United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 54

Rule 54. Judgment; Costs

Currentness

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Demand for Judgment; Relief to Be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs; Attorney's Fees.

(1) ***Costs Other Than Attorney's Fees.*** Unless a federal statute, these rules, or a court order provides otherwise, costs--other than attorney's fees--should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

(2) ***Attorney's Fees.***

(A) *Claim to Be by Motion.* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) *Proceedings.* Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) *Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge.* By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) *Exceptions.* Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.

Credits

(Amended December 27, 1946, effective March 19, 1948; April 17, 1961, effective July 19, 1961; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 29, 2002, effective December 1, 2002; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

Editors' Notes

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). The second sentence is derived substantially from [former] Equity Rule 71 (Form of Decree).

Note to Subdivision (b). This provides for the separate judgment of equity and code practice. See Wis.Stat. (1935) § 270.54; Compare N.Y.C.P.A. (1937) § 476.

Note to Subdivision (c). For the limitation on default contained in the first sentence, see 2 N.D.Comp.Laws Ann. (1913) § 7680; N.Y.C.P.A. (1937) § 479. Compare *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 13, r.r. 3-12. The remainder is a usual code provision. It makes clear that a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both. This necessarily includes the deficiency judgment in foreclosure cases formerly provided for by Equity Rule 10 (Decree for Deficiency in Foreclosures, Etc.).

Note to Subdivision (d). For the present rule in common law actions, see *Ex parte Peterson,* 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920); Payne, *Costs in Common Law Actions in the Federal Courts* (1935), 21 Va.L.Rev. 397.

The provisions as to costs in actions in forma pauperis contained in U.S.C., Title 28, former §§ 832-836 [now 1915] are unaffected by this rule. Other sections of U.S.C., Title 28, which are unaffected by this rule are: [former] §§ 815 (Costs; plaintiff not entitled to, when), 821 [now 1928] (Costs; infringement of patent; disclaimer), 825 (Costs; several actions), 829 [now 1927] (Costs; attorney liable for, when), and 830 [now 1920] (Costs; bill of; taxation).

The provisions of the following and similar statutes as to costs against the United States and its officers and agencies are specifically continued:

U.S.C., Title 15, §§ 77v(a), 78aa, 79y (Securities and Exchange Commission)

U.S.C., Title 16, § 825p (Federal Power Commission)

U.S.C., Title 26, [former] §§ 3679(d) and 3745(d) (Internal revenue actions)

U.S.C., Title 26, [former] § 3770(b)(2) (Reimbursement of costs of recovery against revenue officers)

U.S.C., Title 28, [former] § 817 (Internal revenue actions)

U.S.C., Title 28, § 836 [now 1915] (United States--actions in *forma pauperis*)

U.S.C., Title 28, § 842 [now 2006] (Actions against revenue officers)

U.S.C., Title 28, § 870 [now 2408] (United States--in certain cases)

U.S.C., Title 28, [former] § 906 (United States--foreclosure actions)

U.S.C., Title 47, § 401 (Communications Commission)

The provisions of the following and similar statutes as to costs are unaffected:

U.S.C., Title 7, § 210(f) (Actions for damages based on an order of the Secretary of Agriculture under Stockyards Act)

U.S.C., Title 7, § 499g(c) (Appeals from reparations orders of Secretary of Agriculture under Perishable Commodities Act)

U.S.C., Title 8, [former] § 45 (Action against district attorneys in certain cases)

U.S.C., Title 15, § 15 (Actions for injuries due to violation of antitrust laws)

U.S.C., Title 15, § 72 (Actions for violation of law forbidding importation or sale of articles at less than market value or wholesale prices)

U.S.C., Title 15, § 77k (Actions by persons acquiring securities registered with untrue statements under Securities Act of 1933)

U.S.C., Title 15, § 78i(e) (Certain actions under the Securities Exchange Act of 1934)

U.S.C., Title 15, § 78r (Similar to 78i(e))

U.S.C., Title 15, § 96 (Infringement of trade-mark--damages)

U.S.C., Title 15, § 99 (Infringement of trade-mark--injunctions)

U.S.C., Title 15, § 124 (Infringement of trade-mark--damages)

U.S.C., Title 19, § 274 (Certain actions under customs law)

U.S.C., Title 30, § 32 (Action to determine right to possession of mineral lands in certain cases)

U.S.C., Title 31, §§ 232 [now 3730] and 234 [former] (Action for making false claims upon United States)

U.S.C., Title 33, § 926 (Actions under Harbor Workers' Compensation Act)

U.S.C., Title 35, § 67 [now 281, 284] (Infringement of patent--damages)

U.S.C., Title 35, § 69 [now 282] (Infringement of patent--pleading and proof)

U.S.C., Title 35, § 71 [now 288] (Infringement of patent--when specification too broad)

U.S.C., Title 45, § 153p (Actions for non-compliance with an order of National R.R. Adjustment Board for payment of money)

U.S.C., Title 46, [former] § 38 (Action for penalty for failure to register vessel)

U.S.C., Title 46, § 829 (Action based on non-compliance with an order of Maritime Commission for payment of money)

U.S.C., Title 46, § 941 (Certain actions under Ship Mortgage Act)

U.S.C., Title 46, § 1227 (Actions for damages for violation of certain provisions of the Merchant Marine Act, 1936)

U.S.C., Title 47, § 206 (Actions for certain violations of Communications Act of 1934)

U.S.C., Title 49, § 16(2) [now 11705] (Action based on non-compliance with an order of I.C.C. for payment of money)

1946 Amendment

Note. The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute. *Hohorst v. Hamburg--American Packet Co.*, 1893, 13 S.Ct. 590, 148 U.S. 262, 37 L.Ed. 443; *Rexford v. Brunswick-Balke-Collender Co.*, 1913, 33 S.Ct. 515, 228 U.S. 339, 57 L.Ed. 864; *Collins v. Miller,* 1920, 40 S.Ct. 347, 252 U.S. 364, 64 L.Ed. 616. Rule 54(b) was originally adopted in view of the wide scope and possible content of the newly created "civil action" in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case. It was not designed to overturn the settled federal rule stated above, which, indeed, has more recently been reiterated in *Catlin v. United States,* 1945, 65 S.Ct. 631, 324 U.S. 229, 89 L.Ed. 911. See also *United States v. Florian,* 1941, 61 S.Ct. 713, 312 U.S. 656, 85 L.Ed. 1105; *Reeves v. Beardall,* 1942, 62 S.Ct. 1085, 316 U.S. 283, 86 L.Ed. 1478.

Unfortunately, this was not always understood, and some confusion ensued. Hence situations arose where district courts made a piecemeal disposition of an action and entered what the parties thought amounted to a judgment, although a trial remained to be had on other claims similar or identical with those disposed of. In the interim the parties did not know their ultimate rights, and accordingly took an appeal, thus putting the finality of the partial judgment in question. While most appellate courts have reached a result generally in accord with the intent of the rule, yet there have been divergent precedents and division of views which have served to render the issues more clouded to the parties appellant. It hardly seems a case where multiplicity of precedents will tend to remove the problem from debate. The problem is presented and discussed in the following cases:

Atwater v. North American Coal Corp., C.C.A.2, 1940, 111 F.2d 125; *Rosenblum v. Dingfelder*, C.C.A.2, 1940, 111 F.2d 406; *Audi-Vision, Inc. v. RCA Mfg. Co., Inc.*, C.C.A.2, 1943, 136 F.2d 621; *Zalkind v. Scheinman*, C.C.A.2, 1943, 139 F.2d 895; *Oppenheimer v. F. J. Young & Co., Inc.*, C.C.A.2, 1944, 144 F.2d 387; *Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp.*, C.C.A.2, 1946, 154 F.2d 814, certiorari denied 1946, 66 S.Ct. 1353, 328 U.S. 859, 90 L.Ed. 1630; *Zarati Steamship Co. v. Park Bridge Corp.*, C.C.A.2, 1946, 154 F.2d 377; *Baltimore and Ohio R. Co. v. United Fuel Gas Co.*, C.C.A.4, 1946, 154 F.2d 545; *Jefferson Electric Co. v. Sola Electric Co.*, C.C.A.7, 1941, 122 F.2d 124; *Leonard v. Socony-Vacuum Oil Co.*, C.C.A.7, 1942, 130 F.2d 535; *Markham v. Kasper*, C.C.A.7, 1945, 152 F.2d 270; *Hanney v. Franklin Fire Ins. Co. of Philadelphia*, C.C.A.9, 1944, 142 F.2d 864; *Toomey v. Toomey*, App.D.C.1945, 149 F.2d 19, 80 U.S.App.D.C. 77.

In view of the difficulty thus disclosed, the Advisory Committee in its two preliminary drafts of proposed amendments attempted to redefine the original rule with particular stress upon the interlocutory nature of partial judgments which did not adjudicate all claims arising out of a single transaction or occurrence. This attempt appeared to meet with almost universal approval from those of the profession commenting upon it, although there were, of course, helpful suggestions for additional changes in language or clarification of detail. But cf. Circuit Judge Frank's dissenting opinion in *Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp.*, supra, n. 21 of the dissenting opinion. The Committee, however, became convinced on careful study of its own proposals that the seeds of ambiguity still remained, and that it had not completely solved the problem of piecemeal appeals. After extended consideration, it concluded that a retention of the older federal rule was desirable, and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule. This is afforded by amended Rule 54(b). It re-establishes an ancient policy with clarity and precision. For the possibility of staying execution where not all claims are disposed of under Rule 54(b), see amended Rule 62(h).

1961 Amendment

This rule permitting appeal, upon the trial court's determination of "no just reason for delay," from a judgment upon one or more but less than all the claims in an action, has generally been given a sympathetic construction by the courts and its validity is settled. *Reeves v. Beardall*, 316 U.S. 283 (1942); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956); *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445 (1956).

A serious difficulty has, however, arisen because the rule speaks of claims but nowhere mentions parties. A line of cases has developed in the circuits consistently holding the rule to be inapplicable to the dismissal, even with the requisite trial court determination, of one or more but less than all defendants jointly charged in an action, i.e. charged with various forms of concerted or related wrongdoing or related liability. See *Mull v. Ackerman*, 279 F.2d 25 (2d Cir. 1960); *Richards v. Smith*, 276 F.2d 652 (5th Cir. 1960); *Hardy v. Bankers Life & Cas. Co.*, 222 F.2d 827 (7th Cir. 1955); *Steiner v. 20th Century-Fox Film Corp.*, 220 F.2d 105 (9th Cir. 1955). For purposes of Rule 54(b) it was arguable that there were as many "claims" as there were parties defendant and that the rule in its present text applied where less than all of the parties were dismissed, cf. *United Artists Corp. v. Masterpiece Productions, Inc.*, 221 F.2d 213, 215 (2d Cir. 1955); *Bowling Machines, Inc. v. First Nat. Bank*, 283 F.2d 39 (1st Cir. 1960); but the Courts of Appeals are now committed to an opposite view.

The danger of hardship through delay of appeal until the whole action is concluded may be at least as serious in the multiple-parties situations as in multiple-claims cases, see *Pabellon v. Grace Line, Inc.*, 191 F.2d 169, 179 (2d Cir. 1951), cert. denied, 342 U.S. 893 (1951), and courts and commentators have urged that Rule 54(b) be changed to take in the former. See *Reagan v. Traders & General Ins. Co.*, 255 F.2d 845 (5th Cir. 1958); *Meadows v. Greyhound Corp.*, 235 F.2d 233 (5th Cir. 1956); *Steiner v. 20th Century-Fox Film Corp.*, supra; 6 Moore's Federal Practice ¶54.34[2] (2d ed. 1953); 3 Barron & Holtzoff, *Federal Practice & Procedure* § 1193.2 (Wright ed. 1958); *Developments in the Law--Multiparty Litigation*, 71 Harv.L.Rev. 874, 981 (1958); Note, 62 Yale L.J. 263, 271 (1953); Ill.Ann.Stat. ch. 110, § 50(2) (Smith-Hurd 1956). The amendment accomplishes this purpose by referring explicitly to parties.

There has been some recent indication that interlocutory appeal under the provisions of 28 U.S.C. § 1292(b), added in 1958, may now be available for the multiple-parties cases here considered. See *Jaffex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508

(2d Cir. 1960). The Rule 54(b) procedure seems preferable for those cases, and § 1292(b) should be held inapplicable to them when the rule is enlarged as here proposed. See *Luckenbach Steamship Co., Inc., v. H. Muehlstein & Co., Inc.*, 280 F.2d 755, 757 (2d Cir. 1960); 1 Barron & Holtzoff, supra, § 58.1, p. 321 (Wright ed. 1960).

1987 Amendment

The amendment is technical. No substantive change is intended.

1993 Amendments

Subdivision (d). This revision adds paragraph (2) to this subdivision to provide for a frequently recurring form of litigation not initially contemplated by the rules--disputes over the amount of attorneys' fees to be awarded in the large number of actions in which prevailing parties may be entitled to such awards or in which the court must determine the fees to be paid from a common fund. This revision seeks to harmonize and clarify procedures that have been developed through case law and local rules.

Paragraph (1). Former subdivision (d), providing for taxation of costs by the clerk, is renumbered as paragraph (1) and revised to exclude applications for attorneys' fees.

Paragraph (2). This new paragraph establishes a procedure for presenting claims for attorneys' fees, whether or not denominated as "costs." It applies also to requests for reimbursement of expenses, not taxable as costs, when recoverable under governing law incident to the award of fees. *Cf. West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83 (1991), holding, prior to the Civil Rights Act of 1991, that expert witness fees were not recoverable under 42 U.S.C. § 1988. As noted in subparagraph (A), it does not, however, apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury. Nor, as provided in subparagraph (E), does it apply to awards of fees as sanctions authorized or mandated under these rules or under 28 U.S.C. § 1927.

Subparagraph (B) provides a deadline for motions for attorneys' fees--14 days after final judgment unless the court or a statute specifies some other time. One purpose of this provision is to assure that the opposing party is informed of the claim before the time for appeal has elapsed. Prior law did not prescribe any specific time limit on claims for attorneys' fees. White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445 (1982). In many nonjury cases the court will want to consider attorneys' fee issues immediately after rendering its judgment on the merits of the case. Note that the time for making claims is specifically stated in some legislation, such as the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(B) (30-day filing period).

Prompt filing affords an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind. It also enables the court in appropriate circumstances to make its ruling on a fee request in time for any appellate review of a dispute over fees to proceed at the same time as review on the merits of the case.

Filing a motion for fees under this subdivision does not affect the finality or the appealability of a judgment, though revised Rule 58 provides a mechanism by which prior to appeal the court can suspend the finality to resolve a motion for fees. If an appeal on the merits of the case is taken, the court may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing under subdivision (d)(2)(B) a new period for filing after the appeal has been resolved. A notice of appeal does not extend the time for filing a fee claim based on the initial judgment, but the court under subdivision (d)(2)(B) may effectively extend the period by permitting claims to be filed after resolution of the appeal. A new period for filing will automatically begin if a new judgment is entered following a reversal or remand by the appellate court or the granting of a motion under Rule 59.

The rule does not require that the motion be supported at the time of filing with the evidentiary material bearing on the fees. This material must of course be submitted in due course, according to such schedule as the court may direct in light of the

circumstances of the case. What is required is the filing of a motion sufficient to alert the adversary and the court that there is a claim for fees, and the amount of such fees (or a fair estimate).

If directed by the court, the moving party is also required to disclose any fee agreement, including those between attorney and client, between attorneys sharing a fee to be awarded, and between adversaries made in partial settlement of a dispute where the settlement must be implemented by court action as may be required by Rules 23(e) and 23.1 or other like provisions. With respect to the fee arrangements requiring court approval, the court may also by local rule require disclosure immediately after such arrangements are agreed to. *E.g.,* Rule 5 of United States District Court for the Eastern District of New York; *cf. In re "Agent Orange" Product Liability Litigation (MDL 381),* 611 F.Supp. 1452, 1464 (E.D.N.Y.1985).

In the settlement of class actions resulting in a common fund from which fees will be sought, courts frequently have required that claims for fees be presented in advance of hearings to consider approval of the proposed settlement. The rule does not affect this practice, as it permits the court to require submissions of fee claims in advance of entry of judgment.

Subparagraph (C) assures the parties of an opportunity to make an appropriate presentation with respect to issues involving the evaluation of legal services. In some cases, an evidentiary hearing may be needed, but this is not required in every case. The amount of time to be allowed for the preparation of submissions both in support of and in opposition to awards should be tailored to the particular case.

The court is explicitly authorized to make a determination of the liability for fees before receiving submissions by the parties bearing on the amount of an award. This option may be appropriate in actions in which the liability issue is doubtful and the evaluation issues are numerous and complex.

The court may order disclosure of additional information, such as that bearing on prevailing local rates or on the appropriateness of particular services for which compensation is sought.

On rare occasion, the court may determine that discovery under Rules 26-37 would be useful to the parties. *Compare* Rules Governing Section 2254 Cases in the U.S. District Courts, Rule 6. *See* Note, *Determining the Reasonableness of Attorneys' Fees--the Discoverability of Billing Records,* 64 *B.U.L.Rev.* 241 (1984). In complex fee disputes, the court may use case management techniques to limit the scope of the dispute or to facilitate the settlement of fee award disputes.

Fee awards should be made in the form of a separate judgment under Rule 58 since such awards are subject to review in the court of appeals. To facilitate review, the paragraph provides that the court set forth its findings and conclusions as under Rule 52(a), though in most cases this explanation could be quite brief.

Subparagraph (D) explicitly authorizes the court to establish procedures facilitating the efficient and fair resolution of fee claims. A local rule, for example, might call for matters to be presented through affidavits, or might provide for issuance of proposed findings by the court, which would be treated as accepted by the parties unless objected to within a specified time. A court might also consider establishing a schedule reflecting customary fees or factors affecting fees within the community, as implicitly suggested by Justice O'Connor in *Pennsylvania v. Delaware Valley Citizens' Council,* 483 U.S. 711, 733 (1987) (O'Connor, J., concurring) (how particular markets compensate for contingency). *Cf. Thompson v. Kennickell,* 710 F.Supp. 1 (D.D.C.1989) (use of findings in other cases to promote consistency). The parties, of course, should be permitted to show that in the circumstances of the case such a schedule should not be applied or that different hourly rates would be appropriate.

The rule also explicitly permits, without need for a local rule, the court to refer issues regarding the amount of a fee award in a particular case to a master under Rule 53. The district judge may designate a magistrate judge to act as a master for this purpose or may refer a motion for attorneys' fees to a magistrate judge for proposed findings and recommendations under Rule 72(b). This authorization eliminates any controversy as to whether such references are permitted under Rule 53(b) as "matters of account and of difficult computation of damages" and whether motions for attorneys' fees can be treated as the equivalent

of a dispositive pretrial matter that can be referred to a magistrate judge. For consistency and efficiency, all such matters might be referred to the same magistrate judge.

Subparagraph (E) excludes from this rule the award of fees as sanctions under these rules or under 28 U.S.C. § 1927.

2002 Amendments

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).

2003 Amendments

Rule 54(d)(2)(D) is revised to reflect amendments to Rule 53.

2007 Amendments

The language of Rule 54 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The words "or class member" have been removed from Rule 54(d)(2)(C) because Rule 23(h)(2) now addresses objections by class members to attorney-fee motions. Rule 54(d)(2)(C) is amended to recognize that Rule 23(h) now controls those aspects of attorney-fee motions in class actions to which it is addressed.

2009 Amendments

Former Rule 54(d)(1) provided that the clerk may tax costs on 1 day's notice. That period was unrealistically short. The new 14-day period provides a better opportunity to prepare and present a response. The former 5-day period to serve a motion to review the clerk's action is extended to 7 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Notes of Decisions (3231)

Fed. Rules Civ. Proc. Rule 54, 28 U.S.C.A., FRCP Rule 54
Amendments received to 2-19-13

End of Document

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 58

Rule 58. Entering Judgment

Currentness

(a) Separate Document. Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

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

(2) to amend or make additional findings under Rule 52(b);

(3) for attorney's fees under Rule 54;

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

(5) for relief under Rule 60.

(b) Entering Judgment.

(1) ***Without the Court's Direction.*** Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(A) the jury returns a general verdict;

(B) the court awards only costs or a sum certain; or

(C) the court denies all relief.

(2) ***Court's Approval Required.*** Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(A) the jury returns a special verdict or a general verdict with answers to written questions; or

(B) the court grants other relief not described in this subdivision (b).

(c) Time of Entry. For purposes of these rules, judgment is entered at the following times:

(1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or

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

(A) it is set out in a separate document; or

(B) 150 days have run from the entry in the civil docket.

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

(e) Cost or Fee Awards. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and 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.

Credits

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; April 22, 1993, effective December 1, 1993; April 29, 2002, effective December 1, 2002; April 30, 2007, effective December 1, 2007.)

Editors' Notes

ADVISORY COMMITTEE NOTES

1937 Adoption

See Wis.Stat. (1935) § 270.31 (judgment entered forthwith on verdict of jury unless otherwise ordered), § 270.65 (where trial is by the court, entered by direction of the court), § 270.63 (entered by clerk on judgment on admitted claim for money). Compare 1 Idaho Code Ann. (1932) § 7-1101, and 4 Mont.Rev.Codes Ann. (1935) § 9403, which provide that judgment in jury cases be entered by clerk within 24 hours after verdict unless court otherwise directs. Conn.Practice Book (1934), § 200, provides that all judgments shall be entered within one week after rendition. In some States such as Washington, 2 Rev.Stat.Ann. (Remington, 1932), § 431, in jury cases the judgment is entered two days after the return of verdict to give time for making motion for new trial; § 435 (*ibid.*), provides that all judgments shall be entered by the clerk, subject to the court's direction.

1946 Amendment

Note. The reference to Rule 54(b) is made necessary by the amendment of that rule.

Two changes have been made in Rule 58 in order to clarify the practice. The substitution of the more inclusive phrase "all relief be denied" for the words "there be no recovery", makes it clear that the clerk shall enter the judgment forthwith in the situations specified without awaiting the filing of a formal judgment approved by the court. The phrase "all relief be denied" covers cases such as the denial of a bankrupt's discharge and similar situations where the relief sought is refused but there is literally no denial of a "recovery".

The addition of the last sentence in the rule emphasizes that judgments are to be entered promptly by the clerk without waiting for the taxing of costs. Certain district court rules, for example, Civil Rule 22 of the Southern District of New York--until its annulment Oct. 1, 1945, for conflict with this rule--and the like rule of the Eastern District of New York, are expressly in conflict with this provision, although the federal law is of long standing and well settled. *Fowler v. Hamill,* 1891, 11 S.Ct. 663, 139 U.S. 549, 35 L.Ed. 266; *Craig v. The Hartford,* C.C.Cal.1856, Fed.Cas. No. 3,333; *Tuttle v. Claflin,* C.C.A.2, 1895, 60 F. 7, certiorari denied 1897; 17 S.Ct. 992, 166 U.S. 721, 41 L.Ed. 1188; *Prescott & A.C. Ry. Co. v. Atchison, T. & S.F.R. Co.,* C.C.A.2, 1897, 84 F. 213; *Stallo v. Wagner,* C.C.A.2, 1917, 245 F. 636, 639-40; *Brown v. Parker,* C.C.A.8, 1899, 97 F. 446; *Allis-Chalmers v. United States,* C.C.A.7, 1908, 162 F. 679. And this applies even though state law is to the contrary. *United States v. Nordbye,* C.C.A.8, 1935, 75 F.2d 744, certiorari denied 56 S.Ct. 103, 296 U.S. 572, 80 L.Ed. 404. Inasmuch as it has been held that failure of the clerk thus to enter judgment is a "misprision" "not to be excused", *The Washington,* C.C.A.2, 1926, 16 F.2d 206, such a district court rule may have serious consequences for a district court clerk. Rules of this sort also provide for delay in entry of the judgment contrary to Rule 58. See *Commissioner of Internal Revenue v. Bedford's Estate,* 1945, 65 S.Ct. 1157, 325 U.S. 283, 91 L.Ed. 1611.

1963 Amendment

Under the present rule a distinction has sometimes been made between judgments on general jury verdicts, on the one hand, and, on the other, judgments upon decisions of the court that a party shall recover only money or costs or that all relief shall be denied. In the first situation, it is clear that the clerk should enter the judgment without awaiting a direction by the court unless the court otherwise orders. In the second situation it was intended that the clerk should similarly enter the judgment forthwith upon the court's decision; but because of the separate listing in the rule, and the use of the phrase "upon receipt . . . of the direction," the rule has sometimes been interpreted as requiring the clerk to await a separate direction of the court. All these judgments are usually uncomplicated, and should be handled in the same way. The amended rule accordingly deals with them as a single group in clause (1) (substituting the expression "only a sum certain" for the present expression "only money"), and requires the clerk to prepare, sign and enter them forthwith, without awaiting court direction, unless the court makes a contrary order. (The clerk's duty is ministerial and may be performed by a deputy clerk in the name of the clerk. See 28 U.S.C. § 956; cf. *Gilbertson v. United States,* 168 Fed. 672 (7th Cir. 1909).) The more complicated judgments described in clause (2) must be approved by the court before they are entered.

Rule 58 is designed to encourage all reasonable speed in formulating and entering the judgment when the case has been decided. Participation by the attorneys through the submission of forms of judgment involves needless expenditure of time and effort and promotes delay, except in special cases where counsel's assistance can be of real value. See *Matteson v. United States,* 240 F.2d 517, 518-19 (2d Cir. 1956). Accordingly, the amended rule provides that attorneys shall not submit forms of judgment unless directed to do so by the court. This applies to the judgments mentioned in clause (2) as well as clause (1).

Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion [for summary judgment] is granted," see *United States v. F. & M. Schaefer Brewing Co.,* 356 U.S. 227, 229, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958). Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for post-verdict motions and for the purpose of appeal. See id.; and compare *Blanchard v. Commonwealth Oil Co.,* 294 F.2d 834 (5th Cir. 1961); *United States v. Higginson,* 238 F.2d 439 (1st Cir. 1956); *Danzig v. Virgin Isle Hotel, Inc.,*

278 F.2d 580 (3d Cir. 1960); *Sears v. Austin*, 282 F.2d 340 (9th Cir. 1960), with *Matteson v. United States*, supra; *Erstling v. Southern Bell Tel. & Tel. Co.*, 255 F.2d 93 (5th Cir. 1958); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958) cert. denied, 358 U.S. 932, 79 S.Ct. 320, 3 L.Ed.2d 304 (1959); *Beacon Fed. S. & L. Assn. v. Federal Home L. Bank Bd.*, 266 F.2d 246 (7th Cir.), cert. denied, 361 U.S. 823, 80 S.Ct. 70, 4 L.Ed.2d 67 (1959); *Ram v. Paramount Film D. Corp.*, 278 F.2d 191 (4th Cir. 1960).

The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document--distinct from any opinion or memorandum--which provides the basis for the entry of judgment. That judgment shall be on separate documents is also indicated in Rule 79(b); and see General Rule 10 of the U.S. District Courts for the Eastern and Southern Districts of New York; *Ram v. Paramount Film D. Corp.*, supra, at 194.

See the amendment of Rule 79(a) and the new specimen forms of judgment, Forms 31 and 32.

See also Rule 55(b)(1) and (2) covering the subject of judgments by default.

1993 Amendments

Ordinarily the pendency or post-judgment filing of a claim for attorney's fees will not affect the time for appeal from the underlying judgment. See Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988). Particularly if the claim for fees involves substantial issues or is likely to be affected by the appellate decision, the district court may prefer to defer consideration of the claim for fees until after the appeal is resolved. However, in many cases it may be more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case. This revision permits, but does not require, the court to delay the finality of the judgment for appellate purposes under revised Fed.R.App.P. 4(a) until the fee dispute is decided. To accomplish this result requires entry of an order by the district court before the time a notice of appeal becomes effective for appellate purposes. If the order is entered, the motion for attorney's fees is treated in the same manner as a timely motion under Rule 59.

2002 Amendments

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.

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.

2007 Amendments

The language of Rule 58 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Notes of Decisions (291)

Fed. Rules Civ. Proc. Rule 58, 28 U.S.C.A., FRCP Rule 58
Amendments received to 2-19-13

End of Document

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 59

Rule 59. New Trial; Altering or Amending a Judgment

Currentness

(a) In General.

(1) ***Grounds for New Trial.*** The court may, on motion, grant a new trial on all or some of the issues--and to any party--as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) ***Further Action After a Nonjury Trial.*** After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Credits

(Amended December 27, 1946, effective March 19, 1948; February 28, 1966, effective July 1, 1966; April 27, 1995, effective December 1, 1995; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

Editors' Notes

ADVISORY COMMITTEE NOTES
1937 Adoption

This rule represents an amalgamation of the petition for rehearing of [former] Equity Rule 69 (Petition for Rehearing) and the motion for new trial of 28 U.S.C., § 2111, formerly § 391 (New trials; harmless error), made in the light of the experience and provision of the code States. Compare Calif.Code Civ.Proc., Deering, 1937, §§ 656 to 663a, 28 U.S.C., § 2111, formerly § 391 (New trials; harmless error) is thus substantially continued in this rule. U.S.C., Title 28, [former] § 840 (Executions; stay on conditions) is modified insofar as it contains time provisions inconsistent with Subdivision (b). For the effect of the motion for new trial upon the time for taking an appeal see *Morse v. United States,* 1926, 46 S.Ct. 241, 270 U.S. 151, 70 L.Ed. 518; *Aspen Mining and Smelting Co. v. Billings,* 1893, 14 S.Ct. 4, 150 U.S. 31, 37 L.Ed. 986.

For partial new trials which are permissible under Subdivision (a), see *Gasoline Products Co., Inc. v. Champlin Refining Co.,* 1931, 51 S.Ct. 513, 283 U.S. 494, 75 L.Ed. 1188; *Schuerholz v. Roach,* C.C.A.4, 1932, 58 F.2d 32; *Simmons v. Fish,* 1912, 97 N.E. 102, 210 Mass. 563, Ann.Cas.1912D, 588 (sustaining and recommending the practice and citing federal cases and cases in accord from about sixteen States and contra from three States). The procedure in several States provides specifically for partial new trials. Ariz.Rev.Code Ann., Struckmeyer, 1928, § 3852; Calif.Code Civ.Proc., Deering, 1937, §§ 657, 662; Smith-Hurd Ill.Stats., 1937, c. 110, § 216 (Par. (f)); Md.Ann.Code, Bagby, 1924, Art. 5, §§ 25, 26; Mich.Court Rules Ann., Searl, 1933, Rule 47, § 2; Miss.Sup.Ct.Rule 12, 161 Miss. 903, 905, 1931; N.J.Sup.Ct.Rules 131, 132, 147, 2 N.J.Misc. 1197, 1246-1251, 1255, 1924; 2 N.D.Comp.Laws Ann., 1913, § 7844, as amended by N.D.Laws 1927, ch. 214.

1946 Amendment

Note. Subdivision (b). With the time for appeal to a circuit court of appeals reduced in general to 30 days by the proposed amendment of Rule 73(a), the utility of the original "except" clause, which permits a motion for a new trial on the ground of newly discovered evidence to be made before the expiration of the time for appeal, would have been seriously restricted. It was thought advisable, therefore, to take care of this matter in another way. By amendment of Rule 60(b), newly discovered evidence is made the basis for relief from a judgment, and the maximum time limit has been extended to one year. Accordingly the amendment of Rule 59(b) eliminates the "except" clause and its specific treatment of newly discovered evidence as a ground for a motion for new trial. This ground remains, however, as a basis for a motion for new trial served not later than 10 days after the entry of judgment. See also Rule 60(b).

As to the effect of a motion under subdivision (b) upon the running of appeal time, see amended Rule 73(a) and Note.

Note to Subdivision (e). This subdivision has been added to care for a situation such as that arising in *Boaz v. Mutual Life Ins. Co. of New York,* C.C.A.8, 1944, 146 F.2d 321, and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry. The subdivision deals only with alteration or amendment of the original judgment in a case and does not relate to a judgment upon motion as provided in Rule 50(b). As to the effect of a motion under subdivision (e) upon the running of appeal time, see amended Rule 73(a) and Note.

The title of Rule 59 has been expanded to indicate the inclusion of this subdivision.

1966 Amendment

By narrow interpretation of Rule 59(b) and (d), it has been held that the trial court is without power to grant a motion for a new trial, timely served, by an order made more than 10 days after the entry of judgment, based upon a ground not stated in the motion but perceived and relied on by the trial court sua sponte. *Freid v. McGrath,* 133 F.2d 350 (D.C.Cir. 1942); *National Farmers Union Auto. & Cas. Co. v. Wood,* 207 F.2d 659 (10th Cir. 1953); *Bailey v. Slentz,* 189 F.2d 406 (10th Cir. 1951); *Marshall's*

U.S. Auto Supply, Inc. v. Cashman, 111 F.2d 140 (10th Cir. 1940), cert. denied, 311 U.S. 667 (1940); but see *Steinberg v. Indemnity Ins. Co.,* 36 F.R.D. 253 (E.D.La.1964).

The result is undesirable. Just as the court has power under Rule 59(d) to grant a new trial of its own initiative within the 10 days, so it should have power, when an effective new trial motion has been made and is pending, to decide it on grounds thought meritorious by the court although not advanced in the motion. The second sentence added by amendment to Rule 59(d) confirms the court's power in the latter situation, with provision that the parties be afforded a hearing before the power is exercised. See 6 *Moore's Federal Practice,* par. 59.09[2] (2d ed. 1953).

In considering whether a given ground has or has not been advanced in the motion made by the party, it should be borne in mind that the particularity called for in stating the grounds for a new trial motion is the same as that required for all motions by Rule 7(b)(1). The latter rule does not require ritualistic detail but rather a fair indication to court and counsel of the substance of the grounds relied on. See *Lebeck v. William A. Jarvis Co.,* 250 F.2d 285 (3d Cir. 1957); *Tsai v. Rosenthal,* 297 F.2d 614 (8th Cir. 1961); *General Motors Corp. v. Perry,* 303 F.2d 544 (7th Cir. 1962); cf. *Grimm v. California Spray-Chemical Corp.,* 264 F.2d 145 (9th Cir. 1959); *Cooper v. Midwest Feed Products Co.,* 271 F.2d 177 (8th Cir. 1959).

1995 Amendments

The only change, other than stylistic, intended by this revision is to add explicit time limits for filing motions for a new trial, motions to alter or amend a judgment, and affidavits opposing a new trial motion. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during the prescribed period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase "no later than" is used--rather than "within"--to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 5 the motions when filed are to contain a certificate of service on other parties. It also should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, but that Bankruptcy Rule 9006(a) excludes intermediate Saturdays, Sundays, and legal holidays only in computing periods less than 8 days.

2007 Amendments

The language of Rule 59 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

2009 Amendments

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.

Former Rule 59(c) set a 10-day period after being served with a motion for new trial to file opposing affidavits. It also provided that the period could be extended for up to 20 days for good cause or by stipulation. The apparent 20-day limit on extending the time to file opposing affidavits seemed to conflict with the Rule 6(b) authority to extend time without any specific limit. This tension between the two rules may have been inadvertent. It is resolved by deleting the former Rule 59(c) limit. Rule 6(b)

governs. The underlying 10-day period was extended to 14 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Notes of Decisions (3735)

Fed. Rules Civ. Proc. Rule 59, 28 U.S.C.A., FRCP Rule 59
Amendments received to 2-19-13

End of Document

United States Code Annotated
Federal Rules of Appellate Procedure (Refs & Annos)
Title II. Appeal from a Judgment or Order of a District Court

Federal Rules of Appellate Procedure Rule 4, 28 U.S.C.A.

Rule 4. Appeal as of Right--When Taken

Currentness

(a) Appeal in a Civil Case.

(1) **Time for Filing a Notice of Appeal.**

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf--including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

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

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order--but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)--becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective--without amendment--to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may--before or after the time has expired, with or without motion and notice--extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

Credits

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7111, 102 Stat. 4419; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 26, 2011, eff. Dec. 1, 2011.)

Editors' Notes

ADVISORY COMMITTEE NOTES

1967 Adoption

Subdivision (a). This subdivision is derived from FRCP 73(a) [rule 73(a), Federal Rules of Civil Procedure, this title] without any change of substance. The requirement that a request for an extension of time for filing the notice of appeal made after expiration of the time be made by motion and on notice codifies the result reached under the present provisions of FRCP 73(a) and 6(b) [rules 73(a) and 6(b), Federal Rules of Civil Procedure]. *North Umberland Mining Co. v. Standard Accident Ins. Co.*, 193 F.2d 951 (9th Cir., 1952); *Cohen v. Plateau Natural Gas Co.*, 303 F.2d 273 (10th Cir., 1962); *Plant Economy, Inc. v. Mirror Insulation Co.*, 308 F.2d 275 (3d Cir., 1962).

Since this subdivision governs appeals in all civil cases, it supersedes the provisions of § 25 of the Bankruptcy Act (11 U.S.C. § 48). Except in cases to which the United States or an officer or agency thereof is a party, the change is a minor one, since a successful litigant in a bankruptcy proceeding may, under § 25, oblige an aggrieved party to appeal within 30 days after entry of judgment--the time fixed by this subdivision in cases involving private parties only--by serving him with notice of entry on the day thereof, and by the terms of § 25 and aggrieved party must in any event appeal within 40 days after entry of judgment. No reason appears why the time for appeal in bankruptcy should not be the same as that in civil cases generally. Furthermore, § 25 is a potential trap for the uninitiated. The time for appeal which it provides is not applicable to all appeals which may fairly be termed appeals in bankruptcy. Section 25 governs only those cause referred to in § 24 as "proceedings in bankruptcy" and "controversies arising in proceedings in bankruptcy." *Lowenstein v. Reikes*, 54 F.2d 481 (2d Cir., 1931), cert. den., 285 U.S. 539, 52 S.Ct. 311, 76 L.Ed. 932 (1932). The distinction between such cases and other cases which arise out of bankruptcy is often difficult to determine. See 2 Moore's Collier on Bankruptcy ¶24.12 through ¶24.36 (1962). As a result it is not always clear whether an appeal is governed by § 25 or by FRCP 73(a) [rule 73(a), Federal Rules of Civil Procedure, this title], which is applicable to such appeals in bankruptcy as are not governed by § 25.

In view of the unification of the civil and admiralty procedure accomplished by the amendments of the Federal Rules of Civil Procedure effective July 1, 1966, this subdivision governs appeals in those civil actions which involve admiralty or maritime claims and which prior to that date were known as suits in admiralty.

The only other change possibly effected by this subdivision is in the time for appeal from a decision of a district court on a petition for impeachment of an award of a board of arbitration under the Act of May 20, 1926, c. 347, § 9 (44 Stat. 585), 45 U.S.C. § 159. The act provides that a notice of appeal from such a decision shall be filed within 10 days of the decision. This singular provision was apparently repealed by the enactment in 1948 of 28 U.S.C. § 2107, which fixed 30 days from the date of entry of judgment as the time for appeal in all actions a civil nature except actions in admiralty or bankruptcy matters or those in which the United States is a party. But it was not expressly repealed, and its status is in doubt. See 7 Moore's Federal Practice ¶73.09[2] (1966). The doubt should be resolved, and no reason appears why appeals in such cases should not be taken within the time provided for civil cases generally.

Subdivision (b). This subdivision is derived from FRCrP 37(a)(2) [rule 37(a)(2), Federal Rules of Criminal Procedure] without change of substance.

1979 Amendment

Subdivision (a)(1). The words "(including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein)," which appear in the present rule are struck out as unnecessary and perhaps misleading in suggesting that there may be other categories that are not either civil or criminal within the meaning of Rule 4(a) and (b).

The phrases "within 30 days of such entry" and "within 60 days of such entry" have been changed to read "after" instead of "or." The change is for clarity only, since the word "of" in the present rule appears to be used to mean "after." Since the proposed amended rule deals directly with the premature filing of a notice of appeal, it was thought useful to emphasize the fact that

except as provided, the period during which a notice of appeal may be filed is the 30 days, or 60 days as the case may be, following the entry of the judgment or order appealed from. See Notes to Rule 4(a)(2) and (4), below.

Subdivision (a)(2). The proposed amendment to Rule 4(a)(2) would extend to civil cases the provisions of Rule 4(b), dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely. Despite the absence of such a provision in Rule 4(a) the courts of appeals quite generally have held premature appeals effective. See, e.g., *Matter of Grand Jury Empanelled Jan. 21, 1975*, 541 F.2d 373 (3d Cir. 1976); *Hodge v. Hodge*, 507 F.2d 87 (3d Cir. 1976); *Song Jook Suh v. Rosenberg*, 437 F.2d 1098 (9th Cir. 1971); *Ruby v. Secretary of the Navy*, 365 F.2d 385 (9th Cir. 1966); *Firchau v. Diamond Nat'l Corp.*, 345 F.2d 269 (9th Cir. 1965).

The proposed amended rule would recognize this practice but make an exception in cases in which a post trial motion has destroyed the finality of the judgment. See Note to Rule 4(a)(4) below.

Subdivision (a)(4). The proposed amendment would make it clear that after the filing of the specified post trial motions, a notice of appeal should await disposition of the motion. Since the proposed amendments to Rules 3, 10, and 12 contemplate that immediately upon the filing of the notice of appeal the fees will be paid and the case docketed in the court of appeals, and the steps toward its disposition set in motion, it would be undesirable to proceed with the appeal while the district court has before it a motion the granting of which would vacate or alter the judgment appealed from. See, e.g., *Keith v. Newcourt*, 530 F.2d 826 (8th Cir. 1976). Under the present rule, since docketing may not take place until the record is transmitted, premature filing is much less likely to involve waste effort. See, e.g. *Stockes v. Peyton's Inc.*, 508 F.2d 1287 (5th Cir. 1975). Further, since a notice of appeal filed before the disposition of a post trial motion, even if it were treated as valid for purposes of jurisdiction, would not embrace objections to the denial of the motion, it is obviously preferable to postpone the notice of appeal until after the motion is disposed of.

The present rule, since it provides for the "termination" of the "running" of the appeal time, is ambiguous in its application to a notice of appeal filed prior to a post trial motion filed within the 10 day limit. The amendment would make it clear that in such circumstances the appellant should not proceed with the appeal during pendency of the motion but should file a new notice of appeal after the motion is disposed of.

Subdivision (a)(5). Under the present rule it is provided that upon a showing of excusable neglect the district court at any time may extend the time for the filing of a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by the rule, but that if the application is made after the original time has run, the order may be made only on motion with such notice as the court deems appropriate.

A literal reading of this provision would require that the extension be ordered and the notice of appeal filed within the 30 day period, but despite the surface clarity of the rule, it has produced considerable confusion. See the discussion by Judge Friendly in In re Orbitek, 520 F.2d 358 (2d Cir. 1975). The proposed amendment would make it clear that a motion to extend the time must be filed no later than 30 days after the expiration of the original appeal time, and that if the motion is timely filed the district court may act upon the motion at a later date, and may extend the time not in excess of 10 days measured from the date on which the order granting the motion is entered.

Under the present rule there is a possible implication that prior to the time the initial appeal time has run, the district court may extend the time on the basis of an informal application. The amendment would require that the application must be made by motion, though the motion may be made *ex parte*. After the expiration of the initial time a motion for the extension of the time must be made in compliance with the F.R.C.P. [Federal Rules of Civil Procedure] and local rules of the district court. See Note to proposed amended Rule 1, *supra*. And see Rules 6(d), 7(b) of the F.R.C.P. [rules 6(d) and 7(b), Federal Rules of Civil Procedure].

The proposed amended rule expands to some extent the standard for the grant of an extension of time. The present rule requires a "showing of excusable neglect." While this was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case "good cause," which is the standard that is applied in the granting of other extensions of time under Rule 26(b) seems to be more appropriate.

Subdivision (a)(6). The proposed amendment would call attention to the requirement of Rule 58 of the F.R.C.P. [Federal Rules of Civil Procedure] that the judgment constitute a separate document. See *United States v. Indrelunas*, 411 U.S. 216 (1973). When a notice of appeal is filed, the clerk should ascertain whether any judgment designated therein has been entered in compliance with Rules 58 and 79(a) and if not, so advise all parties and the district judge. While the requirement of Rule 58 is not jurisdictional, (see *Bankers Trust Co. v. Mallis*, 431 U.S. 928 (1977)), compliance is important since the time for the filing of a notice of appeal by other parties is measured by the time at which the judgment is properly entered.

1991 Amendment

The amendment provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to Rule 77(d) of the Federal Rules of Civil Procedure, is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. The amendment adds a new subdivision (6) allowing a district court to reopen for a brief period the time for appeal upon a finding that notice of entry of a judgment or order was not received from the clerk or a party within 21 days of its entry and that no party would be prejudiced. By "prejudice" the Committee means some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal, consequences that are present in every appeal. Prejudice might arise, for example, if the appellee had taken some action in reliance on the expiration of the normal time period for filing a notice of appeal.

Reopening may be ordered only upon a motion filed within 180 days of the entry of a judgment or order or within 7 days of receipt of notice of such entry, whichever is earlier. This provision establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a judgment to seek additional time to appeal and enables any winning party to shorten the 180-day period by sending (and establishing proof of receipt of) its own notice of entry of a judgment, as authorized by Fed.R.Civ.P. 77(d). Winning parties are encouraged to send their own notice in order to lessen the chance that a judge will accept a claim of non-receipt in the face of evidence that notices were sent by both the clerk and the winning party. Receipt of a winning party's notice will shorten only the time for reopening the time for appeal under this subdivision, leaving the normal time periods for appeal unaffected.

If the motion is granted, the district court may reopen the time for filing a notice of appeal only for a period of 14 days from the date of entry of the order reopening the time for appeal.

Transmittal Note: Upon transmittal of this rule to Congress, the Advisory Committee recommends that the attention of Congress be called to the fact that language in the fourth paragraph of 28 U.S.C. § 2107 might appropriately be revised in light of this proposed rule.

1993 Amendment

Note to Paragraph (a)(1). The amendment is intended to alert readers to the fact that paragraph (a)(4) extends the time for filing an appeal when certain posttrial motions are filed. The Committee hopes that awareness of the provisions of paragraph (a)(4) will prevent the filing of a notice of appeal when a posttrial tolling motion is pending.

Note to Paragraph (a)(2). The amendment treats a notice of appeal filed after the announcement of a decision or order, but before its formal entry, as if the notice had been filed after entry. The amendment deletes the language that made paragraph (a)(2) inapplicable to a notice of appeal filed after announcement of the disposition of a posttrial motion enumerated in paragraph (a)(4) but before the entry of the order, see *Acosta v. Louisiana Dep't of Health & Human Resources*, 478 U.S. 251 (1986) (per curiam); *Alerte v. McGinnis*, 898 F.2d 69 (7th Cir.1990). Because the amendment of paragraph (a)(4) recognizes all notices of appeal filed after announcement or entry of judgment--even those that are filed while the posttrial motions enumerated in paragraph (a)(4) are pending--the amendment of this paragraph is consistent with the amendment of paragraph (a)(4).

Note to Paragraph (a)(3). The amendment is technical in nature; no substantive change is intended.

Note to Paragraph (a)(4). The 1979 amendment of this paragraph created a trap for an unsuspecting litigant who files a notice of appeal before a posttrial motion, or while a posttrial motion is pending. The 1979 amendment requires a party to file a new notice of appeal after the motion's disposition. Unless a new notice is filed, the court of appeals lacks jurisdiction to hear the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982). Many litigants, especially pro se litigants, fail to file the second notice of appeal, and several courts have expressed dissatisfaction with the rule. See, e.g., *Averhart v. Arrendondo*, 773 F.2d 919 (7th Cir.1985); *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 746 F.2d 278 (5th Cir.1984), cert. denied, 479 U.S. 930 (1986).

The amendment provides that a notice of appeal filed before the disposition of a specified posttrial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.

Because a notice of appeal will ripen into an effective appeal upon disposition of a posttrial motion, in some instances there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. Many such appeals will be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a posttrial motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, the Committee does not believe that an additional notice of appeal is needed.

The amendment provides that a notice of appeal filed before the disposition of a posttrial tolling motion is sufficient to bring the underlying case, as well as any orders specified in the original notice, to the court of appeals. If the judgment is altered upon disposition of a posttrial motion, however, and if a party wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a party files an amended notice, no additional fees are required because the notice is an amendment of the original and not a new notice of appeal.

Paragraph (a)(4) is also amended to include, among motions that extend the time for filing a notice of appeal, a Rule 60 motion that is served within 10 days after entry of judgment. This eliminates the difficulty of determining whether a posttrial motion made within 10 days after entry of a judgment is a Rule 59(e) motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time. The amendment comports with the practice in several circuits of treating all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4). See, e.g., *Finch v. City of Vernon*, 845 F.2d 256 (11th Cir.1988); *Rados v. Celotex Corp.*, 809 F.2d 170 (2d Cir.1986); *Skagerberg v. Oklahoma*, 797 F.2d 881 (10th Cir.1986). To conform to a recent Supreme Court decision, however--*Budinich v. Becton Dickinson and Co.*, 486 U.S. 196 (1988)--the amendment excludes motions for attorney's fees from the class of motions that extend the filing time unless a district court, acting under Rule 58, enters an order extending the time for appeal. This amendment is to be read in conjunction with the amendment of Fed.R.Civ.P. 58.

Note to subdivision (b). The amendment grammatically restructures the portion of this subdivision that lists the types of motions that toll the time for filing an appeal. This restructuring is intended to make the rule easier to read. No substantive change is intended other than to add a motion for judgment of acquittal under Criminal Rule 29 to the list of tolling motions. Such a motion is the equivalent of a Fed.R.Civ.P. 50(b) motion for judgment notwithstanding the verdict, which tolls the running of time for an appeal in a civil case.

The proposed amendment also eliminates an ambiguity from the third sentence of this subdivision. Prior to this amendment, the third sentence provided that if one of the specified motions was filed, the time for filing an appeal would run from the entry of an order denying the motion. That sentence, like the parallel provision in Rule 4(a)(4), was intended to toll the running of time for appeal if one of the posttrial motions is timely filed. In a criminal case, however, the time for filing the motions runs not from entry of judgment (as it does in civil cases), but from the verdict or finding of guilt. Thus, in a criminal case, a posttrial motion may be disposed of more than 10 days before sentence is imposed, i.e. before the entry of judgment. *United States v. Hashagen*, 816 F.2d 899, 902 n. 5 (3d Cir.1987). To make it clear that a notice of appeal need not be filed before entry of judgment, the amendment states that an appeal may be taken within 10 days after the entry of an order disposing of the motion, or within 10 days after the entry of judgment, whichever is later. The amendment also changes the language in the third sentence providing that an appeal may be taken within 10 days after the entry of an order *denying* the motion; the amendment says instead that an appeal may be taken within 10 days after the entry of an order *disposing* of the last such motion outstanding. (Emphasis added) The change recognizes that there may be multiple posttrial motions filed and that, although one or more motions may be granted in whole or in part, a defendant may still wish to pursue an appeal.

The amendment also states that a notice of appeal filed before the disposition of any of the posttrial tolling motions becomes effective upon disposition of the motions. In most circuits this language simply restates the current practice. See *United States v. Cortes*, 895 F.2d 1245 (9th Cir.), cert. denied, 495 U.S. 939 (1990). Two circuits, however, have questioned that practice in light of the language of the rule, see *United States v. Gargano*, 826 F.2d 610 (7th Cir.1987), and *United States v. Jones*, 669 F.2d 559 (8th Cir.1982), and the Committee wishes to clarify the rule. The amendment is consistent with the proposed amendment of Rule 4(a)(4).

Subdivision (b) is further amended in light of new Fed.R.Crim.P. 35(c), which authorizes a sentencing court to correct any arithmetical, technical, or other clear errors in sentencing within 7 days after imposing the sentence. The Committee believes that a sentencing court should be able to act under Criminal Rule 35(c) even if a notice of appeal has already been filed; and that a notice of appeal should not be affected by the filing of a Rule 35(c) motion or by correction of a sentence under Rule 35(c).

Note to subdivision (c). In *Houston v. Lack*, 487 U.S. 266 (1988), the Supreme Court held that a *pro se* prisoner's notice of appeal is "filed" at the moment of delivery to prison authorities for forwarding to the district court. The amendment reflects that decision. The language of the amendment is similar to that in Supreme Court Rule 29.2.

Permitting an inmate to file a notice of appeal by depositing it in an institutional mail system requires adjustment of the rules governing the filing of cross-appeals. In a civil case, the time for filing a cross-appeal ordinarily runs from the date when the first notice of appeal is filed. If an inmate's notice of appeal is filed by depositing it in an institution's mail system, it is possible that the notice of appeal will not arrive in the district court until several days after the "filing" date and perhaps even after the time for filing a cross-appeal has expired. To avoid that problem, subdivision (c) provides that in a civil case when an institutionalized person files a notice of appeal by depositing it in the institution's mail system, the time for filing a cross-appeal runs from the district court's receipt of the notice. The amendment makes a parallel change regarding the time for the government to appeal in a criminal case.

1995 Amendment

Subdivision (a). Fed.R.Civ.P. 50, 52, and 59 were previously inconsistent with respect to whether certain postjudgment motions had to be filed or merely served no later than 10 days after entry of judgment. As a consequence Rule 4(a)(4) spoke of making

or serving such motions rather than filing them. Civil Rules 50, 52, and 59, are being revised to require filing before the end of the 10-day period. As a consequence, this rule is being amended to provide that 'filing' must occur within the 10 day period in order to affect the finality of the judgment and extend the period for filing a notice of appeal.

The Civil Rules require the filing of postjudgment motions 'no later than 10 days after entry of judgment'--rather than 'within' 10 days--to include postjudgment motions that are filed before actual entry of the judgment by the clerk. This rule is amended, therefore, to use the same terminology.

The rule is further amended to clarify the fact that a party who wants to obtain review of an alteration or amendment of a judgment must file a notice of appeal or amend a previously filed notice to indicate intent to appeal from the altered judgment.

1998 Amendments

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; in this rule, however, substantive changes are made in paragraphs (a)(6) and (b)(4), and in subdivision (c).

Subdivision (a), paragraph (1). Although the Advisory Committee does not intend to make any substantive changes in this paragraph, cross-references to Rules 4(a)(1)(B) and (4)(c) have been added to subparagraph (a)(1)(A).

Subdivision (a), paragraph (4). Item (iv) in subparagraph (A) of Rule 4(a)(4) provides that filing a motion for relief under Fed.R.Civ.P. 60 will extend the time for filing a notice of appeal if the Rule 60 motion is filed no later than 10 days after judgment is entered. Again, the Advisory Committee does not intend to make any substantive change in this paragraph. But because Fed.R.Civ.P. 6(a) and Fed.R.App.P. 26(a) have different methods for computing time, one might be uncertain whether the 10-day period referred to in Rule 4(a)(4) is computed using Civil Rule 6(a) or Appellate Rule 26(a). Because the Rule 60 motion is filed in the district court, and because Fed.R.App.P. 1(a)(2) says that when the appellate rules provide for filing a motion in the district court, "the procedure must comply with the practice of the district court," the rule provides that the 10-day period is computed using Fed.R.Civ.P. 6(a)

Subdivision (a), paragraph (6). Paragraph (6) permits a district court to reopen the time for appeal if a party has not received notice of the entry of judgment and no party would be prejudiced by the reopening. Before reopening the time for appeal, the existing rule requires the district court to find that the moving party was entitled to notice of the entry of judgment and did not receive it "from the clerk or any party within 21 days of its entry." The Advisory Committee makes a substantive change. The finding must be that the movant did not receive notice "from the district court or any party within 21 days after entry." This change broadens the type of notice that can preclude reopening the time for appeal. The existing rule provides that only notice from a party or from the clerk bars reopening. The new language precludes reopening if the movant has received notice from "the court."

Subdivision (b). Two substantive changes are made in what will be paragraph (b)(4). The current rule permits an extension of time to file a notice of appeal if there is a "showing of excusable neglect." First, the rule is amended to permit a court to extend the time for "good cause" as well as for excusable neglect. Rule 4(a) permits extensions for both reasons in civil cases and the Advisory Committee believes that "good cause" should be sufficient in criminal cases as well. The amendment does not limit extensions for good cause to instances in which the motion for extension of time is filed before the original time has expired. The rule gives the district court discretion to grant extensions for good cause whenever the court believes it appropriate to do so provided that the extended period does not exceed 30 days after the expiration of the time otherwise prescribed by Rule 4(b). Second, paragraph (b)(4) is amended to require only a "finding" of excusable neglect or good cause and not a "showing" of them. Because the rule authorizes the court to provide an extension without a motion, a "showing" is obviously not required; a "finding" is sufficient.

Subdivision (c). Substantive amendments are made in this subdivision. The current rule provides that if an inmate confined in an institution files a notice of appeal by depositing it in the institution's internal mail system, the notice is timely filed if deposited on or before the last day for filing. Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee amends the rule to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subdivision.

When an inmate uses the filing method authorized by subdivision (c), the current rule provides that the time for other parties to appeal begins to run from the date the district court "receives" the inmate's notice of appeal. The rule is amended so that the time for other parties begins to run when the district court "dockets" the inmates appeal. A court may "receive" a paper when its mail is delivered to it even if the mail is not processed for a day or two, making the date of receipt uncertain. "Docketing" is an easily identified event. The change eliminates uncertainty. Paragraph (c)(3) is further amended to make it clear that the time for the government to file its appeal runs from the later of the entry of the judgment or order appealed from or the district court's docketing of a defendant's notice filed under this paragraph (c).

2002 Amendments

Subdivision (a)(1)(C). The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). *Compare United States v. Craig*, 907 F.2d 653, 655-57, *amended* 919 F.2d 57 (7th Cir. 1990); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); *with Yasui v. United States*, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970) (applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2255, the Supreme Court has recognized the continued availability of a writ of error *coram nobis* in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error *coram nobis* to set aside the conviction. *United States v. Morgan*, 346 U.S. 502 (1954). As the Court recognized, in the *Morgan* situation an application for a writ of error *coram nobis* "is of the same general character as [a motion] under 28 U.S.C. § 2255." *Id.* at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. § 2255, should also apply when a district court grants or denies a writ of error *coram nobis*. In addition, the strong public interest in the speedy resolution of criminal appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the *Morgan* situation, as the party seeking the writ of error *coram nobis* has already served his or her full sentence.

Notwithstanding *Morgan*, it is not clear whether the Supreme Court continues to believe that the writ of error *coram nobis* is available in federal court. In civil cases, the writ has been expressly abolished by Fed. R. Civ. P. 60(b). In criminal cases, the Supreme Court has recently stated that it has become " 'difficult to conceive of a situation' " in which the writ " 'would be necessary or appropriate.' " *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)). The amendment to Rule 4(a)(1) is not intended to express any view on this issue; rather, it is merely meant to specify time limitations for appeals.

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error *coram nobis*. Litigants may bring and label as applications for a writ of error *coram nobis* what are in reality motions for a new trial under Fed. R. Crim. P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

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

Subdivision (a)(4)(A)(vi). Rule 4(a)(4)(A)(vi) has been amended to remove a parenthetical that directed that the 10-day deadline be "computed using Federal Rule of Civil Procedure 6(a)." That parenthetical has become superfluous because Rule 26(a)(2) has been amended to require that all deadlines under 11 days be calculated as they are under Fed. R. Civ. P. 6(a).

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

Subdivision (a)(5)(A)(ii). Rule 4(a)(5)(A) permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause. The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during the 30 days after the original deadline expires, the district court may grant an extension if a party shows either excusable neglect or good cause.

Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought during the 30 days following the expiration of the original deadline. *See Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir. 1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Advisory Committee Note to the 1979 amendment to Rule 4(a)(5). But the Advisory Committee Note refers to a draft of the 1979 amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 148-49 (2d ed. 1996).

The failure of the courts of appeals to apply Rule 4(a)(5)(A) as written has also created tension between that rule and Rule 4(b)(4). As amended in 1998, Rule 4(b)(4) permits the district court to extend the time for filing a notice of appeal in a *criminal* case for an additional 30 days upon a finding of excusable neglect or good cause. Both Rule 4(b)(4) and the Advisory Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or during the 30 days following the expiration of the original deadline.

Rule 4(a)(5)(A)(ii) has been amended to correct this misunderstanding and to bring the rule in harmony in this respect with Rule 4(b)(4). A motion for an extension filed prior to the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause. Likewise, a motion for an extension filed during the 30 days following the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause.

The good cause and excusable neglect standards have "different domains." *Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 232 (7th Cir. 1990). They are not interchangeable, and one is not inclusive of the other. The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations in which there is no fault--excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant.

Thus, the good cause standard can apply to motions brought during the 30 days following the expiration of the original deadline. If, for example, the Postal Service fails to deliver a notice of appeal, a movant might have good cause to seek a post-expiration extension. It may be unfair to make such a movant prove that its "neglect" was excusable, given that the movant may not have been neglectful at all. Similarly, the excusable neglect standard can apply to motions brought prior to the expiration of the

original deadline. For example, a movant may bring a pre-expiration motion for an extension of time when an error committed by the movant makes it unlikely that the movant will be able to meet the original deadline.

Changes Made After Publication and Comments No changes were made to the text of the proposed amendment. The stylistic changes to the Committee Note suggested by Judge Newman were adopted. In addition, two paragraphs were added at the end of the Committee Note to clarify the difference between the good cause and excusable neglect standards.

Subdivision (a)(7). Several circuit splits have arisen out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacts with the requirement in Fed. R. Civ. P. 58 that, to be "effective," a judgment must be set forth on a separate document. Rule 4(a)(7) and Fed. R. Civ. P. 58 have been amended to resolve those splits.

1. The first circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the extent to which orders that dispose of post-judgment motions must be set forth on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the "entry" of the order disposing of the last such remaining motion. Courts have disagreed about whether such an order must be set forth on a separate document before it is treated as "entered." This disagreement reflects a broader dispute among courts about whether Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by the Federal Rules of Civil Procedure ("FRCP")) or whether Rule 4(a)(7) instead incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former "camp" disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter "camp" disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

Rule 4(a)(7) has been amended to make clear that it simply incorporates the separate document requirement as it exists in Fed. R. Civ. P. 58. If Fed. R. Civ. P. 58 does not require that a judgment or order be set forth on a separate document, then neither does Rule 4(a)(7); the judgment or order will be deemed entered for purposes of Rule 4(a) when it is entered in the civil docket. If Fed. R. Civ. P. 58 requires that a judgment or order be set forth on a separate document, then so does Rule 4(a)(7); the judgment or order will not be deemed entered for purposes of Rule 4(a) until it is so set forth and entered in the civil docket (with one important exception, described below).

In conjunction with the amendment to Rule 4(a)(7), Fed. R. Civ. P. 58 has been amended to provide that orders disposing of the postjudgment motions listed in new Fed. R. Civ. P. 58(a)(1) (which postjudgment motions include, but are not limited to, the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A)) do not have to be set forth on separate documents. *See* Fed. R. Civ. P. 58(a)(1). Thus, such orders are entered for purposes of Rule 4(a) when they are entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). *See* Rule 4(a)(7)(A)(1).

2. The second circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the following question: When a judgment or order is required to be set forth on a separate document under Fed. R. Civ. P. 58 but is not, does the time to appeal the judgment or order--or the time to bring post-judgment motions, such as a motion for a new trial under Fed. R. Civ. P. 59--ever begin to run? According to every circuit except the First Circuit, the answer is "no." The First Circuit alone holds that parties will be deemed to have waived their right to have a judgment or order entered on a separate document three months after the judgment or order is entered in the civil docket. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 236 (1st Cir. 1992) (en banc). Other circuits have rejected this cap as contrary to the relevant rules. *See, e.g., United States v. Haynes*, 158 F.3d 1327, 1331 (D.C. Cir. 1998); *Hammack v. Baroid Corp.*, 142 F.3d 266, 269-70 (5th Cir. 1998); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds*, 143 F.3d 263 (6th Cir. 1998) (en banc). However, no court has questioned the wisdom of imposing such a cap as a matter of policy.

Both Rule 4(a)(7)(A) and Fed. R. Civ. P. 58 have been amended to impose such a cap. Under the amendments, a judgment or order is generally treated as entered when it is entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). There is one exception: When Fed. R. Civ. P. 58(a)(1) requires the judgment or order to be set forth on a separate document, that judgment

or order is not treated as entered until it is set forth on a separate document (in addition to being entered in the civil docket) or until the expiration of 150 days after its entry in the civil docket, whichever occurs first. This cap will ensure that parties will not be given forever to appeal (or to bring a postjudgment motion) when a court fails to set forth a judgment or order on a separate document in violation of Fed. R. Civ. P. 58(a)(1).

3. The third circuit split--this split addressed only by the amendment to Rule 4(a)(7)--concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the ... order ... represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been set forth on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Thus, the parties can choose to appeal without waiting for the order to be set forth on a separate document.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request that judgment be set forth on a separate document, and appeal a second time. *See, e.g., Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir. 1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g., Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994).

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive the requirement that the judgment or order be set forth on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without waiting for the judgment or order to be set forth on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay.

4. The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to set forth the judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). The Fifth Circuit stressed that the plaintiff could return to the district court, move that the judgment be set forth on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g., Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994) (per curiam); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been set forth on a separate document but was not. *See, e.g., Haynes*, 158 F.3d at 1330-31; *Clough v. Rush*, 959 F.2d 182, 186 (10th Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990). In the view of these courts, the remand in *Townsend* was "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

The Committee agrees with the majority of courts that have rejected the *Townsend* approach. In drafting new Rule 4(a)(7)(B), the Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of *Townsend*.

Changes Made After Publication and Comments No changes were made to the text of proposed Rule 4(a)(7)(B) or to the third or fourth numbered sections of the Committee Note, except that, in several places, references to a judgment being "entered" on a separate document were changed to references to a judgment being "set forth" on a separate document. This was to maintain stylistic consistency. The appellate rules and the civil rules consistently refer to "entering" judgments on the civil docket and to "setting forth" judgments on separate documents.

Two major changes were made to the text of proposed Rule 4(a)(7)(A)--one substantive and one stylistic. The substantive change was to increase the "cap" from 60 days to 150 days. The Appellate Rules Committee and the Civil Rules Committee had to balance two concerns that are implicated whenever a court fails to enter its final decision on a separate document. On the one hand, potential appellants need a clear signal that the time to appeal has begun to run, so that they do not unknowingly forfeit their rights. On the other hand, the time to appeal cannot be allowed to run forever. A party who receives no notice whatsoever of a judgment has only 180 days to move to reopen the time to appeal from that judgment. *See* Rule 4(a)(6)(A). It hardly seems fair to give a party who *does* receive notice of a judgment an unlimited amount of time to appeal, merely because that judgment was not set forth on a separate piece of paper. Potential appellees and the judicial system need *some* limit on the time within which appeals can be brought.

The 150-day cap properly balances these two concerns. When an order is not set forth on a separate document, what signals litigants that the order is final and appealable is a lack of further activity from the court. A 60-day period of inactivity is not sufficiently rare to signal to litigants that the court has entered its last order. By contrast, 150 days of inactivity is much less common and thus more clearly signals to litigants that the court is done with their case.

The major stylistic change to Rule 4(a)(7) requires some explanation. In the published draft, proposed Rule 4(a)(7)(A) provided that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered for purposes of Rule 58(b) of the Federal Rules of Civil Procedure." In other words, Rule 4(a)(7)(A) told readers to look to FRCP 58(b) to ascertain when a judgment is entered for purposes of starting the running of the time to appeal. Sending appellate lawyers to the civil rules to discover when time began to run for purposes of the appellate rules was itself somewhat awkward, but it was made more confusing by the fact that, when readers went to proposed FRCP 58(b), they found this introductory clause: "Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62 when.... "

This introductory clause was confusing for both appellate lawyers and trial lawyers. It was confusing for appellate lawyers because Rule 4(a)(7) informed them that FRCP 58(b) would tell them when the time begins to run for purposes of the *appellate* rules, but when they got to FRCP 58(b) they found a rule that, by its terms, dictated only when the time begins to run for purposes of certain *civil* rules. The introductory clause was confusing for trial lawyers because FRCP 58(b) described when judgment is entered for some purposes under the civil rules, but then was completely silent about when judgment is entered for other purposes.

To avoid this confusion, the Civil Rules Committee, on the recommendation of the Appellate Rules Committee, changed the introductory clause in FRCP 58(b) to read simply: "Judgment is entered for purposes of *these Rules* when.... " In addition, Rule 4(a)(7)(A) was redrafted [1] so that the triggering events for the running of the time to appeal (entry in the civil docket, and being set forth on a separate document or passage of 150 days) were incorporated directly into Rule 4(a)(7), rather than indirectly through a reference to FRCP 58(b). This eliminates the need for appellate lawyers to examine Rule 58(b) and any chance that Rule 58(b)'s introductory clause (even as modified) might confuse them.

We do not believe that republication of Rule 4(a)(7) or FRCP 58 is necessary. In *substance*, rewritten Rule 4(a)(7)(A) and FRCP 58(b) operate identically to the published versions, except that the 60-day cap has been replaced with a 150-day cap--a change that was suggested by some of the commentators and that makes the cap more forgiving.

Subdivision (b)(5). Federal Rule of Criminal Procedure 35(a) permits a district court, acting within 7 days after the imposition of sentence, to correct an erroneous sentence in a criminal case. Some courts have held that the filing of a motion for correction of

a sentence suspends the time for filing a notice of appeal from the judgment of conviction. *See, e.g.*, *United States v. Carmouche*, 138 F.3d 1014, 1016 (5th Cir. 1998) (per curiam); *United States v. Morillo*, 8 F.3d 864, 869 (1st Cir. 1993). Those courts establish conflicting timetables for appealing a judgment of conviction after the filing of a motion to correct a sentence. In the First Circuit, the time to appeal is suspended only for the period provided by Fed. R. Crim. P. 35(a) for the district court to correct a sentence; the time to appeal begins to run again once 7 days have passed after sentencing, even if the motion is still pending. By contrast, in the Fifth Circuit, the time to appeal does not begin to run again until the district court actually issues an order disposing of the motion.

Rule 4(b)(5) has been amended to eliminate the inconsistency concerning the effect of a motion to correct a sentence on the time for filing a notice of appeal. The amended rule makes clear that the time to appeal continues to run, even if a motion to correct a sentence is filed. The amendment is consistent with Rule 4(b)(3)(A), which lists the motions that toll the time to appeal, and notably omits any mention of a Fed. R. Crim. P. 35(a) motion. The amendment also should promote certainty and minimize the likelihood of confusion concerning the time to appeal a judgment of conviction.

If a district court corrects a sentence pursuant to Fed. R. Crim. P. 35(a), the time for filing a notice of appeal of the corrected sentence under Rule 4(b)(1) would begin to run when the court enters a new judgment reflecting the corrected sentence.

Changes Made After Publication and Comments The reference to Federal Rule of Criminal Procedure 35(c) was changed to Rule 35(a) to reflect the pending amendment of Rule 35. The proposed amendment to Criminal Rule 35, if approved, will take effect at the same time that the proposed amendment to Appellate Rule 4 will take effect, if approved.

2005 Amendments

Rule 4(a)(6) has permitted a district court to reopen the time to appeal a judgment or order upon finding that four conditions were satisfied. First, the district court had to find that the appellant did not receive notice of the entry of the judgment or order from the district court or any party within 21 days after the judgment or order was entered. Second, the district court had to find that the appellant moved to reopen the time to appeal within 7 days after the appellant received notice of the entry of the judgment or order. Third, the district court had to find that the appellant moved to reopen the time to appeal within 180 days after the judgment or order was entered. Finally, the district court had to find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to specify more clearly what type of "notice" of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal. In addition, Rule 4(a)(6) has been amended to address confusion about what type of "notice" triggers the 7-day period to bring a motion to reopen. Finally, Rule 4(a)(6) has been reorganized to set forth more logically the conditions that must be met before a district court may reopen the time to appeal.

Subdivision (a)(6)(A). Former subdivision (a)(6)(B) has been redesignated as subdivision (a)(6)(A), and one substantive change has been made. As amended, the subdivision will preclude a party from moving to reopen the time to appeal a judgment or order only if the party receives (within 21 days) formal notice of the entry of that judgment or order under Civil Rule 77(d). No other type of notice will preclude a party.

The reasons for this change take some explanation. Prior to 1998, former subdivision (a)(6)(B) permitted a district court to reopen the time to appeal if it found "that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry." The rule was clear that the "notice" to which it referred was the notice required under Civil Rule 77(d), which must be served by the clerk pursuant to Civil Rule 5(b) and may also be served by a party pursuant to that same rule. In other words, prior to 1998, former subdivision (a)(6)(B) was clear that, if a party did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d), that party could later move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive "*such* notice"--that is, the notice required by Civil Rule 77(d)--but instead referred to the failure of the moving party to receive "*the* notice." And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the *clerk* or any party," both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from "the *district court* or any party."

The 1998 amendment meant, then, that the type of notice that precluded a party from moving to reopen the time to appeal was no longer limited to Civil Rule 77(d) notice. Under the 1998 amendment, *some* type of notice, in addition to Civil Rule 77(d) notice, precluded a party. But the text of the amended rule did not make clear what type of notice qualified. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, former subdivision (a)(6)(B)--new subdivision (a)(6)(A)--has been amended to restore its pre-1998 simplicity. Under new subdivision (a)(6)(A), if the court finds that the moving party was not notified under Civil Rule 77(d) of the entry of the judgment or order that the party seeks to appeal within 21 days after that judgment or order was entered, then the court is authorized to reopen the time to appeal (if all of the other requirements of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice of the entry of a judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A).

Subdivision (a)(6)(B). Former subdivision (a)(6)(A) required a party to move to reopen the time to appeal "within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed]." Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made: The subdivision now makes clear that only formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period to move to reopen the time to appeal.

The circuits have been split over what type of "notice" is sufficient to trigger the 7-day period. The majority of circuits that addressed the question held that only *written* notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g., Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included oral notice that was not "the functional equivalent of written notice." *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 304-05 (2d Cir. 1999)).

Former subdivision (a)(6)(A)--new subdivision (a)(6)(B)--has been amended to resolve this circuit split by providing that only formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period. Using Civil Rule 77(d) notice as the trigger has two advantages: First, because Civil Rule 77(d) is clear and familiar, circuit splits are unlikely to develop over its meaning. Second, because Civil Rule 77(d) notice must be served under Civil Rule 5(b), establishing whether and when such notice was provided should generally not be difficult.

Using Civil Rule 77(d) notice to trigger the 7-day period will not unduly delay appellate proceedings. Rule 4(a)(6) applies to only a small number of cases--cases in which a party was not notified of a judgment or order by either the clerk or another party within 21 days after entry. Even with respect to those cases, an appeal cannot be brought more than 180 days after entry, no matter what the circumstances. In addition, Civil Rule 77(d) permits parties to serve notice of the entry of a judgment or

order. The winning party can prevent Rule 4(a)(6) from even coming into play simply by serving notice of entry within 21 days. Failing that, the winning party can always trigger the 7-day deadline to move to reopen by serving belated notice.

2009 Amendments

Subdivision (a)(4)(A)(vi). Subdivision (a)(4) provides that certain timely post-trial motions extend the time for filing an appeal. Lawyers sometimes move under Civil Rule 60 for relief that is still available under another rule such as Civil Rule 59. Subdivision (a)(4)(A)(vi) provides for such eventualities by extending the time for filing an appeal so long as the Rule 60 motion is filed within a limited time. Formerly, the time limit under subdivision (a)(4)(A)(vi) was 10 days, reflecting the 10-day limits for making motions under Civil Rules 50(b), 52(b), and 59. Subdivision (a)(4)(A)(vi) now contains a 28-day limit to match the revisions to the time limits in the Civil Rules.

Subdivision (a)(4)(B)(ii). Subdivision (a)(4)(B)(ii) is amended to address problems that stemmed from the adoption--during the 1998 restyling project--of language referring to "a judgment altered or amended upon" a post-trial motion.

Prior to the restyling, subdivision (a)(4) instructed that "[a]ppellate review of an order disposing of any of [the post-trial motions listed in subdivision (a)(4)] requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding." After the restyling, subdivision (a)(4)(B)(ii) provided: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion."

One court has explained that the 1998 amendment introduced ambiguity into the Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). The current amendment removes that ambiguous reference to "a judgment altered or amended upon" a post-trial motion, and refers instead to "a judgment's alteration or amendment" upon such a motion. Thus, subdivision (a)(4)(B)(ii) requires a new or amended notice of appeal when an appellant wishes to challenge an order disposing of a motion listed in Rule 4(a)(4)(A) or a judgment's alteration or amendment upon such a motion.

Subdivision (a)(5)(C). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

Subdivision (a)(6)(B). The time set in the former rule at 7 days has been revised to 14 days. Under the time-computation approach set by former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 14 days offsets the change in computation approach. See the Note to Rule 26.

Subdivisions (b)(1)(A) and (b)(3)(A). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

2010 Amendments

Subdivision (a)(7). Subdivision (a)(7) is amended to reflect the renumbering of Civil Rule 58 as part of the 2007 restyling of the Civil Rules. References to Civil Rule "58(a)(1)" are revised to refer to Civil Rule "58(a)." No substantive change is intended.

2011 Amendments

Subdivision (a)(1)(B). Rule 4(a)(1)(B) has been amended to make clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.)

The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3), which specified an extended 60-day period to respond to complaints when "[a] United States officer or employee [is] sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." The Committee Note to the 2000 amendment explained: "Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." The same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal.

However, because of the greater need for clarity of application when appeal rights are at stake, the amendment to Rule 4(a)(1)(B), and the corresponding legislative amendment to 28 U.S.C. § 2107 that is simultaneously proposed, include safe harbor provisions that parties can readily apply and rely upon. Under new subdivision 4(a)(1)(B)(iv), a case automatically qualifies for the 60-day appeal period if (1) a legal officer of the United States has appeared in the case, in an official capacity, as counsel for the current or former officer or employee and has not withdrawn the appearance at the time of the entry of the judgment or order appealed from or (2) a legal officer of the United States appears on the notice of appeal as counsel, in an official capacity, for the current or former officer or employee. There will be cases that do not fall within either safe harbor but that qualify for the longer appeal period. An example would be a case in which a federal employee is sued in an individual capacity for an act occurring in connection with federal duties and the United States does not represent the employee either when the judgment is entered or when the appeal is filed but the United States pays for private counsel for the employee.

Notes of Decisions (1908)

Footnotes

1 A redraft of Rule 4(a)(7) was faxed to members of the Appellate Rules Committee two weeks after our meeting in New Orleans. The Committee consented to the redraft without objection.

F. R. A. P. Rule 4, 28 U.S.C.A., FRAP Rule 4

Amendments received to 2-19-13

End of Document

Chuck Emerald, Plaintiff,
v.
Ronald Radah, Defendant.

Plaintiff's Proposed Jury Charges

Plaintiff Chuck Emerald, by his attorney Steven Ingrassia, submits the following proposed jury charges in connection with the trial of this action. Plaintiff expressly reserves his rights to amend and/or supplement these proposed charges.

Dated: New York, New York March 21, 2013

Respectfully submitted,

Steven Ingrassia

Attorney for Plaintiff

I. PROPOSED CHARGES TO BE GIVEN PRIOR TO THE PRESENTATION OF EVIDENCE

Parties

(New York Pattern Jury Instruction 1:2)

The party who brings a lawsuit is called the plaintiff. In this action the plaintiff is Chuck Emerald and he is suing to recover damages that he allegedly sustained in connection with the sale of his partnership interest in an entity known as "Green Chip LLC." The party against whom the suit is brought is called the defendant. In this action the defendant is Ronald Radah.

Openings and Evidence

(New York Pattern Jury Instruction 1:3)

When I have completed these opening instructions to you, the attorneys will make opening statements to you in which each will outline for you what he or she expects to prove. The purpose of such opening statements is to tell you about each party's claims so that you will have a better understanding of the evidence as it is introduced. What is said in such opening statements is not evidence. The evidence upon which you will base your decision will come from the testimony of witnesses here in court or in examinations before trial, or in the form of photographs, documents, or other exhibits introduced as evidence. Plaintiff makes an opening statement first, followed by defendant. After the opening statements, plaintiff will introduce evidence in support of his claim. Normally a plaintiff must produce all of his witnesses and complete his entire case before defendant introduces any evidence, although exceptions are sometimes made to that rule in order to accommodate a witness. After plaintiff has completed the introduction of all of his evidence, defendant may present witnesses and exhibits. If they do so, plaintiff may be permitted to offer additional evidence for the purpose of rebutting defendant's evidence. Each witness is first examined by the party who calls that witness to testify, and then the opposing party is permitted to question the witness.

Objections, Motion, Exceptions

(New York Pattern Jury Instruction 1:4)

At times during the trial, an attorney may object to a question or to the introduction of an exhibit or make motions concerning legal questions that apply to this case. Arguments in connection with such objections or motions are

sometimes made out of the presence of the jury. Any ruling upon such objections or motions will be based solely upon the law and therefore you must not conclude from any such ruling or from anything I say during the course of the trial that I favor any party to this lawsuit. After such a ruling, you may hear one of the attorneys taking what we call an exception to it. Exceptions have nothing to do with your role in this case and I mention the procedure to you so that you will not be confused if you hear the word during the trial.

Summations

(New York Pattern Jury Instruction 1:5)

Upon completion of the introduction of evidence, the attorneys will again speak to you in a closing statement or summation. In summing up, the lawyers will point out what they believe the evidence has shown, what inferences or conclusions they believe you should draw from the evidence and what conclusions they believe you should reach as your verdict. What is said by the attorneys in summation, like what is said by them in their opening statements, or in the making of objections or motions during the trial, is not evidence. Summations are intended to present the arguments of the parties based on the evidence.

Function of Court and Jury

(New York Pattern Jury Instruction 1:6)

After the summations, I will instruct you on the rules of law applicable to the case and you will then retire for your deliberations. Your function as jurors is to decide what has or has not been proved and apply the rules of law that I give you to the facts as you find them to be. The decision you reach will be your verdict. Your decision will be based on the testimony that you hear and the exhibits that will be received in evidence during the trial. You are the sole and exclusives judges of the facts and nothing I say or do should be taken by you as any indication of my opinion as to the facts. As to the facts, neither I nor anyone else may invade your province. I will preside impartially and not express any opinion concerning the facts. Any opinions of mine on the facts would, in any event, be totally irrelevant because the facts are for you to decide. On the other hand, and with equal emphasis, I instruct you that in accordance with the oath you took as jurors you are required to accept the rules of law that I give you whether you agree with them or not. You are not to ask anyone else about the law. *[If a lawyer or judge is a member of the jury, the following should be added:* including the lawyer or judge serving as a juror.]

You should not consider or accept any advice about the law from anyone else but me.

Consider Only Competent Evidence

(New York Pattern Jury Instruction 1:7)

As the sole judges of the facts, you must decide which of the witnesses you believe, what portion of their testimony you accept and what weight you give to it. At times during the trial I may sustain objections to questions and you may hear no answer, or, where an answer has been made, I may instruct that it be stricken or removed from the record and that you disregard it and dismiss it from your minds. You may not draw any inference or conclusion from an unanswered question nor may you consider testimony which has been stricken or removed from the record in reaching your decision. The law requires that your decision be made solely upon the evidence before you. Such items as I exclude them from your consideration will be excluded because they are not legally admissible.

Weighing Testimony

(New York Pattern Jury Instruction 1:8)

The law does not, however, require you to accept all of the evidence I shall admit. In deciding what evidence you will accept you must make your own evaluation of the testimony given by each of the witnesses, and decide how much weight you choose to give to that testimony. The testimony of a witness may not conform to the facts as they occurred because he or she is intentionally lying, because the witness did not accurately see or hear what he or she is testifying about, because the witness's recollection is faulty, or because the witness has not expressed himself or herself clearly in testifying. There is no magical formula by which you evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you decide for yourselves the reliability or unreliability of things people tell you. The same tests that you use in your everyday dealings are the tests that you apply in your deliberations. The interest or lack of interest of any witness in the outcome of this case, the bias or prejudice of a witness, if there be any, the appearance, the manner in which the witness gives testimony on the stand, the opportunity that the witness had to observe the facts about which he or she testifies, the probability or improbability of the witness' testimony when considered in light of all the other evidence in the case, are all items to be considered by you in deciding how much weight, if any, you will give to that witness' testimony. If it appears that there is a discrepancy in the evidence, you will have to consider whether the apparent discrepancy can be reconciled by fitting the two stories together. If, however, that is not possible, you will then have to decide which of the conflicting stories you will accept.

Conduct During Recess

(New York Pattern Jury Instruction 1:9)

The purpose of the rules I have outlined for you is to make sure that a just result is reached when you decide the case. For the same purpose, you should keep in mind several rules governing your own conduct during any recess.

Discussion With Others – Independent Research

(New York Pattern Jury Instruction 1:11)

In fairness to the parties to this lawsuit, it is very important that you keep an open mind throughout the trial. Then, after you have heard both sides fully, you will reach your verdict only on the evidence as it is presented to you in this courtroom, and only in this courtroom, and then only after you have heard the summations of each of the attorneys and my instructions to you on the law. You will then have an opportunity to exchange views with each member of the jury during your deliberations to reach your verdict.

Please do not discuss this case either among yourselves or with anyone else during the course of the trial. Do not do any independent research on any topic you might hear about in the testimony or see in the exhibits, whether by consulting others, reading newspapers, books or magazines, or conducting an internet search of any kind. All electronic devices, including any cell phones, Blackberries, iPhones, iPads, laptops, or any other personal electronic devices must be turned off while you are in the courtroom and while you are deliberating after I have given you the law applicable to this case. *[In the event that the court requires the jurors to relinquish their devices, the charge should be modified to reflect the court's practice].*

It is important to remember that you may not use any internet services, such as Google, Facebook, Twitter or any others to individually or collectively research topics concerning the trial, which includes the law, information about any of the issues in contention, the parties, the lawyers or the court. After you have rendered your verdict and have been discharged, you will be free to do any research you choose, or to share your experiences, either directly, or through your favorite electronic means.

For now, be careful to remember these rules whenever you use a computer or other personal electronic device during the time you are serving as a juror but you are not in the courtroom.

While this instruction may seem unduly restrictive, it is vital that you carefully follow these directions. The reason is simple. The law requires that you consider only the testimony and evidence you hear and see in this courtroom. Not only does our law mandate it, but the parties depend on you to fairly and impartially consider only the admitted evidence. To do otherwise, by allowing outside information to affect your judgment, is unfair and prejudicial to the parties and could lead to this case's having to be retried.

Accordingly, I expect that you will seriously and faithfully abide by this instruction.

Discussion by Others

(New York Pattern Jury Instruction 1:12)

Please do not permit any person who is not a juror to discuss this case in your presence, and if anyone does so despite you telling the person not to, report that to me as soon as you are able. You should not, however, discuss with your fellow jurors either that fact or any other fact you feel necessary to bring to my attention.

Conversation With Parties or Attorneys

(New York Pattern Jury Instruction 1:13)

Although it is normal human tendency to talk to people with whom one comes in contact, please do not, during the time you serve on this jury, talk, whether in or out of the courtroom, with any of the parties or their attorneys or any witness. By this I mean not only do not talk about the case, but do not talk to them at all, even to pass the time of day. In no other way can all parties be assured of the absolute impartiality they are entitled to expect from you as jurors.

Alternate Jurors

(New York Pattern Jury Instruction 1:13 A)

Under the law only six jurors will deliberate on this case when it is submitted for consideration.

We have selected additional jurors. Alternate jurors are selected to serve because a regular juror may be prevented from continuing to serve by some emergency such as a serious illness or death. Although this seldom happens during a trial, there are cases where we do call on the service of alternates. Alternates are required to pay the same careful attention to the trial as the regular jurors, so that if needed they will be fully familiar with the case.

The fact that there are alternate jurors does not mean that any regular juror is free to excuse himself or herself from the case. As a duly chosen juror it is your obligation to be available throughout the trial.

Conclusion

(New York Pattern Jury Instruction 1:14)

The description of trial procedure, the rules governing your conduct and the legal principles I have discussed with you will, I believe, make it easier for you to understand the trial as it goes on and to reach a just result at its conclusion.

II. PROPOSED CHARGES TO BE GIVEN AFTER THE PRESENTATION OF EVIDENCE

Introduction

(New York Pattern Jury Instruction 1:20)

Members of the jury, we come now to that portion of the trial when you are instructed on the law applicable to the case and after which you will retire for your final deliberations. You have now heard all the evidence introduced by the parties and through arguments of their attorneys you have learned the conclusions which each party believes should be drawn from the evidence presented to you.

Review Principles Stated

(New York Pattern Jury Instruction 1:21)

You will recall that at the beginning of the trial I stated for you certain principles so that you could have them in mind as the trial progressed. Briefly, they were that you are bound to accept the law as I give it to you, whether or not you agree with it. You are not to ask anyone else about the law. [*If a lawyer or judge is a member of the jury, the following should be added:* including the lawyer or judge serving as a juror.] You should not consider or accept any advice about the law from anyone else but me. Furthermore, you must not conclude from my rulings or anything I have said during the trial that I favor any party to this lawsuit. Furthermore, you may not draw any inference from an unanswered question nor consider testimony which has been stricken from the record in reaching your decision. Finally, in deciding how much weight you choose to give to the testimony of any particular witness, there is no magical formula which can be used. The tests used in your everyday affairs to decide the reliability or unreliability of statements made to you by others are the tests you will apply in your deliberations. The items to be taken into consideration in determining the weight you will give to the testimony of a witness include the interest or lack of interest of the witness in the outcome of the case, the bias or prejudice of the witness, if there be any, the age, the appearance, the manner of the witness as the witness testified, the opportunity the witness had to observe the facts about which he or she testified, the probability or improbability of the witness' testimony when considered in the light of all the other evidence in the case.

Falsus in Uno

(New York Pattern Jury Instruction 1:22)

If you find that any witness has willfully testified falsely as to any material fact, that is as to an important matter, the law permits you to disregard completely the entire testimony of that witness upon the principle that one who testifies falsely about one material fact is likely to testify falsely about everything. You are not required, however, to consider such a witness as totally "unbelievable." You may accept so much of his or her testimony as you deem true and disregard what you feel is false. By the processes which I have just described to you, you, as the sole judges of the facts, decide which of the witnesses you will believe, what portion of their testimony you accept and what weight you will give it.

Burden of Proof – Clear and Convincing Evidence

(New York Pattern Jury Instruction 1:64)

The burden is on the plaintiff to prove his breach of fiduciary duty and fraud claims by clear and convincing evidence.[FN1] This means evidence that satisfies you that there is a high degree of probability that there was a breach of fiduciary duty or fraud as I will define it for you.

FN1. *City of New York v. Tavern on the Green, L.P.*, 427 B.R. 233, 242 (Bankr. S.D.N.Y. 2010) (standard of proof for fraud is clear and convincing evidence); *AIG Global Sec. Lending Corp. v. Banc of Am. Sec. LLC*, 646 F. Supp. 2d 385, 389 (S.D.N.Y. 2009) (quoting *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966,

970 (2d Cir. 1987) (same); *Vermeer Owners, Inc. v. Guterman*, 78 N.Y.2d 1114, 1116, 578 N.Y.S.2d 128, 129-30 (1991) (same).

To decide for the plaintiff it is not enough to find that the preponderance of the evidence is in the plaintiffs favor. A party who must prove his case by a preponderance of the evidence only need satisfy you that the evidence supporting his case more nearly represents what actually happened than the evidence which is opposed to it. But a party who must establish his case by clear and convincing evidence must satisfy you that the evidence makes it highly probable that what he claims is what actually happened.

If, upon all the evidence, you are satisfied that there is a high probability that there was (e.g., fraud, malice, mistake, a gift, a contract between the plaintiff and the deceased, incompetency, addition) as I (have defined, will define) it for you, you must decide for the plaintiff. If you are not satisfied that there is such a high probability, you must decide for the plaintiff.

Breach of Fiduciary Duty

(Adapted from New York Pattern Jury Instruction 3:59)

Plaintiff Chuck Emerald claims that defendant Ronald Radah breached his fiduciary duty to Emerald.

Chuck Emerald was Radah's partner in the partnership and a partner has a duty to his or her partner to act in good faith and in the partner's best interest during the period of the partnership. A fiduciary owes his or her partner an undivided and unqualified loyalty and may not act in any manner contrary to the interest of the partner. A person acting in a fiduciary capacity is required to make truthful and complete disclosures to those to whom a fiduciary duty is owed and the fiduciary may not obtain an improper advantage at the other's expense.

Chuck Emerald claims that Radah did not act in good faith or in his best interests:
a. by failing to disclose the $100 million offer from Greener;
b. by concealing the true nature and value of the business;

Chuck Emerald claims that as a result of these breaches, he sustained damages in the amount of $30 million.

If you find that Radah did not owe a fiduciary duty to Emerald with respect to any of the listed items, you need proceed no further as to that defendant with respect to that item.

If you find that Radah did breach his fiduciary duty to Emerald, you must then decide whether that breach was the proximate cause of damages allegedly sustained by Emerald. The standard for determining proximate cause is known as the "but for" standard.[FN3] This means that before you can find that a breach was the proximate cause of Emerald's alleged damage, you must find that "but for" the breach Emerald would not have acted as he did. In this case, that means that "but for" the breach Emerald would not have sold his Partnership interest for $20 million. In determining whether a breach was the "but for" cause of damages, you may take into consideration Emerald's level of sophistication as a business man, the nature of his relationship with defendant, as well as all other factors that contributed to his decision to sell his Partnership interest. If you find that a breach by Ronald Radah was not the "but for" cause of Emerald's alleged damages, you need proceed no further. If you find that a breach by Ronald Radah was the "but for" cause of Emerald's alleged damages, you must then decide the amount of damages Emerald sustained and I will talk to you in a few minutes about how to calculate damages.

FN3 Where the claim is one for breach of fiduciary duty owed to a client by an attorney, the more rigorous "but for" standard of causation applies, *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 780 NYS2d 593.*

Fraud

(Adapted from New York Pattern Jury Instruction 3:20)

The plaintiff Chuck Emerald seeks to recover damages that he claims were caused by a fraud committed by the defendant Ronald Radah. Before he can recover, Emerald must prove -- by clear and convincing evidence -that Ronald Radah made a material representation of fact; that the representation was false; that Ronald Radah knew it was false or made the representation recklessly without regard to whether it was true or false; that Ronald Radah made the representation to induce Emerald to rely upon it; that Emerald did rely upon it and acted reasonably in doing so; and that as a result, Emerald sustained damages.

Chuck Emerald claims that Ronald Radah made the following misrepresentations:

a. that it would be impossible to continue on in the business and development of the property unless Mr. Emerald sold his interest for $20 million or contributed an additional $15 million;
b. that there were only 5 offers for purchasing the properties, totaling between $25 and $50 million while Greener Pastures

Chuck Emerald also claims that Ronald Radah failed to disclose to him:

a. a. his discussions with Greener Pastures indicating it was willing to offer around $100 million

Ronald Radah claims that:
a. he made no misrepresentations to Emerald;

Chuck Emerald has the burden of proving by clear and convincing evidence with respect to each of his specific allegations:

First, that Ronald Radah made a representation of fact to Emerald;

Second, that the representation was material, that it would reasonably make a significant difference in the decision to sell or not to sell, and that it was false;[FN4]

FN4. *Barron Partners, LP v. LAB123, Inc.*, 593 F. Supp. 2d 667, 672 (S.D.N . Y. 2009); *Greenberg v. Chuist*, 282 F. Supp. 2d 112, 119 (S.D.N.Y. 2003).

Third, that Ronald Radah knew the representation was false or made the representation recklessly without regard to whether it was true or false;

Fourth, that Ronald Radah made the representation to induce Emerald to sell his Partnership interest for $20 million;

Fifth, that Emerald justifiably relied upon Ronald Radah's representation in deciding to sell his Partnership interest for $20 million; and

Sixth, that, as a result, Emerald was damaged.[FN5]

FN5. *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 646 N.Y.S.2d 76 (1996).

The first question you will be asked to decide is whether Ronald Radah made one or more of the representations. A representation is made when by words or deeds an impression is communicated to the mind of another person.[FN6] Active concealment can also support a claim of fraud but only if defendant had some reason to believe the information that was allegedly concealed was material and relevant to the transaction.[FN7] Only representations of fact, however, are actionable. Representations of opinion or a prediction of something which is hoped or expected to occur in the

future is not enough.[FN8] Also, representations that are mere "puffery" are not sufficient.[FN9]

FN6. *Chase Manhattan Bank, N.A. v. Perla*, 65 A.D.2d 207, 411 N.Y.S.2d 66 (1978).

FN7. *Commander Terminals, LLC v. Commander Oil Corp.*, 71 A.D.3d 623, 897 N.Y.S.2d 151 (2d Dep't 2010); *Botti v. Russell*, 225 A.D.2d 1016, 640 N.Y.S.2d 285 (3d Dep't 1996).

FN8. *Mandarin Trading Ltd. v. Wildenstein*, 65 A.D.3d 448, 884 N.Y.S.2d 47 (1st Dep't 2009).

FN9. *Longo v. Butler Equities II, L.P.*, 278 A.D.2d 97, 718 N.Y.S.2d 30 (1st Dep't 2000).

If you find that Radah did make one or more representations to Chuck Emerald, you must next decide whether the representation that they made were material and whether they were true or false – at the time they were made. If the representations were not material, you need proceed no further. If the representations were true, you also need proceed no further on the claim of fraud.

If one or more representation was both material and false, you must next decide whether Radah knew the representation was false or made the representation recklessly without regard to whether it was true or false. If you find that Ronald Radah did not know that any representation was false and that Ronald Radah did not make any representation recklessly, you need proceed no further on the claim of fraud. If defendant had a reasonable basis to believe their representations were true, there is no intent to deceive and you need proceed no further.[FN10]

FN10. *Rich v. Touche Ross & Co.*, 69 A.D.2d 778, 415 N.Y.S.2d 23 (1st Dep't 1979); *Buchall v. Higgins*, 109 A.D. 607, 96 N.Y.S. 241 (2d Dep't 1905).

If you find that Ronald Radah did know one or more representation was false or acted recklessly, you must next decide whether the representation was made to induce Emerald to sell his Partnership interest for $20 million.

If you find that Ronald Radah did not make the statement to induce Emerald to sell his Partnership interest for $20 million, you need proceed no further on the claim of fraud. If you find that Ronald Radah did make the representation to induce Emerald to sell his Partnership interest for $20 million, you must next decide whether Emerald was justified in relying on those representations.

Whether the person to whom a representation is made is justified in relying upon it generally depends upon whether the fact represented is one that a reasonable person would believe and consider important in deciding whether to sell his Partnership interest.

If you find that Emerald did sustain damage as a result of the fraud, you must next decide the actual monetary loss sustained and I will talk to you in a few minutes about how to calculate damages.

Consider Damages Only If Necessary

(Adapted from Modern Federal Jury Instructions 77.01)

If the plaintiff has proven by clear and convincing evidence that Ronald Radah is liable on plaintiffs claim, then you must determine the damages to which the plaintiff is entitled. However, you should not infer that the plaintiff is entitled to recover damages merely because I am instructing you on the elements of damages. It is exclusively your function to decide upon liability, and I am instructing you on damages only so that you will have guidance should you decide that the plaintiff is entitled to recovery.

Compensatory Damages

(Modern Federal Jury Instructions 77-3)

The purpose of the law of damages is to award just and fair compensation for the loss which resulted from the defendant's violation of the plaintiffs rights. If you find that the defendant is liable on the claims, as I have explained them, then you must award the plaintiff sufficient damages to compensate him or her for any injury proximately caused by the defendant's conduct.

These are known as "compensatory damages." Compensatory damages seek to make the plaintiff whole – that is, to compensate him or her for the damage suffered

I remind you that you may award compensatory damages only for injuries that a plaintiff proves were proximately caused by a defendant's allegedly wrongful conduct. The damages that you award must be fair and reasonable, neither inadequate or excessive. You should not award compensatory damages for speculative injuries, but only for those injuries that a plaintiff has actually suffered or which he or she is reasonably likely to suffer in the near future.

In awarding compensatory damages, if you decide to award them, you must be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require a plaintiff to prove the amount of his or her losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

In all instances, you are to use sound discretion in fixing an award of damages, drawing reasonable inferences where you deem appropriate from the facts and circumstances in evidence.

Damages

Plaintiff has the burden of proof with respect to damages. The measure of damages in an action for fraud and in a breach of fiduciary duty action based on fraud is the actual pecuniary loss sustained as a direct result of the wrong. This is known as the "out-of pocket" rule. [FN15] The "out-of pocket" rule measures loss by calculating the difference between the value of what plaintiff parted with and the value of what plaintiff received. In this case, that means the value of Emerald's 50% interest in the Partnership as of the time he sold his interest to Ronald Radah less the $20 million dollars he received at the time of the sale of his property interest.

FN15. *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 646 N.Y.S.2d 76 (1996); *Reno v. Bull*, 226 N.Y. 546, 124 N.E. 144 (1919); Restatement (First) of Torts § 549(a) (1938).

Plaintiff has the burden of proof with respect to damages just as he has with respect to all other elements of his claims. He must prove his damages by clear and convincing evidence. In computing damages, you are not permitted to speculate or guess. Only expert testimony is sufficient to prove the value of plaintiffs interest as of the time of sale of his property interest.[FN19] Plaintiff has not offered such expert testimony and you should take this into consideration as you attempt to calculate damages. If you find that Emerald has not presented sufficient proof of what the value of his interest as of the time of sale of Emerald's property interest then you cannot calculate damages and you must find in favor of defendant Ronald Radah.

FN19. *Burns v. Burns*, 84 N.Y.2d 369, 375, 618 N.Y.S.2d 761, 764 (1994); *cf. Ribak v. State*, 38 N.Y.S.2d 869, 873-74 (N.Y. Ct. Cl. 1942).

If you find that Emerald has presented sufficient proof of what the value of his interest was at the time of sale of Emerald's interest then you should use that value and subtract $20 million to determine Emerald's damages.

General Instruction - Interested Witness - Generally

(New York Pattern Jury Instruction 1:91)

The plaintiff and the defendant both testified before you. As parties to the action, both are interested witnesses.

An interested witness is not necessarily less believable than a disinterested witness. The fact that he is interested in the outcome of the case does not mean that he has not told the truth. It is for you to decide from the demeanor of the witness on the stand and such other tests as your experience dictates whether or not the testimony has been influenced, intentionally or unintentionally, by his interest. You may, if you consider it proper under all the circumstances, not believe the testimony of such a witness, even though it is not otherwise challenged or contradicted. However, you are not required to reject the testimony of such a witness, and may accept all or such part of his testimony as you find reliable and reject such part as you find unworthy of acceptance.

Conclusion

(New York Pattern Jury Instruction 1:28)

I have now outlined for you the rules of law that apply to this case and the processes by which you weigh the evidence and decide the facts. In a few minutes you will retire to the jury room for your deliberations. (Traditionally, Juror No. 1 acts as foreperson. Your first order of business when you are in the jury room will be the election of a foreperson.) In order that your deliberations may proceed in an orderly fashion, you must have a foreperson, but of course, his or her vote is entitled to no greater weight than that of any other juror. Your function - to reach a fair decision from the law and the evidence - is an important one. When you are in the jury room, listen to each other, and discuss the evidence and issues in the case among yourselves. It is the duty of each of you, as jurors, to consult with one another, and to deliberate with a view of reaching agreement on a verdict, if you can do so without violating your individual judgment and your conscience. While you should not surrender conscientious convictions of what the truth is and of the weight and effect of the evidence and while each of you must decide the case for yourself and not merely consent to the decision of your fellow jurors, you should examine the issues and the evidence before you with candor and frankness, and with proper respect and regard for the opinions of each other. Remember in your deliberations that the dispute between the parties is, for them, a very important matter. They and the court rely upon you to give full and conscientious deliberation and consideration to the issues and evidence before you. By so doing, you carry out to the fullest your oaths as jurors to truly try the issues of this case and render a true verdict.

Alternate Jurors

(New York Pattern Jury Instruction 1:29)

At this point, I am going excuse our alternate jurors. As I told you before, your services were required as a safeguard against the possibility that one of the regular jurors might be unable to complete his or her service. Fortunately this has not occurred. I commend the alternate jurors for their faithful attendance and attention. On behalf of the Court and the parties, I thank you for your service.

General Instruction -Supplemental Charge - To Jury Unable to Agree

(New York Pattern Jury Instruction 1:100)

It is highly desirable that you agree upon a verdict, if you reasonably can. The case is important to the parties involved, and its presentation has involved expense to both sides. If you fail to agree upon a verdict, the case will have to be tried before another jury selected in the same manner as you were chosen. There is no reason to believe that the case will ever be submitted to a jury more competent to you.

By pointing out to you the desirability of your reaching a verdict, I am not, in any way, suggesting that you surrender

your conscientious convictions about the truth and about the weight and effect of all the evidence. However, in most cases, absolute certainly cannot be expected, and each of you must decide the case for yourselves by examining the questions with candor and frankness. It is your duty to give careful consideration to the opinion and reasoning of your fellow jurors, and they must give similar consideration of all of the evidence, it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and conscience.

Chuck Emerald, Plaintiff,
v.
Ronald Radah, Defendant.

Defendant's Proposed Jury Charges

DefendantRonald Radah, by his attorney Nicole Romano, submits the following proposed jury charges in connection with the trial of this action. Defendant expressly reserves his rights to amend and/or supplement these proposed charges.

Dated: New York, New York March 21, 2013

Respectfully submitted,

Nicole Romano

Attorney for Defendant

I. PROPOSED CHARGES TO BE GIVEN PRIOR TO THE PRESENTATION OF EVIDENCE

Parties

(New York Pattern Jury Instruction 1:2)

The party who brings a lawsuit is called the plaintiff. In this action the plaintiff is Chuck Emerald and he is suing to recover damages that he allegedly sustained in connection with the sale of his partnership interest in an entity known as "Green Chip LLC" The party against whom the suit is brought is called the defendant. In this action the defendant isRonald Radah.

Openings and Evidence

(New York Pattern Jury Instruction 1:3)

When I have completed these opening instructions to you, the attorneys will make opening statements to you in which each will outline for you what (he, she) expects to prove. The purpose of such opening statements is to tell you about each party's claims so that you will have a better understanding of the evidence as it is introduced. What is said in such opening statements is not evidence. The evidence upon which you will base your decision will come from the testimony of witnesses here in court or in examinations before trial, or in the form of photographs, documents, or other exhibits introduced as evidence. Plaintiff makes an opening statement first, followed by defendant. After the opening statements, plaintiff will introduce evidence in support of his claim. Normally a plaintiff must produce all of his witnesses and complete his entire case before defendant introduces any evidence, although exceptions are sometimes made to that rule in order to accommodate a witness. After plaintiff has completed the introduction of all of his evidence, defendant may present witnesses and exhibits. If they do so, plaintiff may be permitted to offer additional evidence for the purpose of rebutting defendant's evidence. Each witness is first examined by the party who calls that witness to testify, and then the opposing party is permitted to question the witness.

Objections, Motion, Exceptions

(New York Pattern Jury Instruction 1:4)

At times during the trial, an attorney may object to a question or to the introduction of an exhibit or make motions

concerning legal questions that apply to this case. Arguments in connection with such objections or motions are sometimes made out of the presence of the jury. Any ruling upon such objections or motions will be based solely upon the law and therefore you must not conclude from any such ruling or from anything I say during the course of the trial that I favor any party to this lawsuit. After such a ruling, you may hear one of the attorneys taking what we call an exception to it. Exceptions have nothing to do with your role in this case and I mention the procedure to you so that you will not be confused if you hear the word during the trial.

Summations

(New York Pattern Jury Instruction 1:5)

Upon completion of the introduction of evidence, the attorneys will again speak to you in a closing statement or summation. In summing up, the lawyers will point out what they believe the evidence has shown, what inferences or conclusions they believe you should draw from the evidence and what conclusions they believe you should reach as your verdict. What is said by the attorneys in summation, like what is said by them in their opening statements, or in the making of objections or motions during the trial, is not evidence. Summations are intended to present the arguments of the parties based on the evidence.

Function of Court and Jury

(New York Pattern Jury Instruction 1:6)

After the summations, I will instruct you on the rules of law applicable to the case and you will then retire for your deliberations. Your function as jurors is to decide what has or has not been proved and apply the rules of law that I give you to the facts as you find them to be. The decision you reach will be your verdict. Your decision will be based on the testimony that you hear and the exhibits that will be received in evidence during the trial. You are the sole and exclusives judges of the facts and nothing I say or do should be taken by you as any indication of my opinion as to the facts. As to the facts, neither I nor anyone else may invade your province. I will preside impartially and not express any opinion concerning the facts. Any opinions of mine on the facts would, in any event, be totally irrelevant because the facts are for you to decide. On the other hand, and with equal emphasis, I instruct you that in accordance with the oath you took as jurors you are required to accept the rules of law that I give you whether you agree with them or not. You are not to ask anyone else about the law. *[If a lawyer or judge is a member of the jury, the following should be added:* including the lawyer or judge serving as a juror.]

You should not consider or accept any advice about the law from anyone else but me.

Consider Only Competent Evidence

(New York Pattern Jury Instruction 1:7)

As the sole judges of the facts, you must decide which of the witnesses you believe, what portion of their testimony you accept and what weight you give to it. At times during the trial I may sustain objections to questions and you may hear no answer, or, where an answer has been made, I may instruct that it be stricken or removed from the record and that you disregard it and dismiss it from your minds. You may not draw any inference or conclusion from an unanswered question nor may you consider testimony which has been stricken or removed from the record in reaching your decision. The law requires that your decision be made solely upon the evidence before you. Such items as I exclude them from your consideration will be excluded because they are not legally admissible.

Weighing Testimony

(New York Pattern Jury Instruction 1:8)

The law does not, however, require you to accept all of the evidence I shall admit. In deciding what evidence you will accept you must make your own evaluation of the testimony given by each of the witnesses, and decide how much weight you choose to give to that testimony. The testimony of a witness may not conform to the facts as they occurred because he or she is intentionally lying, because the witness did not accurately see or hear what he or she is testifying about, because the witness's recollection is faulty, or because the witness has not expressed himself or herself clearly in testifying. There is no magical formula by which you evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you decide for yourselves the reliability or unreliability of things people tell you. The same tests that you use in your everyday dealings are the tests that you apply in your deliberations. The interest or lack of interest of any witness in the outcome of this case, the bias or prejudice of a witness, if there be any, the appearance, the manner in which the witness gives testimony on the stand, the opportunity that the witness had to observe the facts about which he or she testifies, the probability or improbability of the witness' testimony when considered in light of all the other evidence in the case, are all items to be considered by you in deciding how much weight, if any, you will give to that witness' testimony. If it appears that there is a discrepancy in the evidence, you will have to consider whether the apparent discrepancy can be reconciled by fitting the two stories together. If, however, that is not possible, you will then have to decide which of the conflicting stories you will accept.

Conduct During Recess

(New York Pattern Jury Instruction 1:9)

The purpose of the rules I have outlined for you is to make sure that a just result is reached when you decide the case. For the same purpose, you should keep in mind several rules governing your own conduct during any recess.

Discussion With Others – Independent Research

(New York Pattern Jury Instruction 1:11)

In fairness to the parties to this lawsuit, it is very important that you keep an open mind throughout the trial. Then, after you have heard both sides fully, you will reach your verdict only on the evidence as it is presented to you in this courtroom, and only in this courtroom, and then only after you have heard the summations of each of the attorneys and my instructions to you on the law. You will then have an opportunity to exchange views with each member of the jury during your deliberations to reach your verdict.

Please do not discuss this case either among yourselves or with anyone else during the course of the trial. Do not do any independent research on any topic you might hear about in the testimony or see in the exhibits, whether by consulting others, reading newspapers, books or magazines, or conducting an internet search of any kind. All electronic devices, including any cell phones, Blackberries, iPhones, iPads, laptops, or any other personal electronic devices must be turned off while you are in the courtroom and while you are deliberating after I have given you the law applicable to this case. [*In the event that the court requires the jurors to relinquish their devices, the charge should be modified to reflect the court's practice].*

It is important to remember that you may not use any interne services, such as Google, Facebook, Twitter or any others to individually or collectively research topics concerning the trial, which includes the law, information about any of the issues in contention, the parties, the lawyers or the court. After you have rendered your verdict and have been discharged, you will be free to do any research you choose, or to share your experiences, either directly, or through your favorite electronic means.

For now, be careful to remember these rules whenever you use a computer or other personal electronic device during the time you are serving as a juror but you are not in the courtroom.

While this instruction may seem unduly restrictive, it is vital that you carefully follow these directions. The reason is simple. The law requires that you consider only the testimony and evidence you hear and see in this courtroom. Not only does our law mandate it, but the parties depend on you to fairly and impartially consider only the admitted evidence. To do otherwise, by allowing outside information to affect your judgment, is unfair and prejudicial to the parties and could lead to this case's having to be retried.

Accordingly, I expect that you will seriously and faithfully abide by this instruction.

Discussion by Others

(New York Pattern Jury Instruction 1:12)

Please do not permit any person who is not a juror to discuss this case in your presence, and if anyone does so despite you telling the person not to, report that to me as soon as you are able. You should not, however, discuss with your fellow jurors either that fact or any other fact you feel necessary to bring to my attention.

Conversation With Parties or Attorneys

(New York Pattern Jury Instruction 1:13)

Although it is normal human tendency to talk to people with whom one comes in contact, please do not, during the time you serve on this jury, talk, whether in or out of the courtroom, with any of the parties or their attorneys or any witness. By this I mean not only do not talk about the case, but do not talk to them at all, even to pass the time of day. In no other way can all parties be assured of the absolute impartiality they are entitled to expect from you as jurors.

Alternate Jurors

(New York Pattern Jury Instruction 1:13 A)

Under the law only six jurors will deliberate on this case when it is submitted for consideration.

We have selected additional jurors. Alternate jurors are selected to serve because a regular juror may be prevented from continuing to serve by some emergency such as a serious illness or death. Although this seldom happens during a trial, there are cases where we do call on the service of alternates. Alternates are required to pay the same careful attention to the trial as the regular jurors, so that if needed they will be fully familiar with the case.

The fact that there are alternate jurors does not mean that any regular juror is free to excuse himself or herself from the case. As a duly chosen juror it is your obligation to be available throughout the trial.

Conclusion

(New York Pattern Jury Instruction 1:14)

The description of trial procedure, the rules governing your conduct and the legal principles I have discussed with you will, I believe, make it easier for you to understand the trial as it goes on and to reach a just result at its conclusion.

II. PROPOSED CHARGES TO BE GIVEN AFTER THE PRESENTATION OF EVIDENCE

Introduction

(New York Pattern Jury Instruction 1:20)

Members of the jury, we come now to that portion of the trial when you are instructed on the law applicable to the case and after which you will retire for your final deliberations. You have now heard all the evidence introduced by the parties and through arguments of their attorneys you have learned the conclusions which each party believes should be drawn from the evidence presented to you.

Review Principles Stated

(New York Pattern Jury Instruction 1:21)

You will recall that at the beginning of the trial I stated for you certain principles so that you could have them in mind as the trial progressed. Briefly, they were that you are bound to accept the law as I give it to you, whether or not you agree with it. You are not to ask anyone else about the law. [*If a lawyer or judge is a member of the jury, the following should be added:* including the lawyer or judge serving as a juror.] You should not consider or accept any advice about the law from anyone else but me. Furthermore, you must not conclude from my rulings or anything I have said during the trial that I favor any party to this lawsuit. Furthermore, you may not draw any inference from an unanswered question nor consider testimony which has been stricken from the record in reaching your decision. Finally, in deciding how much weight you choose to give to the testimony of any particular witness, there is no magical formula which can be used. The tests used in your everyday affairs to decide the reliability or unreliability of statements made to you by others are the tests you will apply in your deliberations. The items to be taken into consideration in determining the weight you will give to the testimony of a witness include the interest or lack of interest of the witness in the outcome of the case, the bias or prejudice of the witness, if there be any, the age, the appearance, the manner of the witness as the witness testified, the opportunity the witness had to observe the facts about which he or she testified, the probability or improbability of the witness' testimony when considered in the light of all the other evidence in the case.

Falsus in Uno

(New York Pattern Jury Instruction 1:22)

If you find that any witness has willfully testified falsely as to any material fact, that is as to an important matter, the law permits you to disregard completely the entire testimony of that witness upon the principle that one who testifies falsely about one material fact is likely to testify falsely about everything. You are not required, however, to consider such a witness as totally "unbelievable." You may accept so much of his or her testimony as you deem true and disregard what you feel is false. By the processes which I have just described to you, you, as the sole judges of the facts, decide which of the witnesses you will believe, what portion of their testimony you accept and what weight you will give it.

Burden of Proof – Clear and Convincing Evidence

(New York Pattern Jury Instruction 1:64)

The burden is on the plaintiff to prove his breach of fiduciary duty and fraud claims by clear and convincing evidence.[FN1] This means evidence that satisfies you that there is a high degree of probability that there was a breach of fiduciary duty or fraud as I will define it for you.

FN1. *City of New York v. Tavern on the Green, L.P.*, 427 B.R. 233, 242 (Bankr. S.D.N.Y. 2010) (standard of proof for fraud is clear and convincing evidence); *AIG Global Sec. Lending Corp. v. Banc of Am. Sec. LLC,*

646 F. Supp. 2d 385, 389 (S.D.N.Y. 2009) (quoting *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 970 (2d Cir. 1987) (same); *Vermeer Owners, Inc. v. Guterman*, 78 N.Y.2d 1114, 1116, 578 N.Y.S.2d 128, 129-30 (1991) (same).

To decide for the plaintiff it is not enough to find that the preponderance of the evidence is in the plaintiffs favor. A party who must prove his case by a preponderance of the evidence only need satisfy you that the evidence supporting his case more nearly represents what actually happened than the evidence which is opposed to it. But a party who must establish his case by clear and convincing evidence must satisfy you that the evidence makes it highly probable that what he claims is what actually happened.

If, upon all the evidence, you are satisfied that there is a high probability that there was (e.g., fraud, malice, mistake, a gift, a contract between the plaintiff and the deceased, incompetency, addition) as I (have defined, will define) it for you, you must decide for the plaintiff. If you are not satisfied that there is such a high probability, you must decide for the defendant.

Breach of Fiduciary Duty

(Adapted from New York Pattern Jury Instruction 3:59)

Plaintiff Chuck Emerald claims that defendantRonald Radah breached his fiduciary duty to Emerald.

Ronald Radah was Emerald's partner in the Partnership and a partner has a duty to his or her partner to act in good faith and in the partner's best interest during the period of the partnership. A fiduciary owes his or her partner an undivided and unqualified loyalty and may not act in any manner contrary to the interest of the partner. A person acting in a fiduciary capacity is required to make truthful and complete disclosures to those to whom a fiduciary duty is owed and the fiduciary may not obtain an improper advantage at the other's expense. A partner's fiduciary duty, however, relates only to matters concerning the business of the partnership and does not create a general duty of disclosure. Also, people can be both a partner with a fiduciary duty and an individual without such a duty and their conduct can be separated accordingly.[FN2]To the extent that Ronald Radah was acting in respect to the Partnership, he owed plaintiff a fiduciary duty. Remember though that people can be both the agent of a partner with a fiduciary duty and an individual without such a duty and their conduct can be separated accordingly.

FN2. *Graubard Molten Dannett& Horowitz v. Moskovitz*, 86 N.Y.2d 112, 120-21, 629 N.Y.S.2d 1009, 1013-14 (1995).

Emerald claims that Ronald Radah did not act in good faith or in his best interests:
a. by failing to disclose their discussions with Greener Pastures about its alleged offer to purchase the Properties;
b. by providing Emeraldwith only offers for the property between $25 million and $50 million;

Emerald claims that as a result of these breaches, he sustained damages.

Ronald Radah denies breaching his fiduciary duties to Emerald and claims that:
a. whenRadah informed Emerald of five acquisition proposals from other companies, he was being truthful;
b. there were no substantive discussions with Greener Pastures about purchasing the Properties at any time before Emerald sold his Partnership interest and inconsequential remarks about a possible purchase of the Properties are not material and do not create a duty to disclose;
c. Emerald is a estate developer with a degree from the Wharton School of Business who hired and worked with real estate consultants and attorneys before he elected to sell his Partnership interest;
d. at no time did defendant interfere with Emerald's efforts to get an appraisal of the Properties;
e. Emerald did not ask for a representation in his purchase and sale contract that would preclude a sale of the Properties nor did he ask for a "tail" which would be a supplemental payment to him if the Properties were sold;
f. Emerald signed a release when he sold his Partnership interest giving up all claims that he had or might have against Ronald Radah.

If you find that Ronald Radah did not owe a fiduciary duty to Emerald with respect to any of the listed items, you need proceed no further as to that defendant with respect to that item.

If you find that Ronald Radah did not owe a fiduciary duty to Emerald with respect to any of the listed items, you need proceed no further as to that defendant with respect to that item.

If you find that Ronald Radah did breach his fiduciary duty to Emerald, you must then decide whether that breach was the proximate cause of damages allegedly sustained by Emerald. The standard for determining proximate cause is known as the "but for" standard.[FN3] This means that before you can find that a breach was the proximate cause of Emerald's alleged damage, you must find that "but for" the breach Emerald would not have acted as he did. In this case, that means that "but for" the breach Emerald would not have sold his Partnership interest for $7.8 million. In determining whether a breach was the "but for" cause of damages, you may take into consideration Emerald's level of sophistication as a business man, the nature of his relationship with defendant, as well as all other factors that contributed to his decision to sell his Partnership interest. If you find that a breach by Ronald Radah was not the "but for" cause of Emerald's alleged damages, you need proceed no further. If you find that a breach by Ronald Radah was the "but for" cause of Emerald's alleged damages, you must then decide the amount of damages Emerald sustained and I will talk to you in a few minutes about how to calculate damages.

FN3. Because plaintiff is seeking compensatory damages, the "but for" standard rather than the "substantial factor" standard applies.*See, RSL Commc'ns PLC v. Bildirici*, 649 F. Supp. 2d 184, 210 (S.D.N.Y. 2009); *LNC Invs., Inc. v. First Fid. Bank, N.A. N.J.*, 173 F.3d 454, 465 (2d Cir. 1999).

Fraud

(Adapted from New York Pattern Jury Instruction 3:20)

The plaintiff Chuck Emerald seeks to recover damages that he claims were caused by a fraud committed by the defendantRonald Radah. Before he can recover, Emerald must prove -- by clear and convincing evidence -that Ronald Radah made a material representation of fact; that the representation was false; that Ronald Radah knew it was false or made the representation recklessly without regard to whether it was true or false; that Ronald Radah made the representation to induce Emerald to rely upon it; that Emerald did rely upon it and acted reasonably in doing so; and that as a result, Emerald sustained damages.

Emerald claims that Ronald Radah made the following misrepresentations:
a. that he did not intend to and would not sell the Properties or their interest therein;
b. that the Properties were worth between $25,000,000 and $50,000,000; and
c. that he would not renovate or otherwise invest in improving the Properties or increasing the Partnership income unless Emerald sold his interest or contributed an additional $15,000,000;

Emerald also claims that Ronald Radah failed to disclose to him:[FN6]

FN6. Defendant specifically objects to a charge that would include a statement of plaintiff's claims couched both as affirmative misrepresentations and as omissions and have eliminated such duplication in their proposed charge. Allowing plaintiff to state his claim both in terms of an affirmative misrepresentation and as an omission would give plaintiff two bites at the apple and would be prejudicial to defendant.

a. their discussions with Greener Pastures;

Ronald Radah claims that:
a. he made no misrepresentations to Emerald;
b. Ronald Radah did not make any representations to Emerald regarding the value of the Properties but merely passed along an opinion of value prepared by other interested parties;

c. that in any event, prior to the sale of his interest, Emerald, who was a real estate developer who worked closely with real estate consultants and attorneys before he elected to sell his Partnership interest should have been aware of the value of the property;
d. Ronald Radah did not intend to renovate or otherwise invest in improving the Properties or increasing Partnership income and did not represent otherwise to Emerald; and
e. Emerald did not ask for a representation in his purchase and sale contract that would preclude a sale of the Properties, nor did he ask for a "tail" which would be a supplemental payment to him if the Properties were sold;
f. Emerald signed a release when he sold his Partnership giving up all claims that he had or might have againstRonald Radah.

Ronald Radah further claims that:
a. beforeEmerald sold his Partnership interest Greener Pastures made only passing remarks to Ronald Radah about purchasing the Properties and did not make an actual offer to purchase the Properties for a specific price;

Emerald has the burden of proving by clear and convincing evidence with respect to each of his specific allegations:

First, that Ronald Radah made a representation of fact to Emerald;

Second, that the representation was material, that it would reasonably make a significant difference in the decision to sell or not to sell, and that it was false;[FN4]

FN4. *Barron Partners, LP v. LAB123, Inc.*, 593 F. Supp. 2d 667, 672 (S.D.N . Y. 2009);*Greenberg v. Chuist*, 282 F. Supp. 2d 112, 119 (S.D.N.Y. 2003).

Third, that Ronald Radah knew the representation was false or made the representation recklessly without regard to whether it was true or false;

Fourth, that Ronald Radah made the representation to induce Emerald to sell his Partnership interest for $20 million;

Fifth, that Emerald justifiably relied upon Ronald Radah's representation in deciding to sell his Partnership interest for $20 million; and

Sixth, that, as a result, Emerald was damaged.[FN5]

FN5. *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 646 N.Y.S.2d 76 (1996).

The first question you will be asked to decide is whether Ronald Radah made one or more of the representations. A representation is made when by words or deeds an impression is communicated to the mind of another person.[FN6] Active concealment can also support a claim of fraud but only if defendant had some reason to believe the information that was allegedly concealed was material and relevant to the transaction.[FN7] Only representations of fact, however, are actionable. Representations of opinion or a prediction of something which is hoped or expected to occur in the future is not enough.[FN8] Also, representations that are mere "puffery" are not sufficient.[FN9]

FN6. *Chase Manhattan Bank, N.A. v. Perla*, 65 A.D.2d 207, 411 N.Y.S.2d 66 (1978).

FN7. *Commander Terminals, LLC v. Commander Oil Corp.*, 71 A.D.3d 623, 897 N.Y.S.2d 151 (2d Dep't 2010); *Botti v. Russell*, 225 A.D.2d 1016, 640 N.Y.S.2d 285 (3d Dep't 1996).

FN8. *Mandarin Trading Ltd. v. Wildenstein*, 65 A.D.3d 448, 884 N.Y.S.2d 47 (1st Dep't 2009).

FN9. *Longo v. Butler Equities II, L.P.*, 278 A.D.2d 97, 718 N.Y.S.2d 30 (1st Dep't 2000).

If you find that Ronald Radah did make one or more representations to Emerald, you must next decide whether the representation that they made were material and whether they were true or false – at the time they were made. If the representations were not material, you need proceed no further. If the representations were true, you also need proceed no further on the claim of fraud.

If one or more representation was both material and false, you must next decide whether Ronald Radah knew the representation was false or made the representation recklessly without regard to whether it was true or false. If you find that Ronald Radah did not know that any representation was false and that Ronald Radah did not make any representation recklessly, you need proceed no further on the claim of fraud. If defendant had a reasonable basis to believe their representations were true, there is no intent to deceive and you need proceed no further.[FN10]

FN10. *Rich v. Touche Ross & Co.*, 69 A.D.2d 778, 415 N.Y.S.2d 23 (1st Dep't 1979); *Buchall v. Higgins*, 109 A.D. 607, 96 N.Y.S. 241 (2d Dep't 1905).

If you find that Ronald Radah did know one or more representation was false or acted recklessly, you must next decide whether the representation was made to induce Emerald to sell his Partnership interest for $20 million.

If you find that Ronald Radah did not make the statement to induce Emerald to sell his Partnership interest for $20 million, you need proceed no further on the claim of fraud. If you find that Ronald Radah did make the representation to induce Emerald to sell his Partnership interest for $20 million, you must next decide whether Emerald was justified in relying on those representations.

Whether the person to whom a representation is made is justified in relying upon it generally depends upon whether the fact represented is one that a reasonable person would believe and consider important in deciding whether to sell his Partnership interest. The law, however, places an affirmative duty on sophisticated parties in business transactions to protect themselves from misrepresentations and omissions by investigating the details of the transactions.[FN11] And, when the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required and he cannot reasonably rely on such representations without making additional inquiries to determine their accuracy.[FN12] Furthermore, when a party investigates the validity of information provided to him and is aware of their falsity, he will not then be heard to complain that he has been deceived.[FN13] Reliance is not justified when the facts are known to the person claiming to have been deceived.[FN14]

FN11. *Global Minerals and Metals Corp. v. Holme*, 35 A.D.3d 93, 100, 824 N.Y.S.2d 210, 215 (1st Dep't 2006); *Abrahami v. UPC Constr. Co.*, 224 A.D.2d 231, 234, 638 N.Y.S.2d 11, 14 (1st Dep't 1996).

FN12. *Banque Franco-Hellenique de Commerce Int'l et Maritime, S.A. v. Christophides*, 106 F.3d 22, 27 (2d Cir. 1997); *Keywell Corp. v. Weinstein*, 33 F.3d 159, 164 (2d Cir. 1994); *Stuart Silver Assocs. v. Baco Dev. Corp.*, 245 A.D.2d 96, 99, 665 N.Y.S.2d 415, 417-18 (1st Dep't 1997); *88 Blue Corp. v. Reiss Plaza Assocs.*, 183 A.D.2d 662, 664, 585 N.Y.S.2d 14, 16 (1st Dep't 1992).

FN13. *Levin v. Gallery 63 Antiques Corp.*, 04 CIV 1504 (KMK), 2006 WL 2802008 (S.D.N.Y. Sept. 28, 2006).

FN14. ***First Nat. State Bank of NJ v. Irving Trust Co.***, 91 A.D.2d 543, 457 N.Y.S.2d 17 (1st Dep't 1982), aff'd, 59 N.Y.2d 991, 466 N.Y.S.2d 682 (1983); ***Sternberg v. Citicorp Credit Servs., Inc.***, 69 A.D.2d 352, 419 N.Y.S.2d 142 (2d Dep't 1979), aff'd, 50 N.Y.2d 856, 430 N.Y.S.2d 54 (1980); ***200 East End Ave. Corp. v. Gen. Elec. Co.***, 5 A.D.2d 415, 172 N.Y.S.2d 409 (1st Dep't 1958), *aff'd*, 6 N.Y.2d 731, 185 N.Y.S.2d 816 (1959).

If you find that Emerald was not justified in relying on the representations, you need proceed no further on the claim of fraud. If you find that Emerald was justified in relying on the representations, you must next decide whether Emerald was damaged as a proximate result of the fraud.

If you find that Emerald did not sustain any damage as a proximate result of the fraud, you will find for Ronald Radah on the claim of fraud. If you find that Emerald did sustain damage as a result of the fraud, you must next decide the actual monetary loss sustained and I will talk to you in a few minutes about how to calculate damages.

Consider Damages Only If Necessary

(Adapted from Modern Federal Jury Instructions 77.01)

If the plaintiff has proven by clear and convincing evidence that Ronald Radah is liable on plaintiffs claim, then you must determine the damages to which the plaintiff is entitled. However, you should not infer that the plaintiff is entitled to recover damages merely because I am instructing you on the elements of damages. It is exclusively your function to decide upon liability, and I am instructing you on damages only so that you will have guidance should you decide that the plaintiff is entitled to recovery.

Compensatory Damages

(Modern Federal Jury Instructions 77-3)

The purpose of the law of damages is to award, as far as. possible, just and fair compensation for the loss, if any, which resulted from the defendant's violation of the plaintiffs rights. If you find that the defendant is liable on the claims, as I have explained them, then you must award the plaintiff sufficient damages to compensate him or her for any injury proximately caused by the defendant's conduct.

These are known as "compensatory damages." Compensatory damages seek to make the plaintiff whole – that is, to compensate him or her for the damage suffered

I remind you that you may award compensatory damages only for injuries that a plaintiff proves were proximately caused by a defendant's allegedly wrongful conduct. The damages that you award must be fair and reasonable, neither inadequate or excessive. You should not award compensatory damages for speculative injuries, but only for those injuries that a plaintiff has actually suffered or which he or she is reasonably likely to suffer in the near future.

In awarding compensatory damages, if you decide to award them, you must be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require a plaintiff to prove the amount of his or her losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

In all instances, you are to use sound discretion in fixing an award of damages, drawing reasonable inferences where you deem appropriate from the facts and circumstances in evidence.

Damages

Plaintiff has the burden of proof with respect to damages. The measure of damages in an action for fraud and in a breach of fiduciary duty action based on fraud is the actual pecuniary loss sustained as a direct result of the wrong. This is known as the "out-of pocket" rule. [FN15] The "out-of pocket" rule measures loss by calculating the difference between the value of what plaintiff parted with and the value of what plaintiff received. In this case, that means the value of Emerald's 50% interest in the Partnership as of the time he sold his interest to Ronald Radahless the $20 million dollars he received at the time of the sale of his property interest.

FN15. *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 646 N.Y.S.2d 76 (1996); *Reno v. Bull*, 226 N.Y. 546, 124 N.E. 144 (1919); Restatement (First) of Torts § 549(a) (1938).

Plaintiff has the burden of proof with respect to damages just as he has with respect to all other elements of his claims. He must prove his damages by clear and convincing evidence. In computing damages, you are not permitted to spe-

culate or guess. Only expert testimony is sufficient to prove the value of plaintiffs interest as of the time of sale of his property interest.[FN19] Plaintiff has not offered such expert testimony and you should take this into consideration as you attempt to calculate damages. If you find that Emerald has not presented sufficient proof of what the value of his interest as of the time of sale of Emerald's property interest then you cannot calculate damages and you must find in favor of defendantRonald Radah.

FN19. *Burns v. Burns*, 84 N.Y.2d 369, 375, 618 N.Y.S.2d 761, 764 (1994); *cf. Ribak v. State*, 38 N.Y.S.2d 869, 873-74 (N.Y. Ct. Cl. 1942).

If you find that Emerald has presented sufficient proof of what the value of his interest was at the time of saleof Emerald's interest then you should use that value and subtract $20 million to determine Emerald's damages.

Punitive Damages

If you should find that the defendant is liable for the plaintiffs injuries, then you may consider awarding punitive damages. Punitive damages may only be recovered where defendant's acts were outrageously, maliciously, oppressively or wantonly done, and where defendant's conduct is aimed at the public generally.[FN21] Punitive damages cannot be recovered for a fraud which constitutes only a private wrong.[FN22]

FN21. *Vasilopoulos v. Romano*, 228 A.D.2d 669, 645 N.Y.S.2d 501 (2d Dep't 1996); *Westinghouse Elec. Supply Co. v. Pyramid Champlain Co.*, 193 A.D.2d 928, 597 N.Y.S.2d 811 (3d Dep't 1993); *Diker v. Cathray Constr. Corp.*, 158 A.D.2d 657, 552 N.Y.S.2d 37 (2d Dep't 1990); *Robinson v. Paramount Pictures Corp.*, 122 A.D.2d 32, 504 N.Y.S.2d 472 (2d Dep't 1986); *Kelly v. Defoe Corp.*, 223 A.D.2d 529, 636 N.Y.S.2d 123 (2d Dep't 1996).

FN22. *Kelly v. Defoe Corp*, 223 A.D.2d 529, 636 N.Y.S.2d 123 (2d Dep't 1996); *Simon v. Ernst & Young*, 223 A.D.2d 506, 637 N.Y.S.2d 375 (1st Dep't 1996); *Barclays Bank of New York, N.A. v. Heady Elec. Co., Inc.*, 174 A.D.2d 963, 571 N.Y.S.2d 650 (3d Dep't 1991); *Mom's Bagels of New York, Inc. v. Sig Greenbaum, Inc.*, 164 A.D.2d 820, 559 N.Y.S.2d 883 (1st Dep't 1990); *Diker v. Cathray Constr. Corp.*, 158 A.D.2d 657, 552 N.Y.S.2d 37 (2d Dep't 1990); *Sorbaro Co. v. Capital Video Corp.*, 168 Misc.2d 143, 646 N.Y.S.2d 445 (Sup. Ct. DutchessCty. 1996), *aff'd*,245 A.D.2d 364, 667 N.Y.S.2d 388 (2d Dep't 1997); *Westinghouse Elec. Supply Co. v. Pyramid Champlain Co.*, 193 A.D.2d 928, 597 N.Y.S.2d 811 (3d Dep't 1993); *RKB Enters. v. Ernst & Young*, 182 A.D.2d 971, 582 N.Y.S.2d 814 (3d Dep't 1992);*Stegich v. Saab Cars USA, Inc.*, 177 Misc.2d 81, 676 N.Y.S.2d 756. (1st Dep't 1998).

You may only award punitive damages if the plaintiff proves by clear and convincing evidence that the defendant's conduct was aimed at the public and was malicious and reckless, not merely unreasonable. An act is malicious and reckless if it is done in such a manner, and under such circumstances, as to reflect utter disregard for the potential consequences of the act on the rights of others.

Return to Courtroom

(New York Pattern Jury Instruction 1:24)

If, in the course of your deliberations, your recollection of any part of the testimony should fail, or you have any questions about my instructions to you on the law, you have the right to return to the courtroom for the purpose of having such testimony read to you or have such question answered.

Consider Only Testimony and Exhibits

(New York Pattern Jury Instruction 1:25)

In deciding this case, you may consider only the exhibits which have been admitted in evidence and the testimony of

the witnesses as you have heard it in this courtroom (or as there has been read to you testimony given on examination before trial. Under our rules of practice an examination before trial is taken under oath and is entitled to equal consideration by you notwithstanding the fact that it was taken before the trial and outside the courtroom). However, arguments, remarks, and summation of the attorneys are not evidence nor is anything that I now say or may have said with regard to the facts, evidence.

Juror's Use of Professional Expertise

(New York Pattern Jury Instruction 1:25A)

Although as jurors you are encouraged to use all of your life experiences in analyzing testimony and reaching a fair verdict, you may not communicate any personal professional expertise you might have or other facts not in evidence to the other jurors during deliberations. You must base your discussions and decisions solely on the evidence presented to you during the trial and that evidence alone. You may not consider or speculate on matters not in evidence or matters outside the case.

Exclude Sympathy

(New York Pattern Jury Instruction 1:27)

In reaching your verdict you are not to be affected by sympathy for any of the parties, what the reaction of the parties or of the public to your verdict may be, whether it will please or displease anyone, be popular or unpopular or, indeed, any consideration outside the case as it has been presented to you in this courtroom. You should consider only the evidence – both the testimony and the exhibits – find the facts from what you consider to be the believable evidence, and apply the law as I now give it to you. Your verdict will be determined by the conclusion you reach, no matter who the verdict helps or hurts.

General Instruction – Admission by a Party – By Statement

(Adapted from New York Pattern Jury Instruction 1:55)

Testimony has been introduced that plaintiff personally or through his agents made statements in writing before he sold his Partnership interest concerning: (i) defendant's right to sell the Properties after plaintiff sold his Partnership interest; (ii) plaintiff's knowledge with respect to the value of the Properties; and (iii) plaintiffs' willingness to sell for a discount.

If you find that by making such statements plaintiff, thereby admitted that: (i) he knew defendant might sell the Properties at any time after plaintiff sold his Partnership interest - including immediately after plaintiff sold his Partnership interest; (ii) before he elected to sell his Partnership interest for $20 million plaintiff was not relying on defendant's statements or purported representations regarding the value of the Properties; and (iii) plaintiff was willing to sell for a discount, you may consider those statements as evidence that plaintiff was not deceived by defendant, plaintiff did not rely on defendant statements and defendant's conduct did not cause any damage to plaintiff.

In deciding how much weight you will give to the statements, you can consider plaintiffs physical condition at the time the statement was made, the words used, the person to whom the statement was made, the time that passed between the making of the statement and the sale of his Partnership interest, all of the other circumstances and conditions existing at the time and place, and the other facts in evidence, as well as the reasonableness of plaintiff's explanation of the statements. You may consider the statements to be conclusive and binding on plaintiff, or you may ignore it altogether, or you may give it a weight between those two extremes, as you find proper under all the circumstances.

General Instruction - Circumstantial Evidence

(New York Pattern Jury Instruction 1:70)

Facts must be proven by evidence. Evidence includes the testimony of a witness concerning what the witness saw, heard or did. Evidence also includes writings, photographs, or other physical objects which may be considered as proof of a fact. Evidence can be either direct or circumstantial. Facts may be provided either by direct or circumstantial evidence or by a combination of both. You may give circumstantial evidence less weight, more weight, or the same weight as direct evidence.

Direct evidence is evidence of what a witness saw, heard, or did which, if believed by you, proves a fact. For example, let us suppose that a fact in dispute is whether I knocked over a water glass near the witness chair. If someone testifies that he saw me knock over the glass, that is direct evidence that I knocked over the glass.

Circumstantial evidence is evidence of a fact which does not directly prove a fact in dispute but which permits a reasonable inference or conclusion that the fact exists. For example, a witness testifies that he saw this water glass on the bench. The witness states that, while he was looking the other way, he heard the breaking glass, looked up, and saw me wiping water from my clothes and from the papers on the bench. This testimony is not direct evidence that I knocked over the glass; it is circumstantial evidence from which you could reasonably infer that I knocked over the glass.

Those facts which form the basis of an inference must be proved and the inference to be drawn must be one that may be reasonably drawn. In the example, even though the witness did not see me knock over the glass, if you believe his testimony, you could conclude that I did. Therefore, the circumstantial evidence, if accepted by you, allows you to conclude that the fact in dispute has been proved.

In reaching you conclusion you may not guess or speculate. Suppose, for example, the witness testifies that the water glass was located equally distant from the court clerk and me. The witness states that he heard the breaking of glass and looked up to see both the court clerk and me brushing water from our clothes. If you believe that testimony, you still could not decide on that evidence alone who knocked over the water glass. Where these are the only proved facts, it would be only a guess as to who did it. But, if the witness also testifies that he heard the court clerk say "I am sorry," this additional evidence would allow you to decide who knocked over the water glass.

General Instruction - Interested Witness - Generally

(New York Pattern Jury Instruction 1:91)

The plaintiff and the defendant both testified before you. As parties to the action, both are interested witnesses.

An interested witness is not necessarily less believable than a disinterested witness. The fact that he is interested in the outcome of the case does not mean that he has not told the truth. It is for you to decide from the demeanor of the witness on the stand and such other tests as your experience dictates whether or not the testimony has been influenced, intentionally or unintentionally, by his interest. You may, if you consider it proper under all the circumstances, not believe the testimony of such a witness, even though it is not otherwise challenged or contradicted. However, you are not required to reject the testimony of such a witness, and may accept all or such part of his testimony as you find reliable and reject such part as you find unworthy of acceptance.

General Instruction - Use of Pre-Trial Deposition Upon Trial

(New York Pattern Jury Instruction 1:94)

You are about to hear the lawyer for (plaintiff, defendant) read portions of a document referred to as an examination before trial of (plaintiff, defendant, the witness AB). You may hear the lawyers refer to this document as an EBT or deposition.

At some point before this trial began the (plaintiff, defendant, witness AB), under oath, answered certain questions put to (him, her) by the lawyers for (plaintiff, defendant) put to (him, her) by the lawyer for (plaintiff, defendant, all parties). A stenographer recorded the questions and answers and transcribed them into a document which the (plaintiff, defendant, witness AB) later signed before a notary public. The portions of the transcript of the examination before trial that you will hear are to be considered as if (plaintiff, defendant, witness AB) were testifying from the witness stand.

General Instructions - Special Verdicts

(Adapted from New York Pattern Jury Instruction 1:97)

This case will be decided on the basis of the answers that you give to certain questions that will be submitted to you. Each of the questions asked calls for a "Yes" or "No" answer. While it is important that the views of all jurors be considered, all of you must agree on the answers to each question. When all of you have agreed on any answer, the foreperson of the jury will write the answer in the space provided for each answer and each juror will sign in the appropriate place to indicate (his, her) agreement or disagreement. As you will note from the wording of the questions, you need not consider certain subsequent questions if your answer to a previous question is "No."

When you have answered all the questions that require answers, report to the court.

Do not assume from the questions or from the wording of the questions or from my instructions on them what the answers should be.

Conclusion

(New York Pattern Jury Instruction 1:28)

I have now outlined for you the rules of law that apply to this case and the processes by which you weigh the evidence and decide the facts. In a few minutes you will retire to the jury room for your deliberations. (Traditionally, Juror No. 1 acts as foreperson. Your first order of business when you are in the jury room will be the election of a foreperson.) In order that your deliberations may proceed in an orderly fashion, you must have a foreperson, but of course, his or her vote is entitled to no greater weight than that of any other juror. Your function - to reach a fair decision from the law and the evidence - is an important one. When you are in the jury room, listen to each other, and discuss the evidence and issues in the case among yourselves. It is the duty of each of you, as jurors, to consult with one another, and to deliberate with a view of reaching agreement on a verdict, if you can do so without violating your individual judgment and your conscience. While you should not surrender conscientious convictions of what the truth is and of the weight and effect of the evidence and while each of you must decide the case for yourself and not merely consent to the decision of your fellow jurors, you should examine the issues and the evidence before you with candor and frankness, and with proper respect and regard for the opinions of each other. Remember in your deliberations that the dispute between the parties is, for them, a very important matter. They and the court rely upon you to give full and conscientious deliberation and consideration to the issues and evidence before you. By so doing, you carry out to the fullest your oaths as jurors to truly try the issues of this case and render a true verdict.

Alternate Jurors

(New York Pattern Jury Instruction 1:29)

At this point, I am going excuse our alternate jurors. As I told you before, your services were required as a safeguard

against the possibility that one of the regular jurors might be unable to complete his or her service. Fortunately this has not occurred. I commend the alternate jurors for their faithful attendance and attention. On behalf of the Court and the parties, I thank you for your service.

General Instruction -Supplemental Charge - To Jury Unable to Agree

(New York Pattern Jury Instruction 1:100)

It is highly desirable that you agree upon a verdict, if you reasonably can. The case is important to the parties involved, and its presentation has involved expense to both sides. If you fail to agree upon a verdict, the case will have to be tried before another jury selected in the same manner as you were chosen. There is no reason to believe that the case will ever be submitted to a jury more competent to you.

By pointing out to you the desirability of your reaching a verdict, I am not, in any way, suggesting that you surrender your conscientious convictions about the truth and about the weight and effect of all the evidence. However, in most cases, absolute certainly cannot be expected, and each of you must decide the case for yourselves by examining the questions with candor and frankness. It is your duty to give careful consideration to the opinion and reasoning of your fellow jurors, and they must give similar consideration of all of the evidence, it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and conscience.

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