

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

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MEMORANDUM

DATE: December 3, 2010

TO: Judge Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Jeffrey S. Sutton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on October 7 and 8, 2010, in Boston, Massachusetts. The Committee approved for publication proposed amendments to Rules 13, 14, and 24, removed one item from its study agenda, and discussed a number of other items.

Part II of this report discusses the proposals for which the Committee seeks publication for comment: proposed amendments to Rules 13, 14, and 24. Part III covers other matters.

The Committee has scheduled its next meeting for April 6 and 7, 2011, in San Francisco, California; the second day of the meeting will overlap with the meeting of the Bankruptcy Rules Committee. The Committee will hold its fall 2011 meeting on October 13 and 14 in Atlanta, Georgia.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the October meeting¹ and in the Committee's study agenda, both of which are attached to this report.

¹ These minutes have not yet been approved by the Committee.

II. Action Item

The Committee is seeking approval to publish for comment proposed amendments to Rules 13, 14, and 24. The proposed amendments to Rules 13 and 14 revise those rules to address permissive interlocutory appeals from the United States Tax Court under 26 U.S.C. § 7482(a)(2). The Committee developed these proposals in consultation with the Tax Court and with the Tax Division of the Department of Justice. The proposed amendment to Rule 24 grows out of a suggestion by the Tax Court that Rule 24(b)'s reference to the Tax Court be revised to remove a possible source of confusion concerning the Tax Court's legal status.

A. Rule 13

The Committee recommends that the Standing Committee approve for publication the proposed amendment to Rule 13 as set out in the enclosure to this report. The amendment will add a new subdivision (b) providing that permissive appeals from the Tax Court are governed by Rule 5, and will make certain other changes.

In 1980, the Second Circuit held in *Shapiro v. C.I.R.*, 632 F.2d 170 (2d Cir. 1980), that 28 U.S.C. § 1292(b) does not authorize permissive interlocutory appeals from an order of the Tax Court. In 1986, Congress responded to *Shapiro* by enacting 26 U.S.C. § 7482(a)(2), which adopts for interlocutory appeals from the Tax Court a system similar to Section 1292(b)'s system for interlocutory appeals from the district courts. Section 7482(a)(2) provides that “[w]hen any judge of the Tax Court includes in an interlocutory order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation,” the court of appeals “may, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of such order.” When applying Section 7482(a)(2), the Tax Court has looked to caselaw interpreting Section 1292(b).

The adoption of Section 7482(a)(2) did not lead to any amendments of the Appellate Rules; thus, it is not entirely clear what rules govern an interlocutory appeal by permission under Section 7482(a)(2). Tax Court Rule 193(a) states in part: “For appeals from interlocutory orders generally, see rules 5 and 14 of the Federal Rules of Appellate Procedure.” This reference is somewhat puzzling, because Rule 14 (with respect to appeals to which it applies) excludes the application of Rule 5.

The Committee proposes to add new Rule 13(b) to make clear that Appellate Rule 5 applies to interlocutory tax appeals under Section 7482(a)(2). The existing provisions of Rule 13 are placed in a renumbered Rule 13(a), are revised to make clear that they apply to appeals as of right, and are slightly restyled. The amendments delete current Rule 13(d)(1)'s definition of “district court” and “district clerk” to encompass the Tax Court and its clerk, because (as

discussed below) such a definition is placed in revised Rule 14. Current Rule 13(d)(1) becomes new Rule 13(a)(4)(A) and is revised to be consistent with the Tax Court's practice of obtaining a transcript for each proceeding and forwarding it to the court of appeals on request. The headings of Rules 13 and 14 and the heading of Title III are revised to reflect the new scope of Title III, which will encompass review of Tax Court orders as well as review of Tax Court decisions.

B. Rule 14

The Committee recommends that the Standing Committee approve for publication the proposed amendment to Rule 14 as set out in the enclosure to this report. The proposed amendment to Rule 14 complements the amendment to Rule 13.

Rule 14 is revised to delete its specific reference to Tax Court "decisions." Rule 14's list of Appellate Rules provisions that do not apply to appeals from the Tax Court is revised to omit Rule 5. A new global definition provides that references "in any applicable rule"² to the "district court" and "district clerk" encompass the Tax Court and its clerk. Omitted from this global definition is Rule 24(a), because that provision's treatment of applications to proceed in forma pauperis on appeal is not meant to apply to appeals from the Tax Court.

Assuming that the Standing Committee decides to approve this package of proposals for publication, it may be worthwhile to consider inviting specific comment on Appellate Rule 14's list of provisions that do not apply to appeals from the Tax Court. That list has not been amended since the adoption of the Appellate Rules, and it may be useful to obtain additional input on whether the list of exclusions accurately reflects the way in which the Appellate Rules provisions, as they stand today, should apply to appeals from the Tax Court.

C. Rule 24

The Committee recommends that the Standing Committee approve for publication the proposed amendment to Rule 24 as set out in the enclosure to this report. The proposed amendment to Rule 24 implements a proposal by the Tax Court that Rule 24(b) be revised to more accurately reflect the status of the Tax Court as a court.

² In style comments prior to the meeting, Professor Kimble suggested deleting "applicable." The Committee carefully discussed this suggestion. Members stated that they prefer to include the word "applicable" for clarity and to emphasize that not all of the Appellate Rules apply to appeals from the Tax Court. On the basis of this discussion, the Committee decided to retain the word "applicable."

III. Information Items

The Committee expects to discuss at its spring 2011 meeting a proposal to amend Rule 4(a)(4) to adjust its treatment of the time to appeal after the disposition of a tolling motion. The Civil / Appellate Subcommittee has been working on this proposal, and has also been discussing the possibility of a proposal to address the doctrine of “manufactured finality.” At the spring 2011 meeting, the Committee will also consider a proposal to streamline Questions 10 and 11 of Appellate Form 4 (concerning applications to proceed in forma pauperis on appeal); Questions 10 and 11, which request information concerning payments to attorneys and others in connection with the case, currently seek more information than seems necessary to the determination of i.f.p. applications.

The Committee is continuing to research issues relating to a proposal to treat federally recognized Native American tribes the same as states for the purpose of amicus filings. Under Rule 29(a), the federal and state governments can file amicus briefs as a matter of course, but tribal amici must seek party consent or court leave. (Moreover, absent contrary action by Congress, new Rule 29(c)(5) will take effect as of December 1, 2010. Rule 29(c)(5) will impose an authorship and funding disclosure requirement on amicus briefs but will exempt the federal and state government entities listed in Rule 29(a).) In addition to receiving input from the National Congress of American Indians and others, the Committee has considered empirical data gathered by the Federal Judicial Center, has considered the history of the Supreme Court’s amicus-filing rule, and has consulted the Chief Judges of the Eighth, Ninth, and Tenth Circuits (where relatively many tribal amicus filings occur).

The Committee is considering whether to modify Rule 28(a)(6)’s requirement that briefs contain a separate “statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below.” Preliminary discussions indicate substantial support for such a modification.

The Committee has begun to consider possible rulemaking responses to the Court’s decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), which held that a district court’s attorney-client privilege ruling did not qualify for an immediate appeal under the collateral order doctrine. Though some have proposed a relatively broad-ranging review of the collateral order doctrine, the Committee intends as an initial matter to focus its consideration on possible ways to provide for immediate appellate review of attorney-client privilege rulings, as well as possible mechanisms to control such appeals (such as certification requirements or expedited procedures). The Committee will coordinate its efforts with the Civil, Criminal, and Evidence Rules Committees.

The Committee has embarked on a review of the caselaw interpreting Rule 4(a)(2), which addresses premature notices of appeal in civil cases. Caselaw in this area addresses a range of different fact patterns, and the Committee plans to consider from a policy perspective whether

the Rule and the caselaw appropriately treat the common situations in which questions of prematurity tend to arise.

The Committee's upcoming joint spring meeting with the Bankruptcy Rules Committee will provide an opportunity for both Committees to discuss the proposed revisions to Part VIII of the Bankruptcy Rules (dealing with bankruptcy appeals).

The Committee has asked the Federal Judicial Center to research the amount of appellate costs that are typically awarded under Rule 39. This inquiry arises in response to concerns raised about the taxation of costs by the Fourth Circuit in the case of *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (2010).

At the fall meeting, the Committee discussed issues raised by *Vanderwerf v. Smithkline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010), concerning the effect on appeal time of the withdrawal of a tolling motion. The Committee also discussed a suggestion that the Appellate Rules might usefully address the question of intervention on appeal. The Committee left these items on its agenda for the time being, though it is not clear that there is any consensus in favor of developing proposals on either topic. The Committee also considered issues raised by *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010) (*en banc*), concerning the quorum requirement applicable to *en banc* courts; after discussion, the Committee removed this item from its study agenda.

Finally, the Committee discussed an inquiry from the Committee on Federal / State Jurisdiction concerning appellate review of remand orders. Members noted that this topic falls within the primary jurisdiction of the Federal / State Jurisdiction Committee, and expressed willingness to assist that Committee should it decide to move forward with a project on this topic.

TAB
6-A

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE*

TITLE III. ~~REVIEW OF A DECISION OF~~ APPEALS FROM
THE UNITED STATES TAX COURT

Rule 13. ~~Review of a Decision of~~ Appeals from the Tax
Court

1 (a) ~~How Obtained; Time for Filing Notice of Appeal~~
2 Appeal as of Right.

3 (1) How Obtained; Time for Filing a Notice of
4 Appeal.

5 ~~(1) Review of a decision of (A)~~ An appeal as of
6 right from the United States Tax Court is
7 commenced by filing a notice of appeal with
8 the Tax Court clerk within 90 days after the
9 entry of the Tax Court's decision. At the time
10 of filing, the appellant must furnish the clerk
11 with enough copies of the notice to enable the
12 clerk to comply with Rule 3(d). If one party
13 files a timely notice of appeal, any other party
14 may file a notice of appeal within 120 days
15 after the Tax Court's decision is entered.

*New material is underlined; matter to be omitted is lined through.

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16 (2) (B) If, under Tax Court rules, a party makes
17 a timely motion to vacate or revise the Tax
18 Court's decision, the time to file a notice of
19 appeal runs from the entry of the order
20 disposing of the motion or from the entry of
21 a new decision, whichever is later.

22 **(b) (2) Notice of Appeal; How Filed.** The notice of
23 appeal may be filed either at the Tax Court
24 clerk's office in the District of Columbia or
25 by mail addressed to the clerk. If sent by mail
26 the notice is considered filed on the postmark
27 date, subject to § 7502 of the Internal
28 Revenue Code, as amended, and the
29 applicable regulations.

30 **(c) (3) Contents of the Notice of Appeal; Service;**
31 **Effect of Filing and Service.** Rule 3
32 prescribes the contents of a notice of appeal,
33 the manner of service, and the effect of its
34 filing and service. Form 2 in the Appendix of
35 Forms is a suggested form of a notice of
36 appeal.

37 (d) (4) **The Record on Appeal; Forwarding;**

38 **Filing.**

39 (1) (A) Except as otherwise provided under

40 Tax Court rules for the transcript of

41 proceedings, the ~~An appeal from the~~

42 ~~Tax Court~~ is governed by the parts of

43 Rules 10, 11, and 12 regarding the

44 record on appeal from a district court,

45 the time and manner of forwarding and

46 filing, and the docketing in the court of

47 appeals. ~~References in those rules and~~

48 ~~in Rule 3 to the district court and~~

49 ~~district clerk are to be read as referring~~

50 ~~to the Tax Court and its clerk.~~

51 (2) (B) ~~If an appeal from a Tax Court~~

52 ~~decision~~ is taken to more than one court

53 of appeals, the original record must be

54 sent to the court named in the first

55 notice of appeal filed. In an appeal to

56 any other court of appeals, the appellant

57 must apply to that other court to make

58 provision for the record.

59 **(b) Appeal by Permission.** An appeal by permission is
60 governed by Rule 5.

Committee Note

Rules 13 and 14 are amended to address the treatment of permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rules 13 and 14 do not currently address such appeals; instead, those Rules address only appeals as of right from the Tax Court. The existing Rule 13 – governing appeals as of right – is revised and becomes Rule 13(a). New subdivision (b) provides that Rule 5 governs appeals by permission. The definition of district court and district clerk in current subdivision (d)(1) is deleted; definitions are now addressed in Rule 14. The caption of Title III is amended to reflect the broadened application of this Title.

Rule 14. Applicability of Other Rules to ~~the Review of a~~ Appeals from the Tax Court Decision

1 All provisions of these rules, except Rules ~~4-9~~ 4, 6-9,
2 15-20, and 22-23, apply to the review of a appeals from the
3 Tax Court decision. References in any applicable rule (other
4 than Rule 24(a)) to the district court and district clerk are to
be read as referring to the Tax Court and its clerk.

Committee Note

Rule 13 currently addresses appeals as of right from the Tax Court, and Rule 14 currently addresses the applicability of the Appellate Rules to such appeals. Rule 13 is amended to add a new subdivision (b) treating permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rule 14 is amended to address the applicability of the Appellate Rules to both appeals as of right and appeals by permission. Because the latter are governed by Rule 5, that rule is deleted from Rule 14's list of inapplicable provisions. Rule 14 is amended to define the terms “district court” and “district clerk” in applicable rules (excluding Rule 24(a)) to include the Tax

Court and its clerk. Rule 24(a) is excluded from this definition because motions to appeal from the Tax Court in forma pauperis are governed by Rule 24(b), not Rule 24(a).

Rule 24. Proceeding in Forma Pauperis

1 **(a) Leave to Proceed in Forma Pauperis.**

2 (1) **Motion in the District Court.** Except as stated in
3 Rule 24(a)(3), a party to a district-court action who
4 desires to appeal in forma pauperis must file a
5 motion in the district court. The party must attach
6 an affidavit that:

7 (A) shows in the detail prescribed by Form 4 of
8 the Appendix of Forms the party's inability to
9 pay or to give security for fees and costs;

10 (B) claims an entitlement to redress; and

11 (C) states the issues that the party intends to
12 present on appeal.

13 (2) **Action on the Motion.** If the district court grants
14 the motion, the party may proceed on appeal
15 without prepaying or giving security for fees and
16 costs, unless a statute provides otherwise. If the
17 district court denies the motion, it must state its
18 reasons in writing.

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19 (3) **Prior Approval.** A party who was permitted to
20 proceed in forma pauperis in the district-court
21 action, or who was determined to be financially
22 unable to obtain an adequate defense in a criminal
23 case, may proceed on appeal in forma pauperis
24 without further authorization, unless:

25 (A) the district court--before or after the notice of
26 appeal is filed--certifies that the appeal is not
27 taken in good faith or finds that the party is
28 not otherwise entitled to proceed in forma
29 pauperis and states in writing its reasons for
30 the certification or finding; or

31 (B) a statute provides otherwise.

32 (4) **Notice of District Court's Denial.** The district
33 clerk must immediately notify the parties and the
34 court of appeals when the district court does any of
35 the following:

36 (A) denies a motion to proceed on appeal in
37 forma pauperis;

38 (B) certifies that the appeal is not taken in good
39 faith; or

40 (C) finds that the party is not otherwise entitled to
 41 proceed in forma pauperis.

42 (5) **Motion in the Court of Appeals.** A party may file
 43 a motion to proceed on appeal in forma pauperis in
 44 the court of appeals within 30 days after service of
 45 the notice prescribed in Rule 24(a)(4). The motion
 46 must include a copy of the affidavit filed in the
 47 district court and the district court's statement of
 48 reasons for its action. If no affidavit was filed in
 49 the district court, the party must include the
 50 affidavit prescribed by Rule 24(a)(1).

51 (b) **Leave to Proceed in Forma Pauperis on Appeal from**
 52 **the United States Tax Court or on Appeal or Review**
 53 **of an Administrative-Agency Proceeding.** ~~When an~~
 54 ~~appeal or review of a proceeding before an~~
 55 ~~administrative agency, board, commission, or officer~~
 56 ~~(including for the purpose of this rule the United States~~
 57 ~~Tax Court) proceeds directly in a court of appeals, a Δ~~
 58 party may file in the court of appeals a motion for leave
 59 to proceed on appeal in forma pauperis with an affidavit
 60 prescribed by Rule 24(a)(1);

61 (1) **in an appeal from the United States Tax Court; and**

62 (2) when an appeal or review of a proceeding before
63 an administrative agency, board, commission, or
64 officer proceeds directly in the court of appeals.

65 (c) **Leave to Use Original Record.** A party allowed to
66 proceed on appeal in forma pauperis may request that
67 the appeal be heard on the original record without
68 reproducing any part.

Committee Note

Rule 24(b) currently refers to review of proceedings “before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court).” Experience suggests that Rule 24(b) contributes to confusion by fostering the impression that the Tax Court is an executive branch agency rather than a court. (As a general example of that confusion, appellate courts have returned Tax Court records to the Internal Revenue Service, believing the Tax Court to be part of that agency.) To remove this possible source of confusion, the quoted parenthetical is deleted from subdivision (b) and appeals from the Tax Court are separately listed in subdivision (b)’s heading and in new subdivision (b)(1).