

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

From: Honorable Michael A. Chagares, Chair
Advisory Committee on Appellate Rules

Re: Report of the Advisory Committee on the Appellate Rules

Date: June 1, 2020

I. Introduction

The Advisory Committee on the Appellate Rules met by telephone conference call on Friday, April 3, 2020. The draft minutes from the meeting are attached to this report.

The Committee approved proposed amendments previously published for comment for which it seeks final approval. 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 proposed amendments are discussed in Part II of this report, and are attached as Appendix A.

The Committee also approved a proposed amendment to Rule 25, dealing with privacy in Railroad Retirement Act cases, for which it seeks approval for publication. This is discussed in Part III of this report, and is attached as Appendix B.

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

II. Action Items for Final Approval After Public Comment

The Committee seeks final approval for proposed amendments to Rules 3, 6, and 42, as well as Forms 1 and 2. These amendments were published for public comment in August 2019.

A. Rule 42 – Voluntary Dismissal

The proposed amendment to Rule 42 would 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 proposed amendment would replace the word “may” with the word “must.”

Here is the proposed text of Rule 42 as published:

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 approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

* * * * *

The Committee received two comments on this proposal.

The Association of the Bar of the City of New York (ABCNY) suggested adding language to proposed Rule 42(b)(3). First, it suggested that the phrase “setting aside or enforcing an administrative agency order” be added to the list of examples of the kinds of actions that require a court order. Second, it suggested that the phrase “if provided by applicable statute” be added to the end of the subsection.

The Committee decided against making either change. Proposed Rule 42(b)(3) does not purport to be exhaustive, nor does it purport to authorize courts of appeals to take actions by order that are not otherwise authorized by law.

The National Association of Criminal Defense Lawyers (NACDL) found the proposal “well taken,” but suggested that two sentences should be added to protect criminal defendants from inappropriate dismissals by counsel.

The Committee decided against making this change. The Federal Rules of Appellate Procedure do not generally address the particular responsibilities that counsel owe to criminal defendants, leaving that to other bodies of law.

Further reflection on a drafting suggestion made in connection with the January meeting of the Standing Committee did lead the Committee to make a minor revision to proposed Rule 42(b)(3): rephrasing it to eliminate the word “mere” and to make clear that it applies only to dismissals under Rule 42(b) itself. The Committee changed the relevant sentence of the Committee Note to reflect this rephrasing.

This is the only change to the proposed Rule made by the Committee since publication:

(3) Other Relief. A court order is required for any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

Committee Note

The amendment replaces old terminology and clarifies that any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating, or remanding—requires a court order.

The style consultants have suggested adding the article “a” before the word “payment” in proposed Rule 42(c).

Here is the proposed amendment recommended for final approval, including both the changes made by the Committee and the one suggested by the style consultants:

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 under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, a payment, or other consideration.

* * * * *

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 alter the legal requirements governing court approval of a

settlement, a payment, or other consideration. See, e.g., F.R.Civ.P. 23(e) (requiring district court approval).

The amendment replaces old terminology and clarifies that any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, 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.

B. Rules 3 and 6; Forms 1 and 2 – Content of Notice of Appeal

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. But a variety of decisions from around the circuits have made drafting a notice of appeal a somewhat treacherous exercise, especially for any litigant taking a final judgment appeal who mentions a particular order that the appellant wishes to challenge on appeal. The proposed amendment to Rule 3 is designed to reduce the inadvertent loss of appellate rights. The proposed amendments to Forms 1 and 2 reflect the proposed changes to Rule 3. The proposed amendment to Rule 6 is a conforming amendment. Accordingly, discussion has focused on Rule 3.

Here is the proposed text of Rule 3 as published:

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 the judgment, ~~or 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.

* * * * *

Nine public comments were submitted. Five were generally supportive. Two were critical. Two were nonresponsive.*

* These two comments questioned some bankruptcy matters.

Thomas Mayes offers his “full support” and urges adoption “without delay” because filing a notice of appeal “ought to be straightforward and ministerial.” Professor Bryan Lammon also supports the proposed amendments, finding them “important and necessary,” but as discussed below, offered a proposed simplification and expansion. The ACBNY supports the amendments, but offered a minor edit. The NACDL “supports these amendments, which are of particular importance in criminal cases,” and suggested an expansion, discussed below. (Its stylistic suggestions for the forms were referred to the style consultants.) The Council of Appellate Lawyers of the American Bar Association has no objection to the proposed rule except, as discussed below, it suggested that it would be better not to allow appellants to limit the scope of a notice of appeal.

The two critical comments, one submitted by Michael Rosman and one submitted by Judge Steven Colloton, are discussed below.

Wholesale Critiques

The Committee received two critical comments that, if accepted, would derail the project.

At the Fall 2019 meeting, the Committee considered the comments of Michael Rosman, who contends that the proposal is inconsistent with Civil Rule 54(b). As he sees it, Civil Rule 54(b), properly understood, requires a district court to enter a separate document that lists “all the claims in the action . . . and the counterclaims, cross-claims, and intervenors’ claims, if any—and identify what has become of all of them.” On this understanding, if a district court dismisses one count of a two count complaint under Civil Rule 12(b)(6) and then grants summary judgment for the defendant on the second count, there is no final judgment until the court files a document that recites both the action on the first count and the action on the second count—and until this is done, an appeal should be dismissed for want of appellate jurisdiction.

The Committee was not persuaded in the Fall. It is generally understood that a decision disposing of all remaining claims of all remaining parties to a case is a final judgment, without the need for the district judge to recite the prior disposition of all previously decided claims. At the January meeting of the Standing Committee, no member expressed agreement with Mr. Rosman’s critique. And at the Spring meeting, the Committee adhered to its view; it does not recommend any changes in response to Mr. Rosman’s comment.

The second critical comment was submitted by Judge Steven Colloton, who urged the Committee to abandon the proposal. Judge Colloton pointed to cases across the circuits, written by illustrious judges, that appropriately read the existing rule to

hold appellants to their choices to limit the notices of appeal. He observed that it is not hard for appellants to designate everything for appeal, and does not think we should encourage appellate counsel to expand the scope of the appeal beyond what was in the notice.

In contrast to Judge Colloton, the comment submitted by the NACDL emphasized the importance of appellate counsel being able to review record material that may not be available at the time the notice of appeal is filed.

As the Supreme Court has recently explained, at the time a notice of appeal is filed, “the defendant likely will not yet have important documents from the trial court, such as transcripts of key proceedings, and may well be in custody, making communication with counsel difficult. And because some defendants receive new counsel for their appeals, the lawyer responsible for deciding which appellate claims to raise may not yet even be involved in the case.” *Garza v. Idaho*, 139 S. Ct. 738, 745-46 (2019) (citations omitted). Accordingly, filing a notice of appeal is “generally speaking, a simple, nonsubstantive act,” and filing requirements for notices of appeal “reflect that claims are . . . likely to be ill defined or unknown” at the time of filing. *Id.*

As a result, the Committee was not persuaded to abandon the project.

Judge Colloton also urged that if the project goes forward, references to “trap for the unwary” should be deleted from the committee note as pejorative.

The Committee declined to delete the phrase, not viewing it as pejorative. As reflected in Black’s Law Dictionary, a trap can exist even if no one intended to set it.

Suggested Simplification

Professor Bryan Lammon suggested simplification by deleting proposed (c)(4) and (c)(5) and instead adding the following to the end of (c)(1) the sentence: “Unless the notice states otherwise, the designation of a judgment or order does not affect the scope of appellate review.”

The Committee declined to adopt this suggestion, concerned both that it would seem to make the designation irrelevant and that it might not clearly overcome the *expressio unius* rationale that is the target of the proposed amendment.

Suggested Broadening

Two comments were submitted suggesting that the project be broadened.

First, the NACDL suggested that proposed Rule 3(c)(5) be expanded to cover criminal cases.

The Committee declined to do so. First, such an expansion would require further review and republication. Second, the NACDL did not point to a particular problem currently occurring in criminal cases, and indicated that there are not many criminal cases where the issue addressed by proposed (c)(5) is presented. Its concern was that a rule limited to civil cases might lead some courts, using an *expressio unius* rationale, to abandon their current precedent that takes an approach in criminal cases similar to that of the proposed rule. To deal with this concern, the Committee added a passage to the committee note:

These two provisions are limited to civil cases. Similar issues may arise in a small number of criminal cases, and similar treatment may be appropriate, but no inference should be drawn about how such issues should be handled in criminal cases.

Second, Professor Bryan Lammon suggested that the proposed amendment provide that there is no need to file a new or amended notice of appeal after the denial of a Rule 4(a)(4)(A) motion. The Committee declined to adopt this suggestion because it would require further review and republication. It decided to roll this suggestion into the new agenda item (20-AP-A) dealing with the relation forward of notices of appeals, discussed below in Part IV.

Attorney's Fees

At the January meeting of the Standing Committee, a concern was raised about whether the proposed amendment might inadvertently change the rule that there is an appealable final judgment even though a motion for attorney's fees is outstanding. One suggestion was that perhaps the proposal should use the conjunction "or" rather than "and" in connecting "claims" with "rights and liabilities" or perhaps the phrase "rights and liabilities" should be deleted.

The Committee decided against making either change. While part of Civil Rule 54(b) uses the conjunction "or," the last sentence of 54(b) uses the conjunction "and," referring to "entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." In addition, keeping "rights and liabilities" in the proposed amendment preserves the intended connection between the proposal and Civil Rule 54(b).

To deal with the concern about attorney’s fees, the Committee added to the committee note a statement that the amendment does not change the principle established in the Supreme Court decisions *Budinich* and *Ray Haluch*. See *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988); *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int’l Union of Operating Eng’rs & Participating Emp’rs*, 571 U.S. 177, 179 (2014). Under these cases, attorney’s fees incurred in the action are collateral—and can be understood as neither “claims” nor “rights and liabilities of the parties” within the meaning of Civil Rule 54(b). As the Court put it in *Budinich*:

As a general matter, at least, we think it indisputable that a claim for attorney’s fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action.

Budinich, 486 U.S. at 200.*

The addition to the committee note is as follows:

The amendment does not change the principle established in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), that “a decision on the merits is a ‘final decision’ for purposes of § 1291 whether or not there remains for adjudication a request for attorney’s fees attributable to the case.” See also *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int’l Union of Operating Eng’rs & Participating Emp’rs*, 571 U.S. 177, 179 (2014) (“Whether the claim for attorney’s fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.”).

Avoiding the Creation of a New Trap for the Unwary

Judge Colloton also suggested that the proposed rule might create its own trap for the unwary. Suppose a party waits until final judgment, but instead of designating the final judgment (or the final judgment and some interlocutory order or orders)

* The Committee also considered a related question about Civil Rule 58(e), a rule that allows a district court to treat a motion for attorney’s fees as if it were a Civil Rule 59 new trial motion for purposes of Appellate Rule 4(a)(4)(A). The Committee concluded that this situation is covered by Rule 4(a)(4)(A)(iii) because such a district court order is effectively an extension of time and Civil Rule 58(e) is the intended reference of subsection (iii).

designates *only* an interlocutory order in the notice of appeal. If Rule 3(c)(1)(B) requires that either a final judgment or an appealable order be designated, might a court conclude that the notice is ineffective?

To guard against this possible result, the Committee added a provision to what would become Rule 3(c)(7):

~~(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, or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment.

It also added an explanation to the committee note:

On occasion, a party may file a notice of appeal after a judgment but designate only a prior nonappealable decision that merged into that judgment. To deal with this situation, existing Rule 3(c)(4) is amended to provide that an appeal must not be dismissed for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment. In this situation, a court should act as if the notice had properly designated the judgment. In determining whether a notice of appeal was filed after the entry of judgment, Rules 4(a)(2) and 4(b)(2) apply.

Designating Only Part of a Judgment or Order in a Notice of Appeal

Throughout the pendency of this proposed amendment, a persistent question has been whether to permit a party to limit the scope of a notice of appeal or to leave such limitations to the briefs. It is a difficult and close issue. Indeed, on all of the issues discussed above, the Committee reached consensus. But on this issue, it was closely divided, five to three.

Rule 3(c)(1)(B) currently permits a party to designate “the judgment, order, or part thereof being appealed.” Believing that the phrase “or part thereof” has contributed to the problem of confusing the judgment or appealable order with the issues sought to be reviewed on appeal, the Committee deleted that phrase in the proposed amendment. But to preserve the ability of a party to limit the scope of a notice of appeal by deliberate choice, proposed Rule 3(c)(6) as published provides: “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.”

The Council of Appellate Lawyers of the American Bar Association submitted a comment suggesting that it would be better not to include a provision allowing for a limitation of the scope of a notice of appeal. The Council is concerned that proposed 3(c)(6) may give rise to strategic attempts to limit the jurisdiction of the court of appeals, particularly when cross-appeals are involved. It supports leaving the narrowing of the issues on appeal to the briefing.

The majority of the Committee decided not to change this aspect of the proposal as published. Current law allows limited notices of appeal, and the point of the current project is to avoid miscommunication, not to change what a party can and cannot do. Retaining the ability to expressly limit the scope of the notice of appeal is valuable, particularly in multi-party cases, enabling an appellant to assure a party that no challenge is being raised as to that party.

Eliminating the ability to limit the scope of the notice of appeal might upset settlement agreements, in which a defendant might have agreed not to appeal a judgment's award of damages to one plaintiff but is still free to appeal the same judgment's award of damages to a second plaintiff. There is utility in binding oneself in the notice of appeal rather than with some assurance on the side.

Eliminating the ability to limit the scope of the notice of appeal might also interfere with the district court's ability to reconsider or modify existing rulings if a particular order does multiple things, of which some may be appealable, some may be unappealable, and some may be uncertain.

Moreover, the current proposal does not appear to give cause for the Council's worries regarding cross-appeals. Rules 4(a)(3) and 4(b)(1) give other parties additional time to file a notice after a timely notice of appeal, but they do not limit such cross-appeals to the same part of the judgment or order referenced in the initial notice.

While not persuaded to eliminate the ability to limit the scope of the notice of appeal, the Committee, cognizant of the competing concerns, decided to retain the matter on its agenda, with a plan to revisit the issue in three years.

A minority of the Committee, on the other hand, would delete proposed (c)(6) and add the following sentence to the end of proposed (c)(4): "Specific designations do not limit the scope of the notice of appeal."

In their view, such an approach would be a "cleaner" alternative, create less uncertainty, and avoid inadvertent loss of appellate rights. Concerns supporting the retention of proposed (c)(6) could be managed in other ways. For example, in multi-party cases where some parties settle, assurance that the appealing party is not

breaching the settlement agreement could be provided separate from the text of the notice of appeal. Similarly, issues regarding the ability of a district court to modify existing rulings could be handled on a case-by-case basis. A motion in the district court, or a statement in a brief, could signal to the courts and parties the limits of what was sought to be raised on appeal.

Disagreement about this aspect of the proposal did not lead any member to withhold support for the proposal as a whole. Once the Committee resolved this issue by a divided vote, the Committee without dissent approved submitting the proposed amendment to the Standing Committee for final approval.

The style consultants suggested a minor change to proposed (c)(4): changing “all orders that merge for purposes of appeal into the designated judgment” to “all orders that, for purposes of appeal, merge into the designated judgment.”

Here is the proposed amendment recommended for final approval, including both the changes made by the Committee and the one suggested by the style consultants:

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 the judgment, ~~—or 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, for purposes of appeal, merge 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, or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment.

~~(5)~~ (8) Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of a notice~~s~~ 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 “the judgment—or 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, for purposes of appeal, merge 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.

The amendment does not change the principle established in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), that “a decision on the merits is a ‘final decision’ for purposes of § 1291 whether or not there remains for adjudication a request for attorney’s fees attributable to the case.” See also *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int’l Union of Operating Eng’rs & Participating Emp’rs.*, 571 U.S. 177, 179 (2014) (“Whether the claim for attorney’s fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.”).

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 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 two provisions are limited to civil cases. Similar issues may arise in a small number of criminal cases, and similar treatment may be

appropriate, but no inference should be drawn about how such issues should be handled in criminal cases.

On occasion, a party may file a notice of appeal after a judgment but designate only a prior nonappealable decision that merged into that judgment. To deal with this situation, existing Rule 3(c)(4) is amended to provide that an appeal must not be dismissed for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment. In this situation, a court should act as if the notice had properly designated the judgment. In determining whether a notice of appeal was filed after the entry of judgment, Rules 4(a)(2) and 4(b)(2) apply.

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.

The proposed amendment to Rule 6 is a conforming amendment. No comments directed to Rule 6 were received, and the Committee requests final approval as published.

The NACDL also noted with approval a minor stylistic change to the forms as published and suggested more stylistic streamlining. The style consultants reviewed those suggestions, and the following revised forms are presented first in redline and then as the clean result:

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~~ Docket 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
_____, (state the date the judgment was entered) 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~~ Docket 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 _____ (describing the order it)) entered in this action on _____ (state the date the order was entered) 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.

Docket No. _____

A.B., Petitioner

v.

Commissioner of Internal
Revenue, Respondent

Notice of Appeal

~~Notice is hereby given that _____ (here name
all parties taking the appeal)* _____ 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 _____ (state the date the
decision was entered) the _____ day of _____, 20__ (relating to _____).~~

(s) _____
Counsel *Attorney for* _____
Address: _____

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

Form 1A

Notice of Appeal to a Court of Appeals From a Judgment of a District Court.

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

A.B., Plaintiff

v.

C.D., Defendant

Notice of Appeal

_____ (name all parties taking the appeal)*
appeal to the United States Court of Appeals for the _____ Circuit from the final
judgment entered on _____ (state the date the judgment was
entered).

(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 an Appealable Order of a District Court.

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

A.B., Plaintiff

v.

C.D., Defendant

Notice of Appeal

_____ (name all parties taking the appeal)*
appeal to the United States Court of Appeals for the _____ Circuit from the order
_____ (describe the order) entered on _____
(state the date the order was entered).

(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.

Docket No. _____

A.B., Petitioner

v.

Commissioner of Internal
Revenue, Respondent

Notice of Appeal

_____ (name all parties taking the appeal)*
appeal to the United States Court of Appeals for the ____ Circuit from the decision
entered on _____ (state the date the decision was entered).

(s) _____
Attorney for _____
Address: _____

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

III. Action Item for Approval for Publication

The Committee seeks approval for publication of a proposed amendment to Rule 25 extending the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.

Civil Rule 5.2(c) protects the privacy of Social Security claimants by limiting electronic access to case files. Although members of the public can access the full electronic record if they come to the courthouse, they can remotely access only the docket and judicial decisions. Appellate Rule 25(a)(5) piggybacks on Civil Rule 5.2(c): “An appeal in a case whose privacy protection was governed by . . . Federal Rule of Civil Procedure 5.2 . . . is governed by the same rule on appeal.”

This piggyback approach works fine for categories of cases that can be heard in both the district courts and the courts of appeals. But unlike Social Security benefit cases, Railroad Retirement benefit cases go directly to the courts of appeals.

There is little doubt that there are close parallels between the Social Security and Railroad Retirement programs. *See BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 898 (2019) (“Given the similarities in timing and purpose of the two programs, it is hardly surprising that their statutory foundations mirror each other.”). Accordingly, the Committee believes that it makes sense to accord the same kind of privacy protection to both kinds of cases.

The Committee requests publication of the following, which has not changed since the Standing Committee saw a working draft in January:

Rule 25. Filing and Service

(a) Filing

* * * *

(5) Privacy Protection. An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case. The provisions on remote access in Federal Rule of Civil Procedure 5.2(c)(1) and (2) apply in a petition for review of a

benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.

* * * *

Committee Note

There are close parallels between the Social Security Act and the Railroad Retirement Act. One difference, however, is that judicial review in Social Security cases is initiated in the district courts, while judicial review in Railroad Retirement cases is initiated directly in the courts of appeals. Federal Rule of Civil Procedure 5.2 protects privacy in Social Security cases by limiting electronic access. The amendment extends those protections to Railroad Retirement cases.

At the January 2020 meeting of the Standing Committee, questions were raised about the scope of the proposal compared to the scope of the work of the Railroad Retirement Board (RRB).

The Committee has confirmed that the RRB renders decisions that are not under the Railroad Retirement Act. In particular, it administers the Railroad Unemployment Insurance Act. The RRB also renders decisions under the Railroad Retirement Act that are not benefits decisions. For example, it decides whether a company is an employer under the Railroad Retirement Act.

The Committee is not aware of any petitions for review under the Railroad Retirement Act that are not directed at the RRB. The Committee nevertheless decided to retain the phrase “Railroad Retirement Board” in the proposed amendment. Not only is clarity enhanced by including this phrase, but it is consonant with Rule 15(a)(2), which requires that a petition for review name the agency as a respondent.

IV. Information Items

The Committee had planned to present the Standing Committee with a proposal to publish modest amendments clarifying the relationship between Rule 35, dealing with rehearing en banc, and Rule 40, dealing with panel rehearing. But a majority of the Committee, by a vote of 5 to 2, reconsidered its prior determination not to make a more thorough revision of these two Rules. Instead of publishing minor changes, the Committee will consider revising these two Rules in order to eliminate much duplication and reduce confusion.

The joint Civil-Appellate subcommittee is exploring finality in consolidated cases, and whether a rule amendment in response to *Hall v. Hall*, 138 S. Ct. 1118 (2018), is appropriate. The subcommittee continues to review data being gathered by the FJC. *Hall* held that consolidated cases retain their separate identities for purposes of appeal, so that when one of the consolidated cases reaches judgment, that judgment is appealable without waiting for the disposition of other cases with which it was consolidated.

Emery Lee of the FJC has searched dockets in all 94 districts for filings in 2015 through 2017. Not including MDL cases, there are 20,730 cases with Civil Rule 42 consolidations in this data set—or 2.5% of federal civil filings. The next step will be to sample these cases in order to try to identify cases in which a *Hall* issue may have arisen.

The joint subcommittee exploring the possibility of an earlier-than-midnight deadline for electronic filing continues to gather information, including information from the FJC about actual filing patterns.

The Committee considered a suggestion for rulemaking to deal with decisions based on grounds that had not been briefed (19-AP-B). The American Academy of Appellate Lawyers suggested that before a decision is issued on grounds not briefed or argued by the parties, the court provide notice of the ground and an opportunity to submit supplemental briefing. The Committee decided that rulemaking would risk delaying decisions and inviting disputes about what was briefed, and observed that rehearing is available. While the suggestion raised a legitimate concern, the Committee concluded that it would be better for the Chair to send a letter to Chief Circuit Judges about the issue and include the letter submitted by the American Academy of Appellate Lawyers. The matter will remain on the agenda to be revisited in three years.

Subcommittees have been appointed to consider two recent suggestions:

- 1) Regularizing the standards and procedures governing IFP status (19-AP-C);
- 2) Amending Rule 4(a)(2) to more broadly allow the relation forward of notices of appeal (20-AP-A). Although the Committee considered this issue about a decade ago and decided against taking action, it is worth reexamining the question.

The second subcommittee will also consider the comment submitted regarding the proposed amendment to Rule 3, suggesting a provision that there is no need to file a new or amended notice of appeal after the denial of a Rule 4(a)(4)(A) motion.

A subcommittee has also been appointed to implement the Coronavirus Aid, Relief, and Economic Security (CARES) Act. In accordance with that Act, this subcommittee will consider whether amendments would be appropriate to deal with future emergencies.

The Committee is also considering a suggestion to amend Rule 43 to require the use of titles rather than names in cases seeking relief against officers in their official capacities (19-AP-G). It has tabled this suggestion pending inquiry into the practice of circuit clerks.

Finally, the Committee considered a suggestion that tight deadlines be established for cases involving Congressional subpoenas (19-AP-H) but agreed without dissent to remove that matter from its agenda.