

**TO:** Molly C. Dwyer, Clerk of Court  
Susan Gelmis, Chief Deputy Clerk  
Ninth Circuit Court of Appeals

**FROM:** Committee on Appellate Courts, Litigation Section

**DATE:** April 30, 2018

**RE:** Invitation to Comment, Circuit Rules 22-1 through 22-6,  
Habeas Corpus Appeals; and Circuit Rule 25-5(f), Certificate of  
Service Requirement

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The Committee on Appellate Courts supports the proposed amendments to Circuit Rules 22-1 through 22-6, and Circuit Rule 25-5(f). We believe the amendments clarify that references to appeals by “petitioners” also encompass appeals taken by defendants in a 28 U.S.C. § 2255 motion.

The Committee, however, believes three minor changes could be made to eliminate any potential confusion.

#### Circuit Rule 22-1(a)

The first sentence of Rule 22-1(a) is being changed from “Petitioners appealing the district court’s judgment ...” to “Appeals from the district court’s judgment ...” The Committee believes this creates some confusion because it implies the rule applies to appeals by respondents. Although the sentence does say that appeals are governed by FRAP 22(b), which provides that a governmental appellant need not obtain a certificate of appealability, since the entirety of Rule 22-1 is about certificates of appealability, we see no need to address appeals by the government.

The Committee proposes changing the first sentence to read: “Appeals from the denial of a 28 U.S.C. § 2254 petition or § 2255 motion are governed by the procedures set forth in FRAP 4 and 22(b).”

## Circuit Rule 22-4

The proposed changes to Rule 22-4(a) leave the language of “A petitioner appealing the denial ...” The Committee believes this sentence should be changed to “An appellant appealing the denial of an authorized SOS petition or motion ...” to make it consistent with the proposed changes made throughout the habeas corpus rules.

The Committee also believes the first sentence of Rule 22-4(a), the first sentence of the last paragraph of Rule 22-4(a), and the first sentence of Rule 22-4(c) and should be changed from “... a motion for a certificate of appealability ...” to “... a request for a COA” to make it consistent with the proposed changes made throughout the habeas corpus rules.

The Committee also suggest deleting ‘(“SOS”)’ from Rule 22-4(a)(1) since that term was defined in the introductory language of Rule 22-4.

In addition to these minor technical suggestions, the Committee believes that the proposed changes to Circuit Rule 22-4 could be clarified by moving the first sentence of the last paragraph of Rule 22-4(a) to the very first sentence of Rule 22-4(a) (and then making necessary grammatical changes to the rest of that paragraph). This would simply clarify up front that a denial of an SOS petition or motion also requires a certificate of appealability, and then go on to explain what documents must be included with the COA request.

For example, the first paragraph could be revised to read:

- (a) **Necessary Documents.** If the district court has denied in full an application for a COA, appellant shall file with the court of appeals a motion for a COA. Appellant shall file with the court of appeals the following documents in an attachment to any COA request:

## Rule 22-6(c):

The Committee suggests changing “Court” in the second sentence of Rule 22-6(c) to “court of appeal” to make it consistent to proposed changes made throughout the habeas corpus rules.

We appreciate your consideration of the Committee’s comments. Please do not hesitate to contact us if you have questions or would like to discuss these comments further.

**CONTACTS:**

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