

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

MISC. No. 8-01

IN RE: RULES 39, 41, AND 42 OF THE RULES OF PRACTICE AND PROCEDURE

Before KRAMER, *Chief Judge*, and FARLEY, HOLDAWAY,  
IVERS, STEINBERG, and GREENE, *Judges*

**ORDER**

Pursuant to the authority of 38 U.S.C. §§ 7263(b) and 7264(a) and consistent with 28 U.S.C. § 2071(b) and (e), the Court has determined that there is an immediate need to amend Rules 39(a), (b), and (c), 41(b), and 42 of its Rules of Practice and Procedure. Accordingly, it is

ORDERED that the attached amendments to Rule 39(a), (b), and (c), 41(b), and 42 are published and will be effective on November 9, 2001. It is further

ORDERED that public comment on the amendments made by this order is invited. Such comment must be submitted to the Clerk of the Court at 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004, by December 28, 2001.

DATED: November 1, 2001

BY THE COURT:

KENNETH B. KRAMER  
Chief Judge

Attachments

**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/or other expenses in connection with an appeal or petition must be filed with the Clerk within 30 days after this Court's judgment becomes final, which occurs 60 days after entry of judgment under Rule 36 or, consistent with Rule 41(b), upon the issuance of an order on consent dismissing, terminating, or remanding a case. See Rule 25 (Filing and Service).

**(b) Supplemental application.** An appellant or petitioner whose application described in subsection (a) of this rule has been granted in whole or in part may, not later than 30 days after the Court action granting such application, file a supplemental application for attorney fees and other expenses in connection with the submission or defense of such subsection (a) application. See Rule 25.

**(c) Response.** Within 30 days after the date on which an application described in subsection (a) or a supplemental application described in subsection (b) is filed, the Secretary shall file and serve a response to the application or supplemental application, stating which elements of the application or supplemental application are not contested and explaining the Secretary's position on those elements that are contested.

*[Comment: The amendment to subsection (a) is issued concurrent with the Court's discontinuation of the practice of including in Clerk's orders regarding consent dispositions a caution regarding the filing deadline for an application under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (EAJA). The amendment specifies the time at which a judgment of the Court becomes final. In light of the additional language, the statutory citations are deleted as unnecessary; the last sentence is replaced by a reference to Rule 25. Subsection (b) is added to provide specifically for the submission, once an initial EAJA application is granted, of a supplemental EAJA application requesting fees and expenses for the fee litigation itself; another reference to Rule 25 is added. Subsection (c) is amended (in light of the premature submission in some cases of EAJA applications prior to judgment becoming final), so as to start the Secretary's 30-day response time from the Court's filing of the EAJA application, rather than upon service of an application on the Secretary, which occurs at the time when a premature application is submitted. In the case of premature applications, unless previously returned to the appellant or petitioner by the Court, filing occurs, upon the Court's initiative, after judgment becomes final. Subsection (c) is also amended to provide a 30-day period for the Secretary to file a response to a supplemental EAJA application as provided for in new subsection (b).]*

## **RULE 41. ISSUANCE OF MANDATE; STAY OF MANDATE**

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- (b) Mandate in Consent Dispositions.** An order on consent dismissing, terminating, or remanding a case will also constitute the final judgment and mandate of the Court.

*[Comment: Subsection (b) is amended to conform to the amendment to Rule 42 being made concurrently, relating to termination of cases where the parties have entered into a settlement agreement.]*

## **RULE 42. VOLUNTARY TERMINATION OR DISMISSAL**

If the parties file with the Clerk a motion to terminate an appeal or petition based upon a settlement agreement to be effective upon the Court's termination of the case, the Clerk may enter the case terminated. On motion of the appellant or petitioner to dismiss, an appeal or petition may be dismissed by the Clerk on terms requested by the appellant or petitioner, agreed upon by the parties, or previously fixed by the Court.

*[Comment: The Rule is amended to provide that the procedure for requesting Court action in the event of settlement is for the parties to file with the Clerk a motion that the Court terminate the case in light of a settlement agreement that is to become effective when the Court acts to terminate the case. The second sentence is revised to make clear that dismissal may be ordered by the Clerk on the basis of a motion for dismissal. The last sentence of the current rule is deleted because under the current practice of the Court an appellant's request to withdraw an appeal or a petitioner's request to withdraw a petition is formally recognized by a dismissal order.]*