

From: Sai
To: RulesCommittee Secretary
Subject: Comment re proposed FRAP 39
Date: Tuesday, April 09, 2024 7:29:16 PM

Dear AOUSC,

I write to comment on the language used in the proposed FRAP 39, "costs are allocated against the [appellant/appellee]" and similar. I have no comment on the substance of the rule or its proposed revision - I know what it means in practice - but I believe the proposed language is incorrect to a strictly textualist reading and would be confusing to a layperson.

1. An ordinary reader would not easily interpret this revised wording correctly unless they already know what it is talking about.

There is no "allocation" - that is a term for how some resource is distributed for future use, generally such that it can be divided up among more than one recipient from a pool - e.g. the amount distributed per person in a class action settlement, where there is a pool of funds to be allocated amongst potential recipients. This rule, by contrast, is about who has to pay whom after the fact for costs already incurred, from their own resources rather than some pool that the court has already taken but hasn't yet allocated.

A benefit of the "costs are taxed against X" language is that it is unusual, does not have a plain English meaning, and therefore signals that this is a term of art rather than something that one should understand from the text alone. I'm all for plain English - but that depends on someone who isn't already familiar with how it's used and what it refers to being able to correctly interpret it from the text alone. "Allocation" has a plain-English meaning that is actually incorrect - e.g. it could be read as talking about obligations to pay some kind of future costs - and the introduced surplusage makes this worse (see below).

The plain English meaning that "allocation" is from some separate pool of resources would also play into sovereign citizen beliefs that everyone has a giant secret pool of money assigned to their social security number corporate person - and I doubt that you want to have to deal with yet more such filings, this time saying that you should "allocate" money to the other side from the sovci's supposed government money pool. That unwanted reading will be made worse by the retained use of the term "tax" (always a popular focus for them). The reference to district court proceedings may make it be brought up under FRCP, as if FRAP applies directly below, not just in appellate cases - so this rule should be clear enough that an easily misguided pro se litigant who makes that error at least will not be wildly wrong on what kinds of costs are taxed and/or allocated, and what that means (namely, appeal's loser pays winner specific kinds of costs).

I suggest that the rule use much more direct phrasing, such as

"the appellee shall bear its own costs and shall pay the appellant all costs incurred by the appellant"

(swapping "appellee" and "appellant" in the opposite clauses). This mirrors the language for "each party bears its own costs" for the cases where that's asymmetrically unilateral because costs are awarded - otherwise (and currently) that phrasing is surplusage.

2. The new rule creates surplusage which is plainly incorrect.

Proposed FRAP 39(a) replaces "taxed" with "allocated", (c) uses both terms, and (e) & (f) use "taxable".

Does "allocatable" mean something different from "taxable"? Does "allocated" mean something different than "taxed"? Why or why not? Why introduce even the possibility of that question being asked, because you've made only a partial replacement of the new word for the old?

I think this could be simplified and avoided by, again, being much more simple and direct. Extending my phrasing above, one could replace the introduction and structure of proposed (e) with e.g.

"Costs' to be paid under this rule are ..."

and simplify out all uses of the word "taxable".

If you do stick with the term "allocated" for (a) and/or (c), at least be consistent and replace all instances of "taxable" with "allocatable". Otherwise it implies that non-"taxed" but "allocatable" costs might be a thing, e.g. maybe that's the term for include lawyer's fees, mailing, damages, etc., and "taxable" is the subset of "allocatable" which means something like "costs FRAP itself requires someone to pay to the court or absolutely necessary to comply with filing requirements".

3. The current language fails to indicate who if anyone is responsible for costs incurred by someone other than appellant or appellee, e.g. amici or intervenors. I believe it is incorrect in saying that the "parties" must agree - e.g. an amicus or intervenor is only sometimes a party and only sometimes the appellee or appellant (e.g. intervention on appeal).

I am not sure how best to fix it, but I suggest e.g. just adding one word

"if ... the affected parties agree"

which would make it clearer that parties who aren't paying or getting paid don't get a say in holding up a settlement between the ones who are.

My apologies that this comment comes late in the cycle - I did not see the proposal until now. I hope that it is nevertheless of some use, as from the report on the agenda (https://www.uscourts.gov/sites/default/files/2024-04-10_agenda_book_for_appellate_rules_meeting_final.pdf tabs 5A through 5C) it seems that nobody else has considered the issues I point out.

Sincerely,
Sai