

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE<sup>1</sup>**

1 **Rule 3. Appeal as of Right—How Taken**

2 \* \* \* \* \*

3 **(c) Contents of the Notice of Appeal.**

4 (1) The notice of appeal must:

5 (A) specify the party or parties taking the appeal

6 by naming each one in the caption or body

7 of the notice, but an attorney representing

8 more than one party may describe those

9 parties with such terms as “all plaintiffs,”

10 “the defendants,” “the plaintiffs A, B, et

11 al.,” or “all defendants except X”;

12 (B) designate the judgment,—or the appealable

13 order—from which the appeal is taken,or

14 part thereof being appealed; and

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<sup>1</sup> New material is underlined; matter to be omitted is lined through.

- 15 (C) name the court to which the appeal is taken.
- 16 (2) A pro se notice of appeal is considered filed on  
17 behalf of the signer and the signer's spouse and  
18 minor children (if they are parties), unless the  
19 notice clearly indicates otherwise.
- 20 (3) In a class action, whether or not the class has  
21 been certified, the notice of appeal is sufficient if  
22 it names one person qualified to bring the appeal  
23 as representative of the class.
- 24 (4) The notice of appeal encompasses all orders that,  
25 for purposes of appeal, merge into the designated  
26 judgment or appealable order. It is not necessary  
27 to designate those orders in the notice of appeal.
- 28 (5) In a civil case, a notice of appeal encompasses  
29 the final judgment, whether or not that judgment  
30 is set out in a separate document under Federal  
31 Rule of Civil Procedure 58, if the notice  
32 designates:





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.

1 **Rule 6. Appeal in a Bankruptcy Case**

2 \* \* \* \* \*

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

- 6 (1) **Applicability of Other Rules.** These rules apply to  
7 an appeal to a court of appeals under 28 U.S.C.  
8 § 158(d)(1) from a final judgment, order, or decree  
9 of a district court or bankruptcy appellate panel  
10 exercising appellate jurisdiction under 28 U.S.C.  
11 § 158(a) or (b), but with these qualifications:
- 12 (A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20,  
13 22–23, and 24(b) do not apply;
- 14 (B) the reference in Rule 3(c) to “Forms 1A and  
15 1B in the Appendix of Forms” must be read  
16 as a reference to Form 5;
- 17 (C) when the appeal is from a bankruptcy  
18 appellate panel, “district court,” as used in

19                   any applicable rule, means “appellate  
20                   panel”; and  
21           (D) in Rule 12.1, “district court” includes a  
22                   bankruptcy court or bankruptcy appellate  
23                   panel.

24   \* \* \* \* \*

#### **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(e)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.]*

\_\_\_\_\_  
\* See Rule 3(e) 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 \_\_\_\_\_

<u>A.B., Plaintiff</u>
<u>v.</u>
<u>C.D., Defendant</u>

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.

**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

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

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.

\* \* \* \* \*

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

Respectfully submitted,

A handwritten signature in black ink that reads "David G. Campbell". The signature is written in a cursive style with a large, prominent initial "D".

David G. Campbell, Chair

Jesse M. Furman

Daniel C. Girard

Robert J. Giuffra Jr.

Frank M. Hull

William J. Kayatta Jr.

Peter D. Keisler

Carolyn B. Kuhl

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