To: Honorable Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

From: David F. Levi, Chair, Advisory Committee on
the Federal Rules of Civil Procedure

Date: May 14, 2001

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met on March 12, 2001, and April 23 and 24, 2001, at the Administrative Office of the United States Courts in Washington, D.C. It voted to recommend adoption of a new rule and rules amendments that were published for comment in August 2000 and January 2001, with modifications in response to the public comments. Part I of this report details these recommendations in four parts. The first relates to new Civil Rule 7.1, governing corporate disclosure; this proposal parallels published proposals to amend Appellate Rule 26.1 and to adopt a new Criminal Rule 12.4, and may be affected by the proposal to publish a Bankruptcy Rule that would depart from these other proposals in significant ways. The second relates to amendments of Civil Rule 58 aimed at the "separate document" requirement, including a conforming amendment of Civil Rule 54; these proposals are integrated with proposals to amend Appellate Rule 4(a)(7), and indeed began with the Appellate Rules Committee. The third relates to Civil Rule 81, which would be amended to integrate better with the separate rules governing § 2254 and § 2255 proceedings; it began in

conjunction with review of those rules, but can be separated from them as the Criminal Rules Committee continues its work on them. The fourth and final part is a set of technical amendments to conform forfeiture provisions of the Supplemental Admiralty Rules to legislative changes that occurred too late to be recognized in the Admiralty Rules amendments that took effect on December 1, 2000.

Part II describes Advisory Committee recommendations to publish for comment three sets of rules amendments. Each involves a project that has been long on the Advisory Committee agenda. The first set, which would amend Civil Rule 23, grows out of ten years of Advisory Committee work, important empirical studies, and the Report of the Ad Hoc Mass Torts Working Group. The central focus is on improving review of class-action settlements, addressing some of the most pressing problems that arise from competing and overlapping class actions, and providing for the first time in Rule 23 for appointment of class counsel and approval of fee awards. Additional changes address notice and also the times for acting to determine whether to certify a class and to consider revision of a certification decision.

The second proposed amendment would rewrite Civil Rule 51 to express clearly the many jury-instruction rules that have grown out of its moderately opaque text. New provisions are added to address such matters as the time for requesting instructions and the court's obligation to inform the parties of all proposed instructions.

The third proposed amendment would rewrite Civil Rule 53 to reflect the vast changes that have overtaken the use of special masters. This work was assisted by a study undertaken by the Federal Judicial Center. The amendment is not intended either to encourage or to discourage the pretrial and post-judgment uses of special

masters that have grown up since Rule 53 was framed to address the use of trial masters. It is intended to give guidelines for these new practices. Special attention is devoted to the relationship between the appointment of special masters and a judicial institution — magistrate judges — that did not exist when Rule 53 was written. In addition, the draft reduces the many cumbersome details that have been written into present Rule 53.

Finally, Part III provides a brief summary of ongoing Advisory Committee work.

Attachments: Enabling Act Memorandum
Notes on § 2283

I Action Items: Rules Published For Comment

A. RULES PUBLISHED FOR COMMENT IN AUGUST 2000

Three sets of rules proposals were published for comment in August 2000. The hearing scheduled for January 29, 2001 was cancelled because no one wished to testify. Summaries of the written comments are provided with the discussion of each proposal. Almost all of the comments were devoted to issues that were discussed thoroughly before the proposals were published. Although the debates are familiar, the views of experienced practitioners and widely representative bar groups lend added support to some of the competing positions.

Discussion of each of these proposals is complicated by the fact that none of them is the sole responsibility of the Civil Rules Advisory Committee among the advisory committees. Indeed, it is fair to say that none of them originated with the Civil Rules Committee. It was possible to coordinate discussion in the Civil Rules Committee with actions taken at the earlier meetings of the Appellate Rules and Bankruptcy Rules Advisory Committees. As to the Criminal Rules Committee, consultation between the reporters was all that was possible.

Each proposal is presented in the form recommended for adoption. Changes from the published versions are described after the summary of comments for each rule.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 7.1. Disclosure Statement

(a) Who Must File: Nongovernmental Corporate Party. A nongovernmental corporate party to an action or proceeding in a district court must file two copies of a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) Time for Filing; Supplemental Filing. A party must:

(1) file the Rule 7.1(a) statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court, and

(2) promptly file a supplemental statement upon any change in the information that the statement requires.

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*New material is underlined; matter to be omitted is lined through.

Committee Note

Rule 7.1 is drawn from Rule 26.1 of the Federal Rules of Appellate Procedure, with changes to adapt to the circumstances of district courts that dictate different provisions for the time of filing, number of copies, and the like. The information required by Rule 7.1(a) reflects the "financial interest" standard of Canon 3C(1)(c) of the Code of Conduct for United States Judges. This information will support properly informed disqualification decisions in situations that call for automatic disqualification under Canon 3C(1)(c). It does not cover all of the circumstances that may call for disqualification under the financial interest standard, and does not deal at all with other circumstances that may call for disqualification.

Although the disclosures required by Rule 7.1(a) may seem limited, they are calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts. Unnecessary disclosure of volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a).

Rule 7.1 does not prohibit local rules that require disclosures in addition to those required by Rule 7.1. Developing experience with local disclosure practices and advances in electronic technology may provide a foundation for adopting more detailed disclosure requirements by future amendments of Rule 7.1.

Recommendation

The comments summarized below raise two fundamental questions, each of which was discussed extensively by several committees before Rule 7.1, Appellate Rule 26.1, and Criminal Rule 12.4 were published for comment. As extensive as it was, the prior discussion achieved compromise positions rather than clearly dispositive conclusions. As published for comment, Rule 7.1(a)(1)(B) required nongovernmental corporate parties to "disclose any additional information that may be required by the Judicial Conference of the United States." Rule 7.1(a)(2) imposed the same requirement on any other party. This provision was challenged as a delegation of rulemaking authority to the Judicial Conference, in defiance of full Enabling Act procedures. And there is a difficult question whether and when Rule 7.1 might preempt local district rules that impose additional disclosure requirements. The Committee Note stated that Rule 7.1 does not prohibit local disclosure rules "unless the Judicial Conference adopts a form that preempts additional disclosures." This observation prompted additional challenges asserting that the Judicial Conference lacks authority to preempt local rules. Discussion of these issues persuaded the Advisory Committee that it is better to retract the Judicial Conference provisions. These provisions were designed to serve an important purpose, and to achieve a wise integration of the Enabling Act with the special competence of the Judicial Conference and its Committee on Codes of Conduct. But the prospect that the Judicial Conference will act in the mid-term future to adopt new disclosure requirements is too slender to justify further testing of the Enabling Act questions.

The recommendation, then, is to delete the provisions for requirements to be adopted by the Judicial Conference and to recommend that the Judicial Conference adopt the remainder of Rule 7.1 as published.

Delegation to Judicial Conference

One concern expressed in the comments is that Judicial Conference exactions are not readily available to practicing lawyers. This concern would be addressed by stating each required disclosure explicitly in Rule 7.1. By itself, this concern did not seem especially troubling. Implementation of any Judicial Conference requirements should be readily accomplished. The requirements should be expressed in forms that are widely available and that become an automatic part of routine filing procedure. There may be brief transition problems, but they could be handled with common sense.

The more fundamental concern is that an Enabling Act Rule should not mandate adherence to requirements formulated by a process outside the Enabling Act, even under auspices so prestigious as the Judicial Conference. In one sense, there is precedent for "delegation" to the Judicial Conference. Rule 83(a)(1) dictates that a local rule "shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States." Rule 5(e) provides that a local rule may "permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." But the Judicial Conference action provided for by each of these rules is narrow and does not involve any fundamental policy. Development of additional disclosure requirements for nongovernmental corporate parties, and development of all disclosure requirements that may be imposed on other parties, is a far more important endeavor. The precedents established by Rules 5(e) and 83(a)(1) do not resolve the doubts that may be felt on this score.

A powerful expression of the Enabling Act concern is provided by Judge Easterbrook's comments on the parallel provisions in Appellate Rule 26.1, as quoted and summarized by Reporter Schiltz.

The core of the argument is that it ill becomes the rules committees to urge regularly that Congress should respect the Enabling Act process and then to recommend rules that abridge, enlarge, or modify the Enabling Act process. The history of the disclosure rules project should serve at the same time to exacerbate this concern and to alleviate it.

Many members of the various committees that have developed the disclosure rules have expressed doubts whether any of the rules of procedure should address disclosure requirements. If Appellate Rule 26.1 had not led the way more than a decade ago, these doubts might have prevailed now. None of the rules committees expresses any sense of special competence in the problems that arise from the Code of Conduct for United States Judges. Another Judicial Conference committee, the Committee on Codes of Conduct, works constantly with these problems. That Committee should have a better-informed sense of the inevitable compromises that must be made in this area. It is not possible to require disclosure and judicial review of every bit of information about every litigant that might give rise to disqualification. The most that can be attempted is disclosure of information that accounts for the most common grounds of disqualification. It might be better for the rules committees to do nothing in this area. The Committee on Codes of Conduct, however, has taken the lead in urging that formal rules of procedure be adopted. Deference to their experience and wisdom has led to the published proposals.

Deference to the Codes of Conduct Committee did not account for the full sweep of Rule 7.1 and the parallel proposals. The Codes of Conduct Committee urged adoption of Appellate Rule 26.1 in all the sets of rules with only minor changes. The history of Appellate Rule 26.1, however, led to consideration of the need for additional disclosure requirements. Before Rule 26.1 was adopted, a draft that

required extensive disclosures was circulated among circuit judges for comment. The reactions were so diverse and hostile that the advisory committee withdrew to a much narrower version. Recognizing the limited nature of the disclosures required, the advisory committee observed that the circuits might wish to adopt circuit rules calling for additional disclosures. Rule 26.1 has been further narrowed since its adoption by deleting the former requirement for disclosures relating to corporate subsidiaries. Most of the circuits have adopted local rules; some of the local rules call for far more information than Rule 26.1 requires. Predictably, wide variations have emerged among the local circuit rules.

A number of district courts have adopted local disclosure rules. A local district rule is likely to resemble the local circuit rule, a circumstance that may contribute to the wide diversity of local district disclosure requirements.

Against this background, the "local rule problem" provoked the usual reactions. Proliferation of local rules is not favored by many of those engaged in the national rules process. At the same time, it was recognized that proposed Rule 7.1, modeled on current Appellate Rule 26.1, requires less disclosures than many local variations. The outcome of the debates was captured in the final sentence of the Committee Note: "Rule 7.1 does not prohibit local rules that require disclosures in addition to those required by Rule 7.1 unless the Judicial Conference adopts requirements that preempt additional disclosures." This sentence reflects an understanding that real benefits may emerge from experience with local rules that supplement Rule 7.1, not only in directly avoiding tardy discovery of disqualification problems but also in paving the way for more detailed national disclosure requirements that really work. At the same time it reflects the hope that one day it may be possible to adopt uniform national requirements. Uniform requirements not only make life

easier for the lawyers who practice in multiple districts, but also make life much easier for institutional litigants who engage in litigation in many different districts.

This history provides, paradoxically, the strongest argument for putting aside the concern that the proposed rules effect an improper delegation of Enabling Act authority. The argument is that disclosure requirements could be adopted by the Judicial Conference, on advice of the Committee on Codes of Conduct, without any exercise of Enabling Act authority. The question is not one of the procedural rules that govern litigation but one of court administration. There is a sufficient touch of "practice and procedure" to support formal rules, and some advantage in providing notice to the bar through the formal rules. But reliance on the Judicial Conference does not reflect any "delegation" of Enabling Act authority. The proposed rules serve only to reflect — and provide notice to the bar of — the independent Judicial Conference authority to regulate these matters.

The argument for independent Judicial Conference authority is subject to its own constraints. The fourth paragraph of 28 U.S.C. § 331 authorizes the Judicial Conference to "submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business." The authority to submit suggestions and recommendations may impliedly defeat authority to impose requirements. The third-from-last paragraph of § 331 directs the Judicial Conference to review rules prescribed under § 2071 by federal courts "other than the Supreme Court and the district courts." Coupled with provisions directing the judicial councils of the circuits to review local district rules, § 332(d)(4) and § 2071(c), these provisions create obstacles to achieving national uniformity by combining Rule 7.1, which could directly supersede local rules, with reliance on the Judicial Conference.

Deferring to doubts about "delegation" to the Judicial Conference does not defeat the original purpose of adopting Rule 7.1. The Committee on Codes of Conduct originally recommended adoption of Appellate Rule 26.1 in all the separate sets of rules. Paring Rule 7.1 back to this core, for these reasons, likely does not require a second publication for comment.

Other Rule 7.1 Revisions

The Bankruptcy Rules Committee has proposed publication of disclosure requirements that would depart significantly from Rule 7.1 as published. The disclosure must identify "any nongovernmental corporation that directly or indirectly owns 10% or more of any class of the corporation's equity interests or states that there are not such entities to report * * *." The Civil Rules Committee has not independently considered the terms of present Appellate Rule 26.1; they were adopted for Rule 7.1 for the reasons described above. It has not independently considered the reasons for the changes proposed by the Bankruptcy Rules Committee. It defers consideration of these matters to the Standing Committee.

Summary of Comments on Rule 7.1

00-CV-001, Committee on Federal Courts, Association of the Bar of the City of New York: The practical reasons that lead to delegating responsibility to the Judicial Conference are understandable. But "[t]he committee is concerned * * * that the necessary contents of a disclosure statement may be less accessible to the bar and to the public if they are not set forth in the rules themselves."

00-CV-002, Public Citizen Litigation Group (Brian Wolfman): Supports Rule 7.1, and Appellate Rule 26.l, for the reasons stated in the Committee Note. The Note should state that the rule applies to

cases pending when the rule takes effect, and that the parties must file disclosure statements within a reasonable time (perhaps 60 days) in such cases.

00-CV-004, Ninth Circuit Conference of Chief Bankruptcy Judges, Hon. Louise De Carl Adler: The Bankruptcy Rules Advisory Committee is working on disclosure rules for contested matters and adversary proceedings. Pending development of these rules, "there [should] be an express exemption from application of proposed Rule 7.1 to cases and proceedings in bankruptcy."

00-CV-005, Federal Civil Procedure Committee, American College of Trial Lawyers, Gregory P. Joseph: Supports two aspects of the proposal: (1) It is desirable to address disclosure in the Civil Rules "so that there is a uniform national standard." (2) "[T]hese disclosure statements ought not be limited to corporations, but extended to nongovernmental parties generally." But disagrees with delegation of further work to the Judicial Conference. There is a trap for the unwary in "referencing a set of requirements that are not included in the Rules, may not exist and are not readily available." The Judicial Conference is part of the process of making Civil Rules; it "is in a position to ensure that all disclosure requirements it deems important become a part of the Rules." But if the Judicial Conference becomes responsible, a useful way to make litigants aware of Judicial Conference disclosure requirements would be to place them in the Civil Cover Sheet. (This will not help with Appellate Rule 26.1, however.)

00-CV-006, Federal Magistrate Judges Association Rules Committee (draft Report): Supports Rule 7.1. The disclosures will prove helpful. "This is consistent with the practice in many district courts currently which has been provided by General Order or Local Rule, but

certainly should be addressed on a nationwide basis through the federal rules."

00-CV-012, William J. Borah: (Mr. Borah reviewed the proposals for the Civil Practice and Procedure Section of the Illinois State Bar Association.) Rule 7.1(a)(1)(A) is a good idea, "and it would also give the opposing party information about the corporate structure of the opponent." The Rule 7.1(a)(1)(B) and 7.1(a)(2) requirements to disclose information required by the Judicial Conference cannot be the subject of comment yet, "when we don't even know what the Judicial Conference might recommend."

Comments on Appellate Rule 26(a)(1)

Some of the comments on Appellate Rule 26(a)(1) raise issues that apply to Rule 7.1 as well. The following summaries were prepared by Dean Patrick Schiltz, Reporter for the Appellate Rules Advisory Committee.

Jack E. Horsley, Esq. (00-AP-002) supports the amendment, which, he says, "will strip away a veil of concealment."

Judge Frank H. Easterbrook (7th Cir.)(00-AP-012) strongly supports two aspects of the proposal — extending the disclosure obligation to non-corporate parties and requiring supplementation — but is "appalled" by a third — giving authority to the Judicial Conference to modify the disclosure obligation without going through the Rules Enabling Act process. Judge Easterbrook's objections to the Judicial Conference provision are several: (1) The provision short-circuits the Rules Enabling Act. The judicial branch keeps telling Congress not to short-circuit the process; the judicial branch impairs its credibility when it short-circuits the process itself. (2) The provision would weaken the role of the Standing Committee. "Other

Committees of the Conference will see (and use) an opening into rules-related issues, and the ability of the Standing Committee to coordinate matters of practice and procedure will be undermined." (3) The provision would create a hardship for lawyers, as the Judicial Conference does not publish its standards in any central, readily accessible location. Judge Easterbrook recalls that some years ago the Advisory Committee on Appellate Rules proposed that the Judicial Conference be given authority to set technical standards for briefs, and that the proposal was rejected by the Standing Committee on the grounds described above. He urges that the Judicial Conference provision of proposed Rule 26.1 suffer a similar fate.

Judge Easterbrook also questions the assertion in the Committee Note that standards on disclosure issued by the Judicial Conference could preempt local rules. He points out that Rule 47(a)(1) provides that local rules "must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States." Judge Easterbrook interprets Rule 47(a)(1) to provide that "[o]nly statutes, rules, and one *particular* Judicial Conference action supersede local rules."

D.C. Circuit Advisory Committee on Procedures (No number; arrived too late to be summarized by Dean Schiltz). Opposes the proposed amendments to Appellate Rule 26.1. "[M]ore than enough information is already being disclosed pursuant to the current version of Rule 26 [sic] and the various local rules." The provision for Judicial Conference disclosure rules "means that each party's attorney will have to be checking on a regular basis to determine whether the Judicial Conference has revised its thinking." Delegation to the Judicial Conference also seems inconsistent with the public comment rules adopted under § 2073(a) and with the requirement that rules be transmitted to Congress no later than May 1; see section 2074.

Changes Made After Publication and Comment

The provisions that would require disclosure of additional information that may be required by the Judicial Conference have been deleted.

Rule 54. Judgments; Costs

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(d) Costs; Attorneys' Fees.

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(2) *Attorneys' Fees.*

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed ~~and served~~ no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other

grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a)~~, and a judgment shall be set forth in a separate document as provided in Rule 58~~.

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Committee Note

Subdivision (d)(2)(C) is amended to delete the requirement that judgment on a motion for attorney fees be set forth in a separate document. This change complements the amendment of Rule 58(a)(1), which deletes the separate document requirement for an order disposing of a motion for attorney fees under Rule 54. These changes are made to support amendment of Rule 4 of the Federal Rules of Appellate Procedure. It continues to be important that a district court make clear its meaning when it intends an order to be the final disposition of a motion for attorney fees.

The requirement in subdivision (d)(2)(B) that a motion for attorney fees be not only filed but also served no later than 14 days after entry of judgment is changed to require filing only, to establish a parallel with Rules 50, 52, and 59. Service continues to be required under Rule 5(a).

Rule 58. Entry of Judgment

~~Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a~~

~~decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.~~

(a) Separate Document.

(1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b);

(C) for attorney fees under Rule 54;

(D) for a new trial, or to alter or amend the judgment, under Rule 59; or

(E) for relief under Rule 60.

(2) Subject to Rule 54(b):

(A) unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(i) the jury returns a general verdict,

(ii) the court awards only costs or a sum certain, or

(iii) the court denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(i) the jury returns a special verdict or a general verdict accompanied by interrogatories, or

(ii) the court grants other relief not described in Rule 58(a)(2).

(b) Time of Entry. Judgment is entered for purposes of these rules:

(1) if Rule 58(a)(1) does not require a separate document, when it is entered in the civil docket under Rule 79(a), and

(2) if Rule 58(a)(1) requires a separate document, when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs:

(A) when it is set forth on a separate document, or

(B) when 150 days have run from entry in the civil docket under Rule 79(a).

(c) Cost or Fee Awards.

(1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).

(2) When a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

(d) Request for Entry. A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1).

Committee Note

Rule 58 has provided that a judgment is effective only when set forth on a separate document and entered as provided in Rule 79(a). This simple separate document requirement has been ignored in many cases. The result of failure to enter judgment on a separate document is that the time for making motions under Rules 50, 52, 54(d)(2)(B), 59, and some motions under Rule 60, never begins to run. The time to appeal under Appellate Rule 4(a) also does not begin to run. There have been few visible problems with respect to Rule 50, 52, 54(d)(2)(B), 59, or 60 motions, but there have been many and horridly confused problems under Appellate Rule 4(a). These amendments are designed to work in conjunction with Appellate Rule 4(a) to ensure that appeal time does not linger on indefinitely, and to maintain the integration of the time periods set for Rules 50, 52, 54(d)(2)(B), 59, and 60 with Appellate Rule 4(a).

Rule 58(a) preserves the core of the present separate document requirement, both for the initial judgment and for any amended judgment. No attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document. It is easy to prepare a separate document that recites the terms of the judgment without offering additional explanation or citation of authority. Forms 31 and 32 provide examples.

Rule 58 is amended, however, to address a problem that arises under Appellate Rule 4(a). Some courts treat such orders as those

that deny a motion for new trial as a "judgment," so that appeal time does not start to run until the order is entered on a separate document. Without attempting to address the question whether such orders are appealable, and thus judgments as defined by Rule 54(a), the amendment provides that entry on a separate document is not required for an order disposing of the motions listed in Appellate Rule 4(a). The enumeration of motions drawn from the Appellate Rule 4(a) list is generalized by omitting details that are important for appeal time purposes but that would unnecessarily complicate the separate document requirement. As one example, it is not required that any of the enumerated motions be timely. Many of the enumerated motions are frequently made before judgment is entered. The exemption of the order disposing of the motion does not excuse the obligation to set forth the judgment itself on a separate document. And if disposition of the motion results in an amended judgment, the amended judgment must be set forth on a separate document.

Rule 58(b) discards the attempt to define the time when a judgment becomes "effective." Taken in conjunction with the Rule 54(a) definition of a judgment to include "any order from which an appeal lies," the former Rule 58 definition of effectiveness could cause strange difficulties in implementing pretrial orders that are appealable under interlocutory appeal provisions or under expansive theories of finality. Rule 58(b) replaces the definition of effectiveness with a new provision that defines the time when judgment is entered. If judgment is promptly set forth on a separate document, as should be done when required by Rule 58(a)(1), the new provision will not change the effect of Rule 58. But in the cases in which court and clerk fail to comply with this simple requirement, the motion time periods set by Rules 50, 52, 54, 59, and 60 begin to run after expiration of 150 days from entry of the judgment in the civil docket as required by Rule 79(a).

A companion amendment of Appellate Rule 4(a)(7) integrates these changes with the time to appeal.

The new all-purpose definition of the entry of judgment must be applied with common sense to other questions that may turn on the time when judgment is entered. If the 150-day provision in Rule 58(b)(2)(B) — designed to integrate the time for post-judgment motions with appeal time — serves no purpose, or would defeat the purpose of another rule, it should be disregarded. In theory, for example, the separate document requirement continues to apply to an interlocutory order that is appealable as a final decision under collateral-order doctrine. Appealability under collateral-order doctrine should not be complicated by failure to enter the order as a judgment on a separate document — there is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion as the court of appeals. Appeal time should start to run when the collateral order is entered without regard to creation of a separate document and without awaiting expiration of the 150 days provided by Rule 58(b)(2). Drastic surgery on Rules 54(a) and 58 would be required to address this and related issues, however, and it is better to leave this conundrum to the pragmatic disregard that seems its present fate. The present amendments do not seem to make matters worse, apart from one false appearance. If a pretrial order is set forth on a separate document that meets the requirements of Rule 58(b), the time to move for reconsideration seems to begin to run, perhaps years before final judgment. And even if there is no separate document, the time to move for reconsideration seems to begin 150 days after entry in the civil docket. This apparent problem is resolved by Rule 54(b), which expressly permits revision of all orders not made final under Rule 54(b) "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

New Rule 58(d) replaces the provision that attorneys shall not submit forms of judgment except on direction of the court. This provision was added to Rule 58 to avoid the delays that were frequently encountered by the former practice of directing the attorneys for the prevailing party to prepare a form of judgment, and also to avoid the occasionally inept drafting that resulted from attorney-prepared judgments. See *11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2786*. The express direction in Rule 58(a)(2) for prompt action by the clerk, and by the court if court action is required, addresses this concern. The new provision allowing any party to move for entry of judgment on a separate document will protect all needs for prompt commencement of the periods for motions, appeals, and execution or other enforcement.

Recommendation

The Advisory Committee recommends that Rules 54(a) and 58 be adopted as published, subject to minor style changes and two significant changes in Rule 58(b). The first change in Rule 58(b) opens up the definition of the time when judgment is entered. As published, Rule 58(b) defined the time of entry solely for purposes of the Civil Rules governing the post-judgment motions that suspend appeal time under Appellate Rule 4(a)(4), adding Civil Rule 62 (execution) as well. At the behest of the Appellate Rules Committee, the definition is changed to cover entry of judgment "for purposes of these rules." The second change expands from 60 days to 150 days the period that defines entry of judgment when a required separate document is not provided.

The comments on Rules 54(a) and 58 focus on Rule 58. Some parts of some of the comments seem to reflect misunderstanding of

Rule 58 as it now is. Other parts of some of the comments seem to reflect misunderstanding of the proposal published last August. It may be that the confusions are related. In any event, the comments suggesting drafting improvement all involve manifest shortcomings and have not provided inspiration for further clarification.

New Rule 58(a)(1) carries forward the requirement that every judgment be entered on a separate document, and adds an explicit requirement that every amended judgment be entered on a separate document. But it further provides that a separate document is not required for an order "disposing of" a motion under Rules 50, 52, 54, 59, or 60. The result is that if action on any of these motions leads to an amended judgment, a new separate document is required. A separate document also is required if the judgment, although unchanged, was not set out on a separate document before the motion was disposed of. But no separate document is required if the motion is denied, or is granted in terms that do not amend a judgment that is properly set out on a separate document. An order granting a motion to amend findings of fact, for example, may not lead to any change in the judgment.

Rule 58(a)(1) drew little comment. Public Citizen Litigation Group finds it a "close question," but believes that the separate document requirement should be retained for these orders. Compliance with the separate document requirement does not impose a great burden. And in complex cases the separate document will alert the parties that appeal time is running.

Rule 58(a)(1) was drawn in reliance on Dean Schiltz's exhaustive study of Rule 58 decisions. The courts of appeals are divided on application of the separate-document requirement to the orders listed in new Rule 58(a)(1). The list is geared to the list of motions in Appellate Rule 4(a)(4) that suspend appeal time until

"entry of the order disposing of the last such remaining motion." The list is somewhat broader than the Appellate Rule 4(a)(4) list because it omits distinctions drawn by Rule 4(a)(4) — for example, it does not require that the motion be timely, and it applies to all Rule 60 motions rather than those made no later than 10 days after judgment is entered. This expansion resulted from the conclusion that the separate document requirement should not be further complicated.

Rule 58(b)(2) is quite a different matter. Here, as with Rule 7.1, the history of this project is important. The beginning was a proposal by the Appellate Rules Committee to amend Appellate Rule 4(a)(7) to provide in essence that the time to appeal starts to run 150 days after an order was entered on the civil docket even though the order was not set forth on a separate document as required by Civil Rule 58. This proposal was advanced to address the "time bomb" problem — the separate document requirement was added to Rule 58 to provide a clear signal that appeal time has started to run, a purpose that led all circuits other than the First Circuit to conclude that appeal time does not start to run until the judgment is set forth on a separate document. The concern is that there are countless numbers of district-court judgments that can be appealed long after all parties understood the litigation had concluded, only because judgment was not set forth on a separate document. The difficulty of proceeding by way of Rule 4(a)(7) alone was that the result would be different times for appeal and for making post-judgment motions. Appeal time might have run, for example, although want of a separate document meant that the time to move for such relief as a new trial had not even begun to run. This difficulty led to the joint drafting process that yielded the published proposals. The Civil Rules Committee was responding to the urgent need felt by the Appellate Rules Committee, not to an independent sense that in fact there is a pressing problem arising from delayed explosion of Rule 58 time bombs.

The public comments include many comments hostile to the "60-day" provision in Rule 58(b)(2). The comments come from many organizations that have great collective experience with federal appeals, and that have provided thoughtful and helpful comments on many rules proposals over the years. There is a common theme. Rule 58 was amended nearly four decades ago to provide a clear signal that appeal time has started to run. The ambiguity and complexity of many orders makes the clear signal more important now than ever. It is easy for a district court to honor the separate-document requirement. Adherence to the requirement, moreover, may lead the district court to think more carefully about the intended finality of its actions. The proposed solution will reset the appeal-time traps that were decommissioned by the separate-document requirement. The traps will be less often fatal if the time period should be extended from 60 days to 180 days, but still will create problems. These problems will be created for little purpose — the abstract fear of long-delayed appeals does not correspond to any real problem. It is better to adhere to the present rule, remembering that any party who is anxious to ensure that appeal time begins to run upon final disposition of an action can request entry of judgment on a separate document.

These are powerful arguments that commanded serious attention. The responses made by the Appellate Rules Committee, however, were convincing. As “easy” as it may seem to comply with the separate document requirement, repeated efforts to achieve uniform compliance have been made without success. Extending the time of entry to 150 days after entry in the civil docket without a required separate document provides ample protection. A lawyer who hears nothing further about an action for 150 days after entry and notice of an order should inquire whether the order was meant to be the final act in the action. The 150-day period is nearly as long as the 180 day period set by Appellate Rule 4(a)(6)(B) that cuts off any

opportunity to appeal when there is no notice at all that judgment has been entered; if we are prepared to cut off any appeal opportunity without any notice, it is generous to set 150 days as the time that starts the appeal period after notice of entry on the docket of an order that ought to have been set forth on a separate document but was not. Expiration of the 150-day period only starts appeal time — there will be at least another 30 days to file the notice of appeal. And in fact many of the untold numbers of "time bombs" do explode into long-delayed appeals. Adherence to the published proposal is recommended, with the change that the period after entry in the civil docket without a required separate document be extended from 60 days to 150 days.

A closer question is presented by the change that extends Rule 58(b) to define entry of judgment for all Civil Rules purposes. The published proposal was designed solely to effect a workable integration of Rule 58 with the Appellate Rules. The need for integration relates directly to Civil Rules 50, 52, 54(d)(2)(b), 59, and 60. Coordination of the execution provisions of Rule 62 with these post-judgment motion rules seemed wise. No thought was given to the ways in which other rules might be affected if included in the definition. But there was much concern that the literal meaning of present Rule 58 could create serious mischief when applied to the Rule 54(a) definition of a judgment as "a decree and any order from which an appeal lies." The Committee Note speaks to this concern and urges a common-sense approach that in effect invites occasional disregard of the literal meaning of proposed Rule 58(b). One of the reasons for adopting this approach was the concern of the Appellate Rules Committee that Rule 58(b) should be simplified to reduce the burden faced by a lawyer directed by Appellate Rule 4(a)(7) to the definition in Rule 58(b). The Appellate Rules Committee has now suggested that it may prove better to adopt the Rule 58(b) language directly into Appellate Rule 4(a)(7). If that happens, Rule 58(b) is

left as an all-purpose definition that is qualified in the Committee Note. Nonetheless, the Advisory Committee determination at the April meeting is presented as a recommendation to approve the revised form of Rule 58(b) that defines entry of judgment for the purpose of all Civil Rules.

Summary of Comments: Rules 54, 58

00-CV-001, Committee on Federal Courts, Association of the Bar of the City of New York: The Rule 58 proposal may resurrect the trap for the unwary that Rule 58 was designed to eliminate [apparently the fear is that the 60-day period after entry on the docket is too brief]. The "time bomb" problem is better addressed in other ways. The ideal solution is to enforce Rule 58 as it is — district court clerks' offices should enforce an operating procedure that bars a case from being closed without entry of a final judgment embodied in a Rule 58 document. Failing that, the rule should provide that a prevailing party who believes that an order is appealable may serve notice of entry on every other party; the notice would start the running of appeal time. As a third choice, the published rule should provide a waiting period of "at least six months" before entry on the docket supersedes the need for entry of a separate judgment document. It is not unusual for 60 days to pass without any event in an action; it is considerably less frequent for an action to lie six months without anything happening.

00-CV-002, Public Citizen Litigation Group, Brian Wolfman: (1) The Rule 54(d)(2) and 58(a)(1) provisions that would eliminate the separate document requirement for specified post-judgment motions present "a close question," but should be rejected. To be sure, "these kinds of post-judgment rulings are generally discrete and imbued with finality," so a formal separate-document notice of appealability is not much needed. But in complex cases it may remain necessary to have a separate document that alerts the parties that appeal time is running.

The burden on courts and clerks is not great — the separate judgment is a short, formulaic document. The party seeking to ensure that appeal times run can request entry of judgment, see proposed Rule 58(d). And it makes sense to retain the separate-document requirement, as the proposal does, for all post-judgment orders not listed.

(2) "PCLG disagrees strenuously with" the proposal that would allow appeal time to begin 60 days after entry of the judgment on the docket, even though no separate document is filed. "[W]e do not understand why the Rules would retain the separate-document requirement and then allow it to evaporate at some point after an appealable order is entered." The very point of the separate document is to eliminate the ambiguities that surround the final-judgment rule. "[T]his signaling function is quite important because frequently an order is ambiguous as to whether it constitutes a 'judgment' * * *." The losing party, although aware that an order has entered, may not be aware that the order is appealable. The passage of 60 days from entry on the docket does not alleviate that ignorance. This is not a workable compromise between the present rule and the alternative of abolishing the separate-document requirement. The "time bomb" problem does not warrant this response. First, there is an easy remedy — district courts only need abide by the present rule; the prevailing party can help under proposed Rule 58(d) by requesting entry of judgment. Second, "we challenge the assumption that there are many 'problem' cases, despite the number of reported decisions on the topic. Third, the cases that involve any significant delay in taking an appeal "generally are cases of genuine ambiguity as to whether the underlying order is 'final' for purposes of appeal."

00-CV-003, Bradley Scott Shannon: Professor Shannon's comment is difficult to summarize because it is rich in detail. The conclusion picks up on the observation in the draft Committee Note that drastic

surgery would be required to fully address the problems that arise from present Rules 54(a) and 58. He agrees, but urges that the time has come for drastic surgery, including revision of Rule 54(a).

Rule 54(a) defines "judgment" for Civil Rules purposes as "a decree and any order from which an appeal lies." If there is no order, a case may move to final disposition without a "judgment" and thus without triggering the separate document requirement of Rule 58. More commonly, district courts have little occasion to think about appealability with respect to many orders that in fact are appealable — the consequence is that appeals are accepted despite failure to enter a separate document, and appeals are dismissed despite entry of a separate document. Rule 54(a) should be amended to refer only to "final" judgments. "Final" would be defined as an order that summarizes the claims disposed of in the action no matter how disposition is accomplished. The order would state whether the disposition is with prejudice, and also would state the precise relief granted.

Rule 58 should retain the separate document requirement, but limit it to the amended Rule 54(a) definition of a "final" judgment. And the present provisions that call for entry of judgment by the clerk in some circumstances, preserved in proposed Rule 58(a)(2), should be discarded. Entry of judgment should be required "very shortly (perhaps 10 days) after disposition of the last remaining claim or claims," and should not be deferred for post-final judgment motions. If a post-final judgment order alters or affects the final judgment in any way, the court should separately prepare and enter an amended final judgment.

00-CV-004, Ninth Circuit Conference of Chief Bankruptcy Judges, Hon. Louise De Carl Adler: "[W]holeheartedly supports the solution proposed. Failure to timely submit a final judgment is frequently a

problem faced by litigants in bankruptcy court and the proposed rules changes will solve it."

00-CV-006, Rules Committee, Federal Magistrate Judges Association (draft Report): Supports the Rule 54 and 58 proposals. The Rule 58 proposal "would help clarify requirements that have been ignored in many cases," and "establishes a basis for insuring that appeal time does not go on indefinitely."

00-CV-007, Advisory Committee on Rules of Practice, United States Court of Appeals for the Ninth Circuit: Expresses concern that "a lack of clarity" could cause "an inadvertent loss of appeal rights." The proposed rule could be read to mean that appeal time never starts to run until a separate document is entered, even in a case in which a separate document is not required. This confusion could lead to a deluge of requests that the court enter a separate document even though none is required. A revised draft is attached. It restates the separate document requirement to apply only to "[a] judgment that terminates a district court action." Time of entry is specified for the situation in which a separate document is entered even though none is required — judgment is entered on the later of the dates when it is entered or when a separate document is entered. (The purpose apparently is to protect against this event: a judgment that does not require a separate document is entered on day 1. On day 15 a separate document is entered. The intending appellant may be confused, believing that appeal time starts on day 16, not day 2.)

00-CV-008, Appellate Practice Section, State Bar of Michigan: The 60-day rule "would create a potential pitfall for litigants where the appealability of the order in question is ambiguous." "The primary rationale for the separate document rule is to create certainty as to when a judgment has been entered, which also provides a readily defined trigger for the 30-day appeal period." A victorious litigant

can avoid the time-bomb problem by submitting a proposed separate-document judgment. Adherence to the separate-document requirement is simple. "Finally, the question arises whether there are actually enough 'problem' cases to justify adoption of a 60-day rule that could give rise to a great many problems in its own right."

00-CV-009, Appellate Courts Committee, Los Angeles County Bar Association, James C. Martin: "Heartily endorses" the proposals. "[T]his was an area fraught with peril and confusion. The amendments provide greater certainty on the triggering events for this key jurisdictional issue."

00-CV-010, Michael Zachary: Writes from experience as a Second Circuit supervisory staff attorney and author of an article on Rules 58 and 79(a). Opposes the 60-day rule as one that "does more harm than good." It will return us to the pre-1963 days with "litigants unfairly losing their right to appeal when the order terminating the case is not clear or when certain types of motions which do not affect finality are still pending." Indeed, some may assume that the failure to enter a separate document "indicates the court's belief that the case is not yet concluded." Conversely, premature and protective appeals will be triggered in ambiguous circumstances "simply to insure against loss of the right to appeal." "Moreover, it has not been my experience that many delayed appeals are filed beyond a few months after the usual time for appeal or that prejudice resulted from the delay in those cases." Any remaining problems can be addressed by the prevailing party's opportunity to request entry of a separate document, or by the trial court acting to do so on its own; if belated appeals still slip through in long-closed cases, they can be dismissed "under the laches doctrine."

Drafting suggestions also are made. Both seem to be based on misreading the published proposals, but will be considered with care.

00-CV-011, Sidney Powell: Ms. Powell has been lead counsel in more than 450 federal appeals. She endorses in full the comments of Public Citizens Litigation Group, 002 above. The separate judgment requirement "serves not only the function of signaling the time to appeal, but it also serves as a single document for purposes of bonding or execution."

00-CV-012, William J. Borah: (Mr. Borah reviewed the proposals for the Civil Practice and Procedure Section of the Illinois State Bar Association.) The Rule 58 proposal "seems to make the whole issue even more confusing and complicated. While the commentary acknowledges the confusing state of this matter, I think that more thought should go into this before a proposal is made which adds to the problems. The commentary refers to the possibility that the 'separate document' rule should be abandoned altogether, and this would not be a bad idea."

00-CV-013, District of Columbia Bar, Litigation Section and Courts, Lawyers and the Administration of Justice Section: Accepts the restructuring of Rule 58, and the Rule 58(a)(1) list of orders that do not require a separate document. But urges that when a separate document is required by Rule 58(a)(1), only entry of a separate document should establish entry of judgment. Rule language is proposed for this purpose. The published proposal "will create more problems than it will cure." The proposal would impose on attorneys an obligation to inspect the docket at regular intervals, in part because "courts normally do not give attorneys notice of docket entries." The amendment could mean that an appeal is lost after 90 days even though there is no separate document. "The remedy is to clarify the requirement for entry of a separate document so that failures to follow the rule are less common." In addition, proposed Rule 58(d) should be revised to state that the court must comply with any legitimate request to enter a separate document.

Comments on Appellate Rule 4(a)(7)

Some of the comments on Appellate Rule 4(a)(7) addressed Civil Rule 58 problems but were not described as such. The following summaries were prepared by Dean Patrick Schiltz, Reporter for the Appellate Rules Advisory Committee.

Judge Frank H. Easterbrook (7th Cir.)(00-AP-012) seems to have two major concerns about the proposed revisions to Rule 4(a)(7)(B).
* * *

Second, Judge Easterbrook essentially opposes the 60-day provision and favors retaining the separate document requirement as it exists. He argues that, without the warning provided by a separate document, some litigants will fail to recognize that the time to appeal has begun to run and find themselves "hornswoggled out of their appeals." He argues that other litigants will "pepper courts of appeals with arguments that one or another decision marked the 'real' end of the case, so that the clock must be deemed to have started more than 30 days before the notice of appeal." Still other litigants will "bombard[] the court with notices of appeal from everything that might in retrospect be deemed a conclusive order."

The Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association (00-AP-017) objects only to the 60-day provision. It has no objection to the remainder of the Rule 4(a)(7)/FRCP 58 proposal, including the provisions that would make clear that the appellant alone can waive the separate document requirement and that orders disposing of certain post-judgment motions need not be entered on separate documents. The Committee does note, though, that it would prefer that FRCP 58 instead provide that *all* orders disposing of post-judgment motions be entered on separate documents.

As to the 60-day provision, the Committee believes that it undermines the fundamental purpose of the separate document requirement, which is to provide litigants with a clear warning of when a judgment has been issued and the time to appeal has begun to run. The Committee concedes that the time bomb problem is "a real concern," but winning litigants can easily protect themselves from time bombs simply by asking the district court to enter judgment on a separate document.

D.C. Circuit Advisory Committee on Procedures: (This comment arrived too late to be summarized by Dean Schiltz.) The problem that appeal time never starts to run "should be addressed. However, some of our members found the new rule unnecessarily complicated." One possibility would be to state the number of days that a party has to appeal when no separate judgment is entered. [Note: this was the first approach of the Appellate Rules Committee; it was put aside because failure to make any other change would mean that the Civil Rules would permit motions for judgment as a matter of law, new trial, revised findings, and the like, after appeal time had expired.] The Rule 58(b)(2) proposal would be clearer if it said that when a separate document is required, judgment is entered when it is set forth on a separate document and entered on the docket under Rule 79(a).

Changes Made After Publication and Comment

Minor style changes were made. The definition of the time of entering judgment in Rule 58(b) was extended to reach all Civil Rules, not only the Rules described in the published version — Rules 50, 52, 54(d)(2)(B), 59, 60, and 62. And the time of entry was extended from 60 days to 150 days after entry in the civil docket without a required separate document.

Rule 81(a): Rules Governing Habeas Corpus

Rule 81. Applicability in General

(a) To What Proceedings Applicable.

* * * * *

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions. ~~The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.~~

16 * * * * *

Committee Note

This amendment brings Rule 81(a)(2) into accord with the Rules Governing § 2254 and § 2255 proceedings. In its present form, Rule 81(a)(2) includes return-time provisions that are inconsistent with the provisions in the Rules Governing §§ 2254 and 2255. The inconsistency should be eliminated, and it is better that the time provisions continue to be set out in the other rules without duplication in Rule 81. Rule 81 also directs that the writ be directed to the person having custody of the person detained. Similar directions exist in the § 2254 and § 2255 rules, providing additional detail for applicants subject to future custody. There is no need for partial duplication in Rule 81.

The provision that the civil rules apply to the extent that practice is not set forth in the § 2254 and § 2255 rules dovetails with the provisions in Rule 11 of the § 2254 rules and Rule 12 of the § 2255 rules.

Recommendation

The Advisory Committee recommends that the Rule 81(a)(2) amendment be submitted to the Judicial Conference for adoption as published. The Committee Note has been changed by deleting a reference to § 2241 proceedings that was marked for deletion before publication but slipped through.

The comment of the National Association of Criminal Defense Lawyers summarized below points out that the Criminal Rules

Committee plans further work on the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings. This work does not seem a reason to defer adoption of the Rule 81 amendments. The amendments eliminate inconsistencies between Rule 81 and some of the § 2254 and § 2255 rules. The second paragraph of § 2243 includes the provisions for addressing the writ and for return time that are deleted from Rule 81 — the amendments will not leave a gap that will be filled only later.

Summary of Comments: Rule 81

00-CV-006, Rules Committee, Federal Magistrate Judges Association (draft Report): Supports the proposal, which brings needed consistency to the rules and avoids unnecessary duplication of the § 2254 and § 2255 rules in Rule 81.

00-CV-014, National Association of Criminal Defense Lawyers: Begins with the suggestion that the published amendments of the Rules Governing § 2254 Cases and the Rules Governing § 2255 Proceedings "need more of an overhaul" than provided by the proposed amendments. On this premise, concludes that the related Rule 81(a)(2) amendment "is premature until the habeas rules are more fully reconsidered." And adds a statement that the Committee Note overstates the role of the § 2254 Rules when habeas corpus is sought under § 2241. Rule 1(b) states that in applications for habeas corpus not covered by Rule 1(a) — which describes various petitions under § 2254 — "these rules may be applied at the discretion of the United States district court." [This seems correct; all of the pre-publication correspondence about Rule 81(a)(2) noted the effect of Rule 1(b).]

Changes Made After Publication and Comment

The only change since publication is deletion of an inadvertent reference to § 2241 proceedings.

ADMIRALTY RULES PUBLISHED FOR COMMENT IN JANUARY 2001

Rule C. In Rem Actions: Special Provisions

* * * * *

(3) Judicial Authorization and Process.

(a) Arrest Warrant.

(i) When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances, but if the property is real property the United States must proceed under applicable statutory procedures.

* * * * *

(6) Responsive Pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute:

(i) a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:

(A) within ~~20~~ 30 days after the earlier of (1) ~~receiving actual notice of execution of process~~ the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows.

(ii) an agent, bailee, or attorney must state the authority to file a statement of interest in or right against the property on behalf of another; and

(iii) a person who files a statement of interest in or right against the property must serve and file an answer within 20 days after filing the statement.

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a):

* * * * *

(iv) a person who asserts a right of possession or any ownership interest must ~~file~~ serve an answer within 20 days after filing the statement of interest or right.

* * * * *

Committee Note

Rule C(3) is amended to reflect the provisions of 18 U.S.C. § 985, enacted by the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202, 214-215. Section 985 provides, subject to enumerated exceptions, that real property that is the subject of a civil forfeiture action is not to be seized until an order of forfeiture is entered. A civil forfeiture action is initiated by filing a complaint, posting notice, and serving notice on the property owner. The summons and arrest procedure is no longer appropriate.

Rule C(6)(a)(i)(A) is amended to adopt the provision enacted by 18 U.S.C. § 983(a)(4)(A), shortly before Rule C(6)(a)(i)(A) took effect, that sets the time for filing a verified statement as 30 days rather than 20 days, and that sets the first alternative event for measuring the 30 days as the date of service of the Government's complaint.

Rule C(6)(a)(iii) is amended to give notice of the provision enacted by 18 U.S.C. § 983(a)(4)(B) that requires that the answer in a forfeiture proceeding be filed within 20 days. Without this notice, unwary litigants might rely on the provision of Rule 5(d) that allows a reasonable time for filing after service.

Rule C(6)(b)(iv) is amended to change the requirement that an answer be filed within 20 days to a requirement that it be served within 20 days. Service is the ordinary requirement, as in Rule 12(a). Rule 5(d) requires filing within a reasonable time after service.

Recommendation

On January 16, 2001, proposals were published to amend the Admiralty Rules to conform to provisions of the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202 ff. A short comment period was set, closing on April 2, 2001. The purpose of setting a short comment period reflected the unusual circumstances surrounding the amendments. Earlier amendments of the Admiralty Rules were transmitted to Congress by the Supreme Court on April 17, 2000, to take effect on December 1, 2000. One week later, Congress adopted the reform act. Several procedural provisions of the reform act were inconsistent with the amendments. The amendments, however, supersede the new statute because the

amendments took effect after the effective date of the statute. The amendments were framed without any information about the legislation that had not yet been clearly developed when the amendments were actually drafted, and there was no intent to supersede the statute. The proposals published in January 2001 seek to conform the Rules to the statute, with the hope that courts will follow the conforming Rules even before they can take effect upon completion of the remaining steps in the Enabling Act process.

No comments have been received on these proposals. The Department of Justice forfeiture experts believe that several more changes are required to adapt the Admiralty Rules to the needs of forfeiture practice, but those changes will require full consideration in the ordinary course of the Enabling Act process. Meanwhile, they believe that the January 2001 proposals should be adopted.

It is recommended that the January 2001 proposals be approved for transmission to the Judicial Conference for approval and submission to the Supreme Court.

Changes Made After Publication and Comment

No changes have been made since publication.