

The sixth sentence authorizes an attorney of record for the deceased to take an appeal on behalf of successors in interest if the deceased has no representative. At present, if a party entitled to appeal dies before the notice of appeal is filed, the appeal can presumably be taken only by his legal representative and must be taken within the time ordinarily prescribed. 13 *Cyclopedia of Federal Procedure* (3d Ed.) §63.21. The states commonly make special provisions for the event of the death of a party entitled to appeal, usually by extending the time otherwise prescribed. Rules of Civil Procedure for Superior Courts of Arizona, Rule 73(t), 16 A.R.S.; New Jersey Rev. Rules 1:3-3; New York Civil Practice Law and Rules, Sec. 1022; Wisconsin Statutes Ann. 274.01(2). The provision in the proposed rule is derived from California Code of Civil Procedure, Sec. 941.

*Subdivision (c).* This subdivision is derived from FRCP 25(d) and Supreme Court Rule 48, with appropriate changes.

NOTES OF ADVISORY COMMITTEE ON RULES—1986  
AMENDMENT

The amendments to Rules 43(a) and (c) are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

**Rule 44. Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party**

(a) CONSTITUTIONAL CHALLENGE TO FEDERAL STATUTE. If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) CONSTITUTIONAL CHALLENGE TO STATE STATUTE. If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

This rule is now found in the rules of a majority of the circuits. It is in response to the Act of August 24, 1937 (28 U.S.C. §2403), which requires all courts of the United States to advise the Attorney General of the existence of an action or proceeding of the kind described in the rule.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Rule 44 requires that a party who “questions the constitutionality of an Act of Congress” in a proceeding in which the United States is not a party must provide written notice of that challenge to the clerk. Rule 44 is designed to implement 28 U.S.C. §2403(a), which states that: “In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality.”

The subsequent section of the statute—§2403(b)—contains virtually identical language imposing upon the courts the duty to notify the attorney general of a state of a constitutional challenge to any statute of that state. But §2403(b), unlike §2403(a), was not implemented in Rule 44.

Rule 44 has been amended to correct this omission. The text of former Rule 44 regarding constitutional challenges to federal statutes now appears as Rule 44(a), while new language regarding constitutional challenges to state statutes now appears as Rule 44(b).

*Changes Made After Publication and Comments.* No changes were made to the text of the proposed amendment or to the Committee Note.

**Rule 45. Clerk’s Duties**

(a) GENERAL PROVISIONS.

(1) *Qualifications.* The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office.

(2) *When Court Is Open.* The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk’s office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk’s office be open for specified hours on Saturdays or on legal holidays other than New Year’s Day, Martin Luther King, Jr.’s Birthday, Washington’s Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans’ Day, Thanksgiving Day, and Christmas Day.

(b) RECORDS.

(1) *The Docket.* The circuit clerk must maintain a docket and an index of all docketed cases in the manner prescribed by the Director of the Administrative Office of the United States Courts. The clerk must record all papers filed with the clerk and all process, orders, and judgments.

(2) *Calendar.* Under the court’s direction, the clerk must prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk must give preference to appeals in criminal cases and to other proceedings and appeals entitled to preference by law.

(3) *Other Records.* The clerk must keep other books and records required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, or by the court.

(c) NOTICE OF AN ORDER OR JUDGMENT. Upon the entry of an order or judgment, the circuit

clerk must immediately serve a notice of entry on each party, with a copy of any opinion, and must note the date of service on the docket. Service on a party represented by counsel must be made on counsel.

(d) CUSTODY OF RECORDS AND PAPERS. The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, original papers constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed.

(As amended Mar. 1, 1971, eff. July 1, 1971; Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005.)

#### NOTES OF ADVISORY COMMITTEE ON RULES—1967

The duties imposed upon clerks of the courts of appeals by this rule are those imposed by rule or practice in a majority of the circuits. The second sentence of subdivision (a) authorizing the closing of the clerk's office on Saturday and non-national legal holidays follows a similar provision respecting the district court clerk's office found in FRCP 77(c) and in FRCrP 56.

#### NOTES OF ADVISORY COMMITTEE ON RULES—1971 AMENDMENT

The amendment adds Columbus Day to the list of legal holidays. See the Note accompanying the amendment of Rule 26(a).

#### NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendment to Rule 45(b) permits the courts of appeals to maintain computerized dockets. The Committee believes that the Administrative Office of the United States Courts ought to have maximum flexibility in prescribing the format of this docket in order to ensure a smooth transition from manual to automated systems and subsequent adaptation to technological improvements.

The amendments to Rules 45(a) and (d) are technical. No substantive change is intended. The Birthday of Martin Luther King, Jr. has been added to the list of national holidays.

#### COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

#### COMMITTEE NOTES ON RULES—2002 AMENDMENT

*Subdivision (c).* Subdivision (c) has been amended so that the clerk may use electronic means to serve notice of entry of an order or judgment upon parties who have consented to such service.

*Changes Made After Publication and Comments.* No changes were made to the text of the proposed amendment or to the Committee Note.

#### COMMITTEE NOTES ON RULES—2005 AMENDMENT

*Subdivision (a)(2).* Rule 45(a)(2) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. See 5 U.S.C. §6103(a). During the

1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

*Changes Made After Publication and Comments.* No changes were made to the text of the proposed amendment or to the Committee Note.

### Rule 46. Attorneys

#### (a) ADMISSION TO THE BAR.

(1) *Eligibility.* An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

(2) *Application.* An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:

"I, \_\_\_\_\_, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) *Admission Procedures.* On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

#### (b) SUSPENSION OR DISBARMENT.

(1) *Standard.* A member of the court's bar is subject to suspension or disbarment by the court if the member:

- (A) has been suspended or disbarred from practice in any other court; or
- (B) is guilty of conduct unbecoming a member of the court's bar.

(2) *Procedure.* The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) *Order.* The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

(c) DISCIPLINE. A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

#### NOTES OF ADVISORY COMMITTEE ON RULES—1967

*Subdivision (a).* The basic requirement of membership in the bar of the Supreme Court, or of the highest court