in such matters before this Court in writing within ten days of such discipline, indictment, charge, conviction, disbarment on consent, or resignation.

Rule 11. Duties of the Clerk

(a) Verification of Information. Upon being informed that a person admitted to practice before this Court has been convicted of any crime or has been subject to discipline by another court or governmental entity, the Clerk of this Court shall determine whether the clerk of the court in which such conviction occurred or in which such discipline was imposed, or the executive officer of the governmental entity in which such discipline was imposed, has forwarded a certificate of such conviction or discipline to this Court. If a certificate has not been so forwarded, the Clerk shall promptly obtain a certificate and file it with this Court.

(b) Notice to Other Jurisdictions. Whenever it appears that a person disbarred, suspended, publicly reprimanded, or disbarred on consent by this Court is admitted to practice in any other jurisdiction or before any other court or governmental entity, the Clerk of this Court shall, within ten days of that action transmit a certified copy of the order of disbarment, suspension, reprimand, or disbarment on consent to the disciplinary authority for each other jurisdiction, court, or governmental entity, if any, affected by the misconduct.

(c) Notice to National Discipline Data Bank. The Clerk of this Court shall promptly notify the National Discipline Data Bank operated by the American Bar Association of any order of this Court imposing public discipline upon any attorney admitted to practice before this Court.

Rule 12. Jurisdiction

Nothing contained in these Rules shall be construed to deny to this Court such powers as are necessary for the Court to maintain control over proceedings conducted before it, such as proceedings for contempt under 38 U.S.C. §7265(a), or to deprive the Court of its inherent disciplinary powers.

Rule 47. Expedited Consideration

(a) Order for Brief. On motion of a party for good cause shown, by written agreement of the

parties, or on its own initiative, the Court may order expedited briefing of a case. Such motion or agreement must be filed not later than ten days before the last day for filing the record on appeal.

(b) Filing and Service of Briefs. If expedited consideration is ordered, the appellant's principal brief must be served and filed within 25 days after the date on which the record on appeal is filed. The Secretary's brief must be served and filed within 15 days after service of the appellant's brief. Any reply brief must be served and filed within 10 days after service of the Secretary's brief.

(c) Table of Contents; Length of Briefs. Briefs filed under this rule must comply with Rule 28 (Briefs), except that principal briefs must be limited to 10 pages, reply briefs must be limited to five pages, and a table of cases is not required.

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

(As amended June 14, 1994, eff. Aug. 1, 1994.)

Rule 48. Disclosure of Certain Protected Records

(a) If, during the time periods set out in Rule 10 or at any other time during a proceeding before the Court, the parties identify records protected by 38 U.S.C. §7332 and at least one of the parties believes that disclosure of such records is required in such proceeding and, further, the parties cannot agree with respect to the disclosure of such records, the party requesting disclosure shall make immediate application therefor, pursuant to 38 U.S.C. §7332(b)(2)(D), caption the case "In re: Sealed Case No. [insert Court of Veterans Appeals case number]" (not disclosing the identity of any individual), and serve on the protected patient or subject or successor in interest a copy of the application. Such application must include a statement specifying those steps taken by the parties to reach agreement before application was made to the Court. Upon receipt of such application, the Clerk, unless otherwise ordered by the Court, shall enter the case as "withdrawn" on the docket, assign a new case number and recaption the case using an encoded identifier, and seal the record on appeal and the file of the Court. Thereafter, any party or representative of a party, unless otherwise ordered by the Court, shall refer any subsequent filing only to the new case number and caption assigned by the Clerk.

(b) The procedures described in this rule may, in the Court's discretion, be applied to cases that the Court orders sealed but which do not contain records protected by 38 U.S.C. §7332.

(As amended June 14, 1994, eff. Aug. 1, 1994.)

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