COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 31, 2019

I. Introduction

The Advisory Committee on the Appellate Rules met on Friday, April 5, 2019, in San Antonio, Texas. The draft minutes of that meeting are attached at Tab B.

It approved proposed amendments previously published for comment for which it seeks final approval. These proposed amendments, discussed in Part II of this report, relate to length limits for responses to petitions for rehearing (Rules 35 and 40).

The Committee also approved proposed amendments for which it seeks approval for publication. One group of proposed amendments relates to the contents of notices of appeal (Rules 3 and 6; Forms 1 and 2). Another proposed amendment deals with agreed dismissals (Rule 42). These are discussed in Part III of this report.

The Committee also considered several other items, removing one of them from its agenda. These items are discussed in Part IV of this report.

II. Action Item for Final Approval After Public Comment

The Committee seeks final approval for proposed amendments to Rules 35 and 40. These amendments were published for public comment in August 2018.

The proposed amendments to Rules 35 and 40 would create length limits applicable to responses to petitions for rehearing. Under the existing rules, there are length limits applicable to petitions for rehearing, but none for responses to those petitions. In addition, the proposed amendment would change the term "answer" in Rule 40 (which deals with petitions for panel rehearing) to the term "response," making it consistent with Rule 35 (which deals with petitions for rehearing en banc).

There was only one comment submitted. That comment, submitted by Aderant Compulaw, agreed with the proposed amendment to Rule 40(a)(3), noting that "it will promote consistency and avoid confusion if Appellate Rule 35 and Appellate Rule 40 utilize the same terminology."

The Committee seeks final approval for the proposed amendments as published.

Rule 35. En Banc Determination

* * * * *

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

* * * * *

(2) Except by the court's permission:

(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

* * * * *

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.

* * * *

Committee Note

The amendment to Rule 35(e) clarifies that the length limits applicable to a petition for hearing or rehearing en banc also apply to a response to such a petition, if the court orders one.

Rule 40. Petition for Panel Rehearing

* * * * *

(a) Time to File; Contents; ~~Answer~~Response; Action by the Court if Granted.

* * * * *

(3) **~~Answer~~Response.** Unless the court requests, no ~~answer~~response to a petition for panel rehearing is permitted. ~~But o~~Ordinarily, rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.

* * * * *

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

Committee Note

The amendment to Rule 40(a)(3) clarifies that the provisions of Rule 40(b) regarding a petition for panel rehearing also apply to a response

to such a petition, if the court orders a response. The amendment also changes the language to refer to a "response," rather than an "answer," to make the terminology consistent with Rule 35; this change is intended to be stylistic only.

Appendix A to this report contains the text of the proposed amendments to Rules 35 and 40.

III. Action Items for Approval for Publication

The Committee seeks approval for publication of proposed amendments to Rules 3 and 6, Forms 1 and 2, and Rule 42.

A. Rule 3(c)—Contents of Notices of Appeal

The Committee has been considering a possible amendment to Rule 3, dealing with the contents of notices of appeal, since the fall of 2017 when a letter from Neal Katyal and Sean Marotta brought to the Committee's attention a troubling line of cases in one circuit. That line of cases, using an expressio unius rationale, would treat a notice of appeal from a final judgment that mentioned one interlocutory order but not others as limiting the appeal to that order, rather than reaching all of the interlocutory orders that merged into the judgment.

Research conducted since that time has revealed that the problem is not confined to a single circuit, but instead that there is substantial confusion both across and within circuits. In addition to a number of decisions that used an expressio unius rationale like the one pointed to in the Katyal and Marotta letter, there are also numerous decisions that would treat a notice of appeal that designated an order that disposed of all remaining claims in a case as limited to the claims disposed of in that order.

Moreover, there have also been cases holding that an appeal that designates an order denying a motion for reconsideration does not bring up for review the underlying judgment sought to be reconsidered.

The Supreme Court has recently described filing a notice of appeal as "generally speaking, a simple, nonsubstantive act," and observed that filing requirements for

notices of appeal "reflect that claims are . . . likely to be ill defined or unknown" at the time of filing. *Garza v. Idaho*, 139 S. Ct. 738, 745-46 (2019).

The Committee's goal in proposing the amendments is fully in accord with *Garza*: to reduce the inadvertent loss of appellate rights caused by the phrasing of a notice of appeal.

Rule 3(c)(1)(B) currently requires that a notice of appeal "designate the judgment, order, or part thereof being appealed." The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated. But some interpret this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal.

The Committee considered various ways to make this point clearer. It settled on four interrelated changes to Rule 3(c)(1)(B). First, to highlight that the distinction between the ordinary case in which an appeal is taken from the final judgment from the less-common case in which an appeal is taken from some other order, the term "judgment" and the term "order" are separated into two subsections. Second, to clarify that the kind of order that is to be designated in the latter situation is one that can serve as the basis of the court's appellate jurisdiction, the word "appealable" is added before the word "order." Third, to clarify that the judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction, the phrase "from which the appeal is taken" replaces the phrase "being appealed" and is placed after each of the two new subsections. Finally, the phrase "part thereof" is deleted because the Committee viewed this phrase as contributing to the problem.

The result would require the appellant to designate:

(i) the judgment from which the appeal is taken, or
(ii) the appealable order from which the appeal is taken.

Reflecting this subdivision of Rule 3(c)(1)(B), the Committee also proposes that Form 1 be replaced by Form 1A (dealing with an appeal from a final judgment) and Form 1B (dealing with an appeal from an appealable order), and that a conforming change be made to Form 2 (dealing with an appeal from the Tax Court).

The Committee considered an alternative that would have avoided adding the word "appealable" before the word "order," and instead would have added the phrase "that supports appellate jurisdiction," after the word "order." It concluded that "appealable order" was clearer and more straightforward than "order that supports appellate jurisdiction."

Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

The Committee considered writing the merger principle into the text of the Rule. But even though the general merger principle can be stated simply—an appeal from a final judgment permits review of all rulings that led up to the judgment—there are exceptions and complications to the general principle. Because of these exceptions and complications, as well as reluctance to stymie future developments, the Committee decided against attempting to codify the merger principle. Instead, the proposed amendment would call attention to the merger principle in the text of the Rule, by adding a new Rule 3(c)(4):

> (4) The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

The Committee Note, however, would state the general merger rule.

To avoid the inadvertent loss of appellate rights where an appellant designates (1) an order that disposes of all remaining claims in a case, or (2) an order denying a motion for reconsideration, the proposed amendment would add a new Rule 3(c)(5):

> (5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:
>
> > (A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or
> >
> > (B) an order described in Rule 4(a)(4)(A).

The phrasing of proposed subsection (A) draws on Civil Rule 54(b), while proposed subsection (B) relies on a cross-reference to the kinds of motions that restart the time for filing a notice of appeal.

The Committee wrestled with the question of whether to authorize an appellant to expressly limit the notice of appeal. On the one hand, in an adversary system, litigants shouldn't be required to appeal more than they choose, particularly in cases involving multiple claims and multiple parties. In addition, a single document may decide multiple motions, and include some decisions (such as granting a preliminary injunction) that are appealable and some decisions (such as setting a discovery schedule) that are not. On the other hand, any limiting work could be left to the briefs. Plus, more explicit attention in the Rules to the possibility of a limited notice of appeal might lead to strategic attempts to limit the jurisdiction of the court of appeals.

The Committee settled on language that did not speak of limiting the "appeal" or "scope of the appeal," but instead on the following, to be added as a new subsection (6):

> (6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of the appeal.

If these competing concerns were resolved the other way, the final clause—"specific designations do not limit the scope of the notice of the appeal"—could be added as a separate sentence to proposed new subsection (4).

A conforming amendment to Rule 6, which governs appeals in bankruptcy cases, would replace the cross-reference to "Form 1" with a cross-reference to "Forms 1A and 1B." The Committee consulted with the Advisory Committee on the Bankruptcy Rules; no objection or other concern was raised.

The Committee also consulted with Chief Judge Maurice B. Foley of the Tax Court. He responded that neither the proposed amendments to Rule 3(c), nor the proposed amendments to Form 2 would create problems with appeals from the Tax Court.

Federal Rule of Appellate Procedure 3

* * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate:

(i) the judgment from which the appeal is taken~~,~~, or

(ii) the appealable order from which the appeal is taken~~, or part thereof being appealed~~; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(~~5~~) (8) Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of ~~a~~ notices of appeal.

* * *

Committee Note

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus and limit the issues on appeal.

Because the jurisdiction of the court of appeals is established by statute, an appeal can be taken only from those district court decisions from which Congress has authorized an appeal. In most instances, that is the final judgment, see, e.g., 28 U.S.C. §1291, but some other orders are considered final within the meaning of 28 U.S.C. §1291, and some interlocutory orders are themselves appealable. See, e.g., 28 U.S.C. §1292. Accordingly, Rule 3(c)(1) currently requires that the notice of appeal "designate the judgment, order, or part thereof being appealed." The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated.

However, some have interpreted this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal. Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of "(i) the judgment from which the appeal is taken, or (ii) the appealable order from which the appeal is taken"—and the phrase "or part thereof" is deleted. In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order.

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some particular order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius* rationale, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable, under the merger principle, on appeal from the final judgment. These decisions create a trap for the unwary.

However, there are circumstances in which an appellant may deliberately choose to limit the scope of the notice of appeal, and it is desirable to enable the appellant to convey this deliberate choice to the other parties.

To alert readers to the merger principle, a new provision is added to Rule 3(c): "The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." The general merger rule can be stated simply: an appeal from a final judgment permits review of all rulings that led up to the judgment. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law.

To remove the trap for the unwary, while enabling deliberate limitations of the notice of appeal, another new provision is added to Rule 3(c):

"An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of the appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."

A related problem arises when a case is decided by a series of orders, sometimes separated by a year or more. For example, some claims might be dismissed for failure to state a claim under F.R.Civ.P. 12(b)(6), and then, after a considerable period for discovery, summary judgment under F.R.Civ.P. 56 is granted in favor of the defendant on the remaining claims. That second order, because it resolves all of the remaining claims, is a final judgment, and an appeal from that final judgment confers jurisdiction to review the earlier 12(b)(6) dismissal. But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of F.R.Civ.P. 58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues

the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by F.R.Civ.P. 58.

To remove this trap, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under F.R.Civ.P. 58, if the notice designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties."

Frequently, a party who is aggrieved by a final judgment will make a motion in the district court instead of filing a notice of appeal. Rule 4(a)(4) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that designates only the order disposing of such a motion as limited to that order, rather than bringing the final judgment before the court of appeals for review. (Again, such an appeal might be brought before or after the judgment is set out in a separate document under F.R.Civ.P. 58.) To reduce the unintended loss of appellate rights in this situation, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under F.R.Civ.P. 58, if the notice designates . . . an order described in Rule 4(a)(4)(A)." This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of

appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

These new provisions are added as Rules 3(c)(4), 3(c)(5), and 3(c)(6), with the existing Rules 3(c)(4) and 3(c)(5) renumbered. In addition, to reflect these changes to the Rule, Form 1 is replaced by Forms 1A and 1B, and Form 2 is amended.

Federal Rule of Appellate Procedure 6

* * *

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b), but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20, 22–23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Forms 1A and 1B in the Appendix of Forms" must be read as a reference to Form 5;

(C) when the appeal is from a bankruptcy appellate panel, "district court," as used in any applicable rule, means "appellate panel"; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

* * *

Committee Note

The amendment replaces "Form 1" with "Forms 1A and 1B" to conform to the amendment to Rule 3(c).

Form 1A

Notice of Appeal to a Court of Appeals From a Judgment ~~or Order~~ of a District Court.

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(~~here~~ name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit ~~(~~from the final judgment ~~) (from an order (describing it))~~ entered in this action on the _____ day of _____, 20___.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 1B

Notice of Appeal to a Court of Appeals From ~~a Judgment or~~ an Appealable Order of a District Court.

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(~~here~~ name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit ~~(from the final judgment) (~~ from ~~an~~ the order ___ (describe~~ing~~ the order ~~it~~) ~~)~~ entered in this action on the _____ day of _____, 20___.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

* *See* Rule 3(c) for permissible ways of identifying appellants.

Form 2

Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court

UNITED STATES TAX COURT
Washington, D.C.

A.B., Petitioner v. Commissioner of Internal Revenue, Respondent	Docket No. _____

Notice of Appeal

Notice is hereby given that _____ (~~here~~ name all parties taking the appeal[1])_____ ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit from ~~(that part of)~~ the decision of this court entered in the above captioned proceeding on the _____ day of _____, 20__ (relating to _____).

(s) _____
Counsel for _____
Address:_____

[1] *See* Rule 3(c) for permissible ways of identifying appellants.

A. Rule 42(b)—Agreed Dismissals

The Committee proposes amending Rule 42(b) to require the circuit clerk to dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. The current Rule gives a discretionary power to dismiss by using the word "may." Prior to restyling, the word "may" was "shall"; the Committee now proposes replacing the word "may" with the word "must." Mandatory dismissal is also the approach of Supreme Court Rule 46.

To clarify the distinction between situations where dismissal is mandated by stipulation of the parties and other situations, the proposed amendment would subdivide Rule 42(b) and add appropriate subheadings.

The current Rule provides that "no mandate or other process may issue without a court order." Modern readers find this phrasing cryptic, and it has produced some difficulty for circuit clerks who have taken to issuing orders in lieu of mandates when appeals are dismissed in order to make clear that jurisdiction over the case is being returned to the district court. Members of the Committee debated whether a mandate is necessary when, for example, an appeal from a preliminary injunction is dismissed. These problems are avoided by replacing this language and instead stating directly: "A court order is required for any relief beyond the mere dismissal of an appeal—including an order vacating an action of the district court or an administrative agency or remanding the case to either of them."

The Committee considered requiring a "judicial order" or "action by a judge" rather than a "court order," but opted for "court order" rather than upset the practice in the Ninth Circuit of delegating some dismissal power to mediators and the Appellate Commissioner.

The Committee also considered deleting the examples of orders beyond mere dismissals, but decided to include them because they were useful illustrations, particularly in light of the decision in *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994) (holding that "mootness by reason of settlement does not justify vacatur of a judgment").

To deal with some litigants who misunderstand the term "fees" to refer to attorney's fees, the proposed amendment adds the word "court" before the word "fees."

The Committee considered adding a provision dealing with situations where court approval of a settlement is required, but concluded that it was sufficient to state

in the Committee Note that the Rule does not affect any law that requires court approval of a settlement.

The Committee considered adding a provision dealing with petitions for review and applications to enforce agency orders, but concluded that it was sufficient to state in the Committee Note that Rule 20 makes Rule 42(b) applicable to petitions for review and applications to enforce an agency order and that "appeal" should be understood to include a petition for review or application to enforce an agency order.

Federal Rule of Appellate Procedure 42

* * *

(b) Dismissal in the Court of Appeals.

(1) Stipulated Dismissal. The circuit clerk ~~may~~ must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. ~~But no mandate or other process may issue without a court order.~~

(2) Appellant's Motion to Dismiss. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(3) Other Relief. A court order is required for any relief beyond the mere dismissal of an appeal—including an order vacating an action of the district court or an administrative agency or remanding the case to either of them.

Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney's fees. The Rule does not affect any law that requires court approval of a settlement.

The amendment replaces old terminology and clarifies that any relief beyond mere dismissal—including vacating or remanding—requires a court order.

Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, "appeal" should be understood to include a petition for review or application to enforce an agency order.

Appendix B to this report contains the text of the proposed amendments and the proposed Committee Notes to Rules 3, 6, and 42, as well as the proposed amendments to Forms 1 and 2.

IV. Information Items

The Committee continues its more comprehensive review of Rules 35 and 40, but is not inclined to make major changes, finding insufficient problems to warrant such changes. It considered, but rejected, a number of possible changes, including (1) revising Rule 35 to apply solely to initial hearing en banc and Rule 40 to apply to both kinds of rehearing; (2) revising Rules 35 and 40 to make them more parallel to each other, or parallel to Rule 21; (3) requiring a single petition rather than separate petitions for panel rehearing and rehearing en banc; and (4) adding to Rule 35 the statement in Rule 40 that a grant of rehearing is unlikely without a call for a response.

The Committee is now focused on the possibility of more modest changes that would largely clarify and codify widespread practices, particularly the ability of a panel to treat a petition for rehearing en banc as including a petition for panel rehearing in order to deal with problems with the panel decision that the panel agrees should be fixed. But the Committee is concerned about making clear what happens if a panel makes a change in response to a petition for rehearing en banc, and in particular making clear that a panel cannot block access to the full court.

The Committee had been examining the possibility of amending Rule 4(a)(5)(C), dealing with extensions of time to appeal, in light of the decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017). *Hamer* distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional). The Committee had tabled this question after the Supreme Court granted certiorari in *Nutraceutical Corp. v. Lambert*. Once the Court decided that case, the Committee reviewed that decision—which held that a mandatory claims-processing rule is not subject to equitable tolling, 139 S. Ct. 710 (2019)—and decided to take no action.

The Committee had also been considering a proposal to prescribe how courts of appeals handle the vote of a judge who leaves the bench. The Supreme Court has recently held, however, that a federal court cannot count the vote of a judge who dies before the decision was filed, noting that "federal judges are appointed for life, not for eternity." *Yovino v. Rizo*, 139 S. Ct. 706, 710 (2019). Accordingly, the Committee agreed to remove this item from its docket.

The Committee has formed a subcommittee to examine a proposal by the General Counsel of the Railroad Retirement Board to extend equivalent privacy protections for Railroad Retirement Act benefit cases as those provided in Social Security cases. Action by the Appellate Rules Committee is appropriate because Railroad Retirement Act benefit cases do not come to the district court. But the Committee wishes to act comprehensively, and therefore will explore whether it might be appropriate to include benefit cases arising under other statutes, such as those dealing with Black Lung and Longshoremen.

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APPENDIX A

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 35. En Banc Determination

* * * * *

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

* * * * *

(2) Except by the court's permission:

(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

* * * * *

[1] New material is underlined in red; matter to be omitted is lined through.

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.

* * * * *

Committee Note

The amendment to Rule 35(e) clarifies that the length limits applicable to a petition for hearing or rehearing en banc also apply to a response to such a petition, if the court orders one.

Changes Made After Publication and Comment

No changes were made.

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; ~~Answer~~Response; Action by the Court if Granted.

* * * * *

(3) **~~Answer~~Response.** Unless the court requests, no ~~answer~~response to a petition for panel rehearing is permitted. ~~But o~~Ordinarily, rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.

* * * * *

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

Committee Note

The amendment to Rule 40(a)(3) clarifies that the provisions of Rule 40(b) regarding a petition for panel rehearing also apply to a response to such a petition, if the court orders a response. The amendment also changes the language to refer to a "response," rather than an "answer," to make the terminology consistent with Rule 35; this change is intended to be stylistic only.

Changes Made After Publication and Comment

No changes were made.

Summary of Public Comment

AP-2018-0001. Aderant CompuLaw. Agreed with the proposed amendment. It will promote consistency and avoid confusion if Appellate Rule 35 and Appellate Rule 40 utilize the same terminology.

APPENDIX B

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 3. Appeal as of Right—How Taken

* * * * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as ''all plaintiffs,'' ''the defendants,'' ''the plaintiffs A, B, et al.,'' or ''all defendants except X'';

(B) designate:

[1] New material is underlined in red; matter to be omitted is lined through.

(i) the judgment from which the appeal is taken~~,~~, or

(ii) the appealable order from which the appeal is taken~~, or part thereof being appealed~~; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose

intent to appeal is otherwise clear from the notice.

(~~5~~) (8) Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of ~~a~~ notices of appeal.

* * * * *

Committee Note

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus and limit the issues on appeal.

Because the jurisdiction of the court of appeals is established by statute, an appeal can be taken only from those district court decisions from which Congress has authorized an appeal. In most instances, that is the final judgment, see, e.g., 28 U.S.C. §1291, but some other orders are considered final within the meaning of 28 U.S.C. §1291, and some interlocutory orders are themselves appealable. See, e.g., 28 U.S.C. §1292. Accordingly, Rule 3(c)(1) currently requires that the notice of appeal "designate the judgment, order, or part thereof being appealed." The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated.

However, some have interpreted this language as an invitation, if not a requirement, to designate each and every

order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal. Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of "(i) the judgment from which the appeal is taken, or (ii) the appealable order from which the appeal is taken"—and the phrase "or part thereof" is deleted. In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order.

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some particular order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius* rationale, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable,

under the merger principle, on appeal from the final judgment. These decisions create a trap for the unwary.

However, there are circumstances in which an appellant may deliberately choose to limit the scope of the notice of appeal, and it is desirable to enable the appellant to convey this deliberate choice to the other parties.

To alert readers to the merger principle, a new provision is added to Rule 3(c): "The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." The general merger rule can be stated simply: an appeal from a final judgment permits review of all rulings that led up to the judgment. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law.

To remove the trap for the unwary, while enabling deliberate limitations of the notice of appeal, another new provision is added to Rule 3(c): "An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of the appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."

A related problem arises when a case is decided by a series of orders, sometimes separated by a year or more. For example, some claims might be dismissed for failure to state a claim under F.R.Civ.P. 12(b)(6), and then, after a considerable period for discovery, summary judgment under F.R.Civ.P. 56 is granted in favor of the defendant on the remaining claims. That second order, because it resolves all of the remaining claims, is a final judgment, and an appeal

from that final judgment confers jurisdiction to review the earlier F.R.Civ.P. 12(b)(6) dismissal. But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of F.R.Civ.P. 58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by F.R.Civ.P. 58.

To remove this trap, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties."

Frequently, a party who is aggrieved by a final judgment will make a motion in the district court instead of filing a notice of appeal. Rule 4(a)(4) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that designates only the order disposing of such a motion as limited to that order, rather than bringing the final judgment

before the court of appeals for review. (Again, such an appeal might be brought before or after the judgment is set out in a separate document under F.R.Civ.P. 58.) To reduce the unintended loss of appellate rights in this situation, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order described in Rule 4(a)(4)(A)." This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

These new provisions are added as Rules 3(c)(4), 3(c)(5), and 3(c)(6), with the existing Rules 3(c)(4) and 3(c)(5) renumbered. In addition, to reflect these changes to the Rule, Form 1 is replaced by Forms 1A and 1B, and Form 2 is amended.

Rule 6. Appeal in a Bankruptcy Case

* * * * *

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b), but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20, 22–23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to ‘‘Forms 1A and 1B in the Appendix of Forms’’ must be read as a reference to Form 5;

(C) when the appeal is from a bankruptcy appellate panel, ‘‘district court,’’ as used in

any applicable rule, means ‘‘appellate panel’’; and

(D) in Rule 12.1, ‘‘district court’’ includes a bankruptcy court or bankruptcy appellate panel.

* * * * *

Committee Note

The amendment replaces ‘‘Form 1” with ‘‘Forms 1A and 1B” to conform to the amendment to Rule 3(c).

Form 1A

Notice of Appeal to a Court of Appeals From a Judgment ~~or Order~~ of a District Court.

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(~~here~~ name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit ~~(~~from the final judgment ~~)~~ ~~(from an order (describing it))~~ entered in this action on the _____ day of _____, 20___.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 1B

Notice of Appeal to a Court of Appeals From ~~a~~ ~~Judgment or~~ an Appealable Order of a District Court.

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(~~here~~ name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit ~~(from the final judgment)~~ ~~(~~ from ~~an~~ the order ___ (describe~~ing~~ the order ~~it~~)_____ ~~)~~ entered in this action on the _____ day of _____, 20___.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 2

Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court

UNITED STATES TAX COURT
Washington, D.C.

A.B., Petitioner v. Commissioner of Internal Revenue, Respondent	Docket No. _____

Notice of Appeal

Notice is hereby given that _____ (~~here~~ name all parties taking the appeal[2])_____ ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit from ~~(that part of)~~ the decision of this court entered in the above captioned proceeding on the _____ day of _____, 20__ (relating to _____).

(s) _____
Counsel for _____
Address:_____

[2] See Rule 3(c) for permissible ways of identifying appellants.

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Rule 42. Voluntary Dismissal

* * * * *

(b) Dismissal in the Court of Appeals.

(1) Stipulated Dismissal. The circuit clerk ~~may~~ must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. ~~But no mandate or other process may issue without a court order.~~

(2) Appellant's Motion to Dismiss. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(3) Other Relief. A court order is required for any relief beyond the mere dismissal of an appeal—including an order vacating an action of the district court or an administrative agency or remanding the case to either of them.

* * * * *

Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney's fees. The Rule does not affect any law that requires court approval of a settlement.

The amendment replaces old terminology and clarifies that any relief beyond mere dismissal—including vacating or remanding—requires a court order.

Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, "appeal" should be understood to include a petition for review or application to enforce an agency order.