

UNITED STATES COURT OF VETERANS APPEALS

MISC. NO. 1-93

IN RE:

INTERIM RULES 36(B) AND 39

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

O R D E R

Pursuant to 38 U.S.C. §4064(a) and consistent with 28 U.S.C. §2071 (b) and (e), the Court has determined that there is an immediate need for rules providing for attorney fees and expenses under the Equal Access to Justice Act, which has been made applicable, by Public Law No. 102-572, § 506 (1992), to any case pending before this Court on October 29, 1992, to any appeal filed in this Court after such date, and to any appeal from this Court that was pending on such date in the United States Court of Appeals for the Federal Circuit. The Court has benefited from the recommendations of its Rules Advisory Committee in meeting this need. It is

ORDERED that the attached Rules of Practice and Procedure 36(b) and 39 are hereby adopted as interim rules effective immediately. It is further

ORDERED that public comment on these rules is invited. Such comment must be submitted to the Clerk of this Court at 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004-2950, by March 31, 1993.

DATED: February 1, 1993

BY THE COURT:

  
FRANK Q. NEBEKER  
Chief Judge

MISC. NO. 5-92 WAS THE LAST IN THE SERIES FOR 1992

## **Rule 36. Publication of Opinion and Entry of Judgment**

**(a) Generally.** [Present Rule 36]

**(b) Upon Remand.** If the Court issues a decision remanding a matter without retaining jurisdiction, a motion for the Court to retain jurisdiction to permit application for attorney fees and expenses under Rule 39 must be filed within 14 days, plus the additional time allowed in Rule 26(c), after the date of the decision. If the motion is granted:

(1) the Clerk shall enter judgment under subsection (a) in accordance with the Court's decision, retaining jurisdiction for the limited purpose of entertaining such an application for attorney fees and expenses;

(2) within 14 days after the date of the final postremand administrative decision, the Secretary shall file a copy of that decision with the Clerk; and

(3) after receiving the copy of the administrative decision, absent good cause, the Clerk shall issue an order declaring the judgment of the Court final within the meaning of 28 U.S.C. § 2412(d)(2)(G).

## **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 shall be filed with the Clerk within 30 days after this Court's judgment becomes final. See also Rule 36(b)(3), 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, shall be captioned with the name and docket number of the proceeding in this Court for which an award is sought. It shall 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 rendered, in this Court and in any proceedings pursuant to this Court's remand, describing:

- (A) the nature of the service;
- (B) the actual time expended;
- (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 14 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.