

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

MISC. NO. 03-12

IN RE: RULES OF PRACTICE AND PROCEDURE

**ORDER**

Pursuant to the authority of 38 U.S.C. § 7264(a), the Court has adopted clerical revisions to Rules 3, 38, 39, and 46 of the Court's Rules of Practice and Procedure. It is

ORDERED that the attached changes to Rules 3, 38, 39, and 46 are hereby published and effective as of this date.

DATED: February 3, 2012

FOR THE COURT:

/s/ Gregory O. Block  
GREGORY O. BLOCK  
Clerk of the Court

Attachment

[Clerk's Note: The revisions to Rules 3 and 38 clarify the potential consequences for failure to comply with a Court order or take any step under the Rules. Rule 39 was reorganized to clarify filing requirements for EAJA applications, supplemental applications, and responses. Revisions to Rules 39 and 46 replace references to "attorney" and "counsel" with the term "representative," and corresponding revisions were also made to FORM 3 (Notice of Appearance).]

### **RULE 3. APPELLATE PROCEDURE**

**(a) Filing.** To appeal a Board of Veterans' Appeals (Board) decision, a person adversely affected by the decision must file a Notice of Appeal with the Clerk, within the time allowed by law. *See* Rule 4(a) (Time for Appeal). Because the Notice of Appeal will likely contain personal identifiers, that electronic record will be locked and accessible through CM/ECF only to CM/ECF Users in that case. *See* E-Rule 4(b). Failure to timely file a Notice of Appeal in accordance with law will result in dismissal of the appeal. *See also* Rule 38(b) (Failure to Act).

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### **RULE 38. FRIVOLOUS FILINGS; FAILURE TO ACT**

**(a) Frivolous Filings.** If the Court determines that an appeal, petition, motion, or other filing is frivolous, it may, after a separately filed motion by a party or notice from the Court and reasonable opportunity to respond, enter such order as it deems appropriate, to include sanctions, dismissal of the appeal, or reduction in any award under 28 U.S.C. § 2412(d).

**(b) Failure to Act.** Failure to take any step under these Rules, or to comply with an order of the Court, may be grounds for such action as the Court deems appropriate, including dismissal of the appeal or assessment of costs.

### **RULE 39: ATTORNEY FEES AND EXPENSES**

**(a) Application.** An application pursuant to 28 U.S.C. § 2412(d), the Equal Access to Justice Act (EAJA), for award of attorney fees and/or other expenses shall be submitted for filing with the Clerk not later than 30 days after the Court's judgment becomes final. *See* Rule 36 (Entry of Judgment) and Rule 41 (Mandate). The time for filing an application under this subsection is set by statute. The application shall include the fees and expenses claimed for the submission of that application.

(1) *Response.* Not later than 30 days after the date on which an application described in section (a) is filed, the Secretary shall submit for filing and serve a response to that application. If the Secretary disputes the amount of fees and expenses sought, before the Secretary files a response the parties shall consult in good faith to seek expeditious resolution of the matter. The response shall state which elements of the application are not contested and explain the Secretary's position on those elements that are contested.

(2) *Reply.* Not later than 30 days after service of any response by the Secretary, the applicant may submit for filing and serve a reply addressing those matters contested by the Secretary.

**(b) Supplemental Application.** Except as provided in paragraph (3) of this section, a party whose application described in section (a) has been granted in whole or in part may, not later than 20 days after the Court action granting such application, file a supplemental application for attorney

fees and other expenses in connection with the defense of such application. A supplemental application shall include the fees and expenses claimed for the submission of that supplemental application.

(1) *Response.* Unless unopposed, and except as provided in paragraph (3) of this section, not later than 20 days after the date on which a supplemental application is filed, the Secretary shall submit for filing and serve a response to that supplemental application. If the Secretary disputes the amount of fees and expenses sought, before the Secretary files a response the parties shall consult in good faith to seek expeditious resolution of the matter. The response shall state which elements of the supplemental application are not contested and explain the Secretary's position on those elements that are contested.

(2) *Reply.* Not later than 10 days after service of any response by the Secretary, the applicant may submit for filing and serve a reply addressing those matters contested by the Secretary.

(3) *Supplemental Applications for Work Performed Before Other Courts.*

(A) Appeals to the Federal Circuit. When an action on an application appealed to the U.S. Court of Appeals for the Federal Circuit is returned to the Court and the application has been granted in whole or in part by any court, any supplemental application (over which the Court has jurisdiction) based on representation provided in that appeal may be filed in the Court not later than 20 days after the mandate is issued by that court. *See* FED. R. APP. P. 41; FED. CIR. R. 41.

(B) Appeals to the U.S. Supreme Court. When an action on an application appealed to the Supreme Court is returned to the Court and the application has been granted in whole or in part by any court, any supplemental application (over which the Court has jurisdiction) based on representation provided in that appeal may be filed in the Court not later than 20 days after the expiration of the time for filing a petition for a rehearing by the Supreme Court. *See* SUP. CT. R. 45.

(C) Timing of Supplemental Responses and Replies. When a supplemental application is filed under paragraph (A) or (B) of this section, the Court will issue an order specifying the timing of responses and replies to ensure that all previous applications have been resolved before requiring a response to the next application.

**(c) Dispute Resolution.** In addition to the good faith resolution requirements of subsections (a)(1) and (b)(1), either party may request or the Court may direct that a staff conference, pursuant to Rule 33, be conducted in person or by telephone to discuss resolution of the contested elements of the application.

**(d) Appendices.** The parties shall attach as appendices to any pleading submitted for filing under this Rule those documents that are not already before the Court that are necessary to meet the application content requirements of 28 U.S.C. § 2412(d).

**(e) Form and Length.** All documents submitted for filing under this Rule shall conform to the requirements set forth in Rule 32 (Form of Briefs, Appendices, and Other Documents), except that no submission for filing may exceed 20 pages, not counting any appendix containing pages necessary to meet the application content requirements of 28 U.S.C. § 2412(d).

**(f) Multiple Representatives.** Applications for EAJA fees in cases in which reimbursement is sought for the work of more than one representative must include a single, consolidated, chronological billing statement for the full fee award requested. That single billing statement shall be in tabular form with entries listed in chronological order and depict the work done on the case on each date, identifying the representative who did the work, and must be signed by the lead representative, who will be responsible for its accuracy and completeness. The lead representative must sign the combined billing statement under a certification that he or she has (1) reviewed the combined billing statement and is satisfied that it accurately reflects the work performed by all representatives and (2) considered and eliminated all time that is excessive or redundant.

**(g) Additional Requirements for Non-Attorney Practitioners.** A non-attorney practitioner must include in the application for EAJA fees a statement of the non-attorney practitioner's education and experience in representing claimants before this Court and a justification for the hourly fee sought.

#### **RULE 46. PRACTICE BEFORE THE COURT AND REPRESENTATION**

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##### **(b) Representation Requirements.**

###### *(1) General appearance.*

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(D) Appearance by Multiple Representatives. In cases where multiple representatives submit for filing a notice of appearance, one representative must be designated as lead representative.