No. 21-6308

IN THE

SUPREME COURT OF THE UNITED STATES

IONA SANDERS,

Petitioner

v.

CHRISTWOOD,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR REHEARING

IONA SANDERS
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pro se/Petitioner

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BACKGROUND

Pursuant to Sup. Ct. R. 44, Petitioner Iona Sanders respectfully petitions for a rehearing and reconsideration of the Court's January 10, 2022 order denying the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, on the grounds of substantial intervening circumstances. Since November 1, 2021 filing, this Court adopted amendments to Rules 3 and 6, and Forms 1 and 2 of the Federal Rules of Appellate Procedure under Section 2072 of Title 28, United States Code, which took effect on December 1, 2021.

Before changes to amendment Rule 3(c), the Fifth Circuit declined to address the district court denied motions to recuse. Fifth Circuit stated the notice of appeal "must designate the judgment or order being appealed" or they would probably lack jurisdiction to assess an "order outside of an explicitly designated order in the notice of appeal." (App. A, p. 5). Many appellate courts misinterpreted Rule 3(c) notice of appeal requirement to "designate the judgment—or the appealable order" being appealed, as appellate jurisdiction that covers a specified judgment or order in the notice of appeal. This misinterpretation had resulted in denying litigants a complete appeal, and limiting the scope of review. This petition shows nationwide importance of this Court recent adoption of the amendment to Rule 3(c), and how these changes would be implemental in preventing limitations on the scope of appeals.

This petition would allow the Petitioner an opportunity to address substantial grounds that would reveal many of the lower courts' opinions and rulings did not align with the evidence in this case. The lower courts disregarded their own Federal Rules of

Civil and Appellate Procedures to advocate for Christwood and violated my constitutional and statutory rights.

ARGUMENT

I Amendments to Federal Rules of Appellate Procedure 3(c) would prevent appellate courts from limiting litigants scope of appeal

During amendments to Rule 3(c), the Committee stated, "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 appellate courts 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." (App. L, pp.17-18).

The Committee further explained the new provision added to Rule 3(c) notice of appeal would "encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order" (App. L, p. 19). The Committee emphasized the merger rule can state: "an appeal from a final judgment permits review of all rulings that led up to the judgment." (App. L, p. 19).

Fifth Circuit also decline review of the district court's denial of Petitioner's motion to recuse because the "notice of appeal designates that her appeal is taken "from the order granting Judgment entered in this action on 5 day of January, 2021." (App. A, p. 5). The court emphasized this was "the district court's grant of summary judgment on the

LWS claims. A notice of appeal must designate the judgment or order being appealed, otherwise, this Court may lack jurisdiction to review the order. Although we liberally construe defects in specifying judgments in a notice of appeal, we typically do not exercise jurisdiction to review an order outside of an explicitly designated order in the notice of appeal. This is especially true when the non-designated order is not impliedly intended for appeal. Because the January 5, 2021 order granting summary judgment is specifically designated in the notice of appeal, and that judgment and accompanying briefing do not involve issues related to the recusal motion, we decline to entertain Sanders's arguments related to the denial of her recusal motion." (App. A, p. 5).

The Committee explained, "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, Rule 3(c)(7) provides 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." (App. L, pp. 21-22).

Appeals II, Petitioner asked the appellate court to address whether the district court violated 28 U.S.C. § 455(a) for the "appearance" of bias when a judge "impartiality might reasonably be questioned," instead of shifting his responsibility of recusal to the litigant's request as being "too late" when Congress did not impose a "timeliness" to the statute (Appellant Brief, p. 3). June 18, 2018, Settlement Conference, Magistrate North,

stated to the Petitioner, while in the presence of my former counsel, "the law is on the side of the business" and, "they already know, they probably win summary judgment." (ROA.159).

Judge Ashe expressed "doubts that Sanders has met this standard relative to Magistrate Judge North, especially considering her two-year delay after the settlement conference before seeking his recusal." (App. D, p. 2121). Judge Ashe's opinion does not acknowledge that Magistrate North's biased statements also silent my advocate and former attorney two years ago. Judge Ashe's opinion should be directed at Magistrate North's recusal for the "appearance of bias" for his "two-year" delay" under 28 U.S.C. § 455(a).

Under 28 U.S.C. § 455(a), "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Circuit splits have caused different interpretations of 28 U.S.C. § 455(a). See SCA Services, Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977), Roberts v. Bailar, 625 F.2d 125, 128 (6th Cir. 1980), Murray v. Murray, 73 A.D.2d 1015 (N.Y. App. Div. 1980), In re International Business Machine Corp., 618 F.2d 923, 932 (2d Cir. 1980), Apple v. Jewish Hosp. & Med. Ctr., 829 F.2d 326, 333 (2d Cir. 1987).

II The Fifth Circuit June 2, 2021 opinion, advocates for Christwood amidst their unlawful discrimination and retaliation

Fifth Circuit opinion omits facts and rephrases the evidence to advocate for Christwood's adverse employment actions. Fifth Circuit stated, "This Court and the Louisiana Supreme Court have held that, under the statute, it is the plaintiff-employee's burden to prove an actual violation of Louisiana law." (App. A, p. 6). Petitioner contends,

under Louisiana State Law, La. R.S. § 40:2009.20 B(1) states, "Any person who is engaged in the practice of medicine, social services, facility administration, psychological or psychiatric services; or any registered nurse, licensed practical nurse, nurse's aide, home- and community-based service provider employee or worker, personal care attendant, respite worker, physician's assistant, physical therapist, or any other direct caregiver having knowledge that a consumer's physical or mental health or welfare has been or may be further adversely affected by abuse, neglect, or exploitation shall, within twenty-four hours, submit a report to the department or inform the unit or local law enforcement agency of such abuse or neglect." *La. R.S. § 40:2009.20.*

Petitioner contends Christwood withheld the initial incident report from the State and expected the Petitioner to delegate to Thompson, LPN, to "redo" the initial incident report. I refused to participate in this activity, as this would violate 46 LAC Pt. XLVII, $ 306 8(k) "delegating nursing care, functions, tasks, or responsibilities to others contrary to regulation, 46 LAC Pt. XLVII, $ 306 8(i) falsifying records, and violate La. Admin. Code tit. 48 § I-6871(C), requiring "The initial report of the incident or accident is due within 24 hours of occurrence or discovery of the incident." Concealing the initial incident report from the State, submission of an unsigned Timeline, without acknowledgment of the initial incident report, and retaliation for refusal to participate in this activity violates State Laws *La. R.S. § 40:2009.20 and LA Rev Stat § 23:967.*

When additional information is applied to nursing documentation, the new entry is designated as a "late entry," and placed in chronological order with the date and time on the initial document. Perry Declaration # 42, when referring to Thompson's incident

report stated, "... I thought it was inadequate as it did not contain an adequate factual accounting of the incident, such as how long the resident had been outside and whether the resident was talking when she was found." (ROA.372). Perry's statement is considered a "late entry" to the initial document, and it does not override state laws, regulations, and guidelines for nursing documentation.

Thompson's incident report is a "fill in the box" document with a narrative section. Thompson had completed his nursing assessment with the resident's medical information, and staff signatures (ROA.2386-2387). Brown (2018) stated, "Even if it's a fill in the box documentation, you can still add it is (sic) a late entry in the narrative portion." Thompson incident report was submitted to Cook, Vice Associate Executive Director, for his review and signature (ROA.2037-2046).

Fifth Circuit stated, "The report was submitted to Sanders's immediate supervisor, Tami Perry, who, as residential health services director, was responsible for overseeing Christwood's ALU, among other units." (App. A, p.2). Fifth Circuit opinion substituted Perry in place of Cook, as this opinion rephrased the evidence, by suppressing Cook's refusal to submit the initial incident report to the State (App. A, p. 2). Cook stated, "It needs to be redone. I am not sending that." (ROA.644, ROA.805). Perry stated, "It will be redone." (ROA.805).

Also, Fifth Circuit stated, "That night, Perry emailed Sanders, reminding her that the report was due the next day, December 20, at noon." (App. A, p. 2). Fifth Circuit failed to address Perry's email instructed the Petitioner to delegate to Thompson to "redo" the incident report, and send this new incident report to the State by noon the following day

(ROA.2390). Thompson stated, "Tami got halfway through rewriting the Incident Report, and then she tore it up." (ROA.805-806, ROA.655-659). Thompson further stated, "She said that she will look at the camera and write a detailed report from the times on the camera and send it with the Incident Report." (ROA.805-806, ROA.655-659).

On January 30, 2017, (constructive discharged), Petitioner disciplinary meeting with Holzhalb, Associate Executive Director, and Perry. In the meeting, Holzhalb listed four pretextual reasons for Christwood's unlawful adverse employment actions (ROA.807-810). First, Holzhalb referred to Thompson as a "new graduate" and stated I assigned him to work the night shift. I informed Holzhalb that Thompson worked the night shift for a couple of years before my March 2015 acceptance of the ALU Director's position, and Christwood does not have a policy on "new graduate" nurses, not working nights. Perry was the ALU Director when Thompson was hired to work night shifts (ROA.806).

Next, Holzhalb stated he had to put more input than he wanted regarding portable equipment for a resident. I informed Holzhalb that staff felt the portable equipment was unsafe and the family requested an alternative decision. Holzhalb then stated I was not present when the State made an unannounced visit on September 6, 2016. I informed Holzhalb that I had a signed administrator approval day off from Cook, and was out of town during the State unannounced visit, but was present for the last two visits (ROA.1199). I informed Holzhalb that Christwood maintained Perry's register with the State as the ALU Director, therefore the State requested Perry during their visits (ROA.888).

Lastly, Holzhalb stated my skill set was to write care plans on skilled nursing and his

decision was not a demotion but a "lateral move" (ROA.806-810).

Also, in the meeting, Perry stated she did not send the State Thompson's incident report, because it was not written well (ROA.807). Perry stated she sent the State a Timeline on December 24th (ROA.807). Brown (2018) stated, "To stick something in the record hours after the care was performed without labeling it as a late entry is fraud." Perry further stated, "Ian for some reason didn't feel like he should redo the Incident Report either. He said it was because after he had talked to you, he didn't want to redo the Incident Report." (ROA.808). Petitioner contends the nursing association has established copyright guidelines for nursing documentation.

Fifth Circuit stated, "Following the incident report debacle, Sanders was reassigned to a quality assurance coordinated position in Christwood's skilled nursing unit with the same pay, benefits, and hours as her previous position." (App. A, p. 3). Christwood's counsel also referred to my termination/demotion as being "reassigned." (ROA.665-667). Fifth Circuit failed to state that the Assisted Living Director is an RN required, supervisory, salary-exempt position, and the coordinator is a non-supervisory position with a significant reduction in job responsibilities, non-exempt, and requires either an LPN or RN, therefore, the same pay and hours could not be the same (ROA.781-783, ROA.829-832). Christwood refused to submit my annual performance evaluations.

Christwood maintained the initial incident report in their possession, custody, and control on 12/20/2016, 12N deadline, but informed the district court it was the Petitioner who did not submit the incident report to the State (ROA.393, ROA.649-650). Perry's Declaration # 48, states, "The original incident report ... was not provided to the State but

remains part of the resident's record at Christwood." (ROA.373).

Fifth Circuit stated the Petitioner raised "new issues related to various claims and procedures not previously raised," but failed to list the "various claims." (App. A, p.4-5). District court stated, "In her surreply, Sanders raises new examples of Christwood's purported state-law violations including LAC 48.1.6869(D) & (E) (retention of records) and LAC 48.I.6865(B)(2)(staffing requirements) along with La.R.S.37:961(4). R. Doc. 131 at 5 & 16-17. Because this is the first time these supposed violations are being raised by Sanders, they cannot form the basis of an LWS claim when she is only now informing her employer of them." (App. B, p. 8).

Petitioner contends, under Fed. Rule Civ. Proc. 8(a)(2), "A pleading that states a claim for relief must contain: a short and plain statement of the claim showing that the pleader is entitled to relief?" (ROA.1675). Under LAC 48.1.6869(D) & (E) (retention of records), I became aware my nurses' note was allegedly destroyed during discovery. Christwood replied, "Defendant has no documents responsive to this request." (ROA.1168). Judge Ashe stated, "Even assuming this allegation is true, it still cannot form the basis of a whistleblower claim because Sanders never informed Christwood that it was violating state law for the destruction of documents." (App. B, p. 15). Thompson's nurses' note is not the same note I read on December 19, 2016 (ROA.2388).

LAC 48.I.6865(B)(2) (staffing requirements), under *48 LAC Pt I, § 6865(2)(a)*, "Level 4 ARCPs shall employ or contract with at least one RN who shall serve as the nursing director and who shall manage the nursing services." (App. K, p.463). Under *48 LAC Pt I, § 6865(2)*(c), "The nursing director shall review and oversee all LPNs and direct

care personnel with respect to the performance of health related services." (App. K, p.463). Perry's Declaration #10, states she is familiar with *48 LAC Pt I, § 6800 et seq,* because of her "work experience at Christwood." (ROA.366).

Under La. R.S. 37:961(4), LPNs performing duties under the direction of an RN are taught in nursing school under *La. Admin. Code tit. 46, § XLVII-933.* Christwood maintained Perry as my supervisor though their decision violates State laws and regulations. ARCP facilities are required to demonstrate knowledge of the regulations so they maintain "compliance with all appropriate federal, stated departmental, or local statutes, laws, ordinances, rules, regulations and fees before the department will issue the ARCP an initial license to operate under *48 LAC Pt I, § 6807(B)* (App. K, p. 442).

Christwood continuously questioned my finances until I informed them that I do not receive "welfare benefits or food stamps" (ROA.321-322). Christwood stereotyped the Petitioner, when the Louisiana State Board of Nurse Examiners lists numerous other offenses when removing RNs licenses, besides misappropriating of agency's funds. The Louisiana State Board of Practical Nurse Examiners also investigates LPNs for falsification of records, and alledged destruction of documents under 46 LAC Pt. XLVII, $ 306 8(i) discovered during litigation.

Fifth Circuit stated, "We agree with the district court's careful and detailed analysis that Sanders has not established and the record summary judgment evidence does not show that Christwood committed or encouraged any actual violations of the state laws that Sanders alleges were violated in her complaint." (App. A, pp. 6-7). Perry's Declaration # 43, stated, "Accordingly, on December 19, 2016, I instructed Sanders to

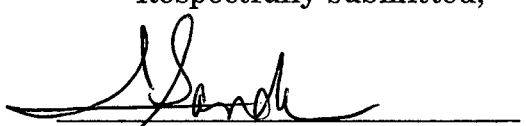
work with Thompson to redo the report and add factual information. Sanders replied that it was "illegal" to alter an incident report." (ROA.373, ROA.2390).

Christwood stated, "The undisputed record evidence shows that on December 19, Tami Perry instructed Plaintiff to work with the nurse on duty to redo the incident report and then submit it to the State by lunch the following day. It further shows that Plaintiff failed to comply with those instructions" (ROA.921). Perry's Declaration # 52 stated, "Later that day, January 30, 2017, Allen and I met with Sanders. In that meeting, Allen provided the letter to Sanders, which noted Sanders's failure to timely submit the incident report and her refusal to obtain a clarified incident report." (ROA.375). Perry's Declaration # 49 stated it was hers and Holzhalb "decision to reassign Sanders from the ALU Director position." (ROA.374).

CONCLUSION

For the reasons outlined in this Petition, Iona Sanders, respectfully requests the Supreme Court grant my Petition for Rehearing and Writ of Certiorari.

Respectfully submitted,



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February 4, 2022

APPENDIX L

117th Congress, 1st Session - - - - - - - - - - - - - House Document 117–30

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE THAT HAVE BEEN ADOPTED BY THE SUPREME COURT OF THE UNITED STATES PURSUANT TO SECTION 2072 OF TITLE 28, UNITED STATES CODE

APRIL 28, 2021.—Referred to the Committee on the Judiciary and ordered to be printed

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U.S. GOVERNMENT PUBLISHING OFFICE
19–011 WASHINGTON : 2021

Appendix L

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 14, 2021.

Hon. NANCY PELOSI,
Speaker of the House of Representatives,
Washington, DC.

DEAR MADAM SPEAKER: I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended rules are the following materials that were submitted to the Court for its consideration pursuant to Section 2072 of Title 28, United States Code: a transmittal letter to the Court dated October 20, 2020; a red line version of the rules with committee notes; an excerpt from the September 2020 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the June 2020 report of the Advisory Committee on Appellate Rules.

Sincerely,

JOHN G. ROBERTS, JR.

April 14, 2021

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. The Federal Rules of Appellate Procedure are amended to include amendments to Rules 3 and 6, and Forms 1 and 2.

[*See infra* pp. ___ ___ ___.]

2. The foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2021, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

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; 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.

(7) An appeal must not be dismissed for informality of form or title of the notice of appeal, 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.

(8) Forms 1A and 1B in the Appendix of Forms are suggested forms of notices of appeal.

* * * * *

Rule 6. Appeal in a Bankruptcy Case

* * * * *

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b), but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20, 22–23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Forms 1A and 1B in the Appendix of Forms" must be read as a reference to Form 5;

(C) when the appeal is from a bankruptcy appellate panel, "district court," as used in

any applicable rule, means "appellate panel"; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

* * * * *

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 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 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.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C DUFF
Secretary

October 20, 2020

MEMORANDUM

To: Chief Justice of the United States
Associate Justices of the Supreme Court

From: James C. Duff

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 3 and 6, and Forms 1 and 2, of the Federal Rules of Appellate Procedure, which were approved by the Judicial Conference at its September 2020 session. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a copy of the affected rules and forms incorporating the proposed amendments and accompanying committee notes; (ii) a blackline version of the same; (iii) an excerpt from the September 2020 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the June 2020 Report of the Advisory Committee on Appellate Rules.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 3. Appeal as of Right—How Taken

* * * * *

(c) Contents of the Notice of Appeal.

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(B) designate the judgment, or the appealable order from which the appeal is taken, ~~or part thereof being appealed~~; and

[1] New material is underlined; matter to be omitted is lined through.

(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~~ notices 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 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 inadvertently 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.'s*, 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 Fed. R. Civ. P. 12(b)(6), and then, after a considerable period for discovery, summary judgment under Fed. 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 Fed. 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 Fed. R. Civ. P. 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of Fed. 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 Fed. 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 Fed. 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 Fed. 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).

Rule 3(c)(5) is 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, Rule 3(c)(7) provides 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.

The 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.

Rule 6. Appeal in a Bankruptcy Case

* * * * *

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b), but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20, 22–23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Forms 1A and 1B in the Appendix of Forms" must be read as a reference to Form 5;

(C) when the appeal is from a bankruptcy appellate panel, "district court," as used in

any applicable rule, means "appellate panel"; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

* * * * *

Committee Note

The amendment replaces Form 1 with Forms 1A and 1B to conform to the amendment to Rule 3(c).

Form 1

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 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 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.*]

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* 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 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 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.

Excerpt from the September 2020 Report of the Committee on Rules of Practice and Procedure

Agenda E-19
Rules
September 2020

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 3 and 6, and Forms 1 and 2, with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were published for public comment in August 2019.

Rule 3 (Appeal as of Right—How Taken), Rule 6 (Appeal in a Bankruptcy Case), Form 1 (Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court), and Form 2 (Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court)

The proposed amendment to Rule 3 revises the requirements for a notice of appeal. Some courts of appeals, using an *expressio unius* rationale, have treated a notice of appeal from a final judgment that mentions one interlocutory order but not others as limiting the appeal to that order, rather than reaching all of the interlocutory orders that merge into the judgment. In order to reduce the loss of appellate rights that can result from such a holding, and to provide other clarifying changes, the proposed amendment changes the language in Rule 3(c)(1)(B) to require the notice of appeal to "designate the judgment—or the appealable order—from which the appeal is taken." The proposed amendment further provides that "[t]he 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

proposal also accounts for situations in which a case is decided by a series of orders over time and for situations in which the notice is filed after entry of judgment but designates only an order that merged into the judgment. Finally, the proposed amendment explains how an appellant may limit the scope of a notice of appeal if it chooses to do so. 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.

The comments received regarding Rule 3 were split, with five comments supporting the proposal (with some suggestions for change) and two comments criticizing the proposal. No comments were filed regarding the proposed amendments to Rule 6, and the only comments regarding Forms 1 and 2 were style suggestions. Most issues raised in the comments had been considered by the Advisory Committee during its previous deliberations. The Advisory Committee added language in proposed Rule 3(c)(7) to address instances where a notice of appeal filed after entry of judgment designates only a prior order merged into the judgment and added a corresponding explanation to the committee note. The Advisory Committee also expanded the committee note to clarify two issues and made minor stylistic changes to Rule 3 and Forms 1 and 2.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 3 and 6, and Forms 1 and 2, be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 3 and 6, and Forms 1 and 2 as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

David G. Campbell, Chair

Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra Jr.	Gene E.K. Pratter
Frank M. Hull	Jeffrey A. Rosen
William J. Kayatta Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps

Excerpt from the June 1, 2020 Report of the Advisory Committee on Appellate Rules

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

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.

* * * * *

II. Action Items for Final Approval After Public Comment

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

* * * * *

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.*

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.

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* These two comments questioned some bankruptcy matters.

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.*

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* 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

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) 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

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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).

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 notices 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) as 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 _____ (describe~~ing~~ 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 the 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.

No. 21-6308

IN THE

SUPREME COURT OF THE UNITED STATES

IONA SANDERS,

Petitioner

v.

CHRISTWOOD,

Respondent

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1, I certify that the Petition for Rehearing contains 2997 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 4, 2022.

LaTonya Blanchard

STATE OF MISSISSIPPI
LATONYA BLANCHARD
NOTARY PUBLIC
ID No. 114523
Commission Expires
November 29, 2023
JEFFERSON DAVIS COUNTY

IONA SANDERS
Post Office Box 62
Franklinton, LA 70438
Tel: (985) 551-0259

pro se/Petitioner