

AMENDMENTS TO THE FEDERAL RULES
OF CIVIL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT
OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE
THAT HAVE BEEN ADOPTED BY THE COURT, PURSUANT TO 28
U.S.C. 2074



APRIL 15, 1997.—Referred to the Committee on the Judiciary and ordered
to be printed

U.S. GOVERNMENT PRINTING OFFICE

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 11, 1997

Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,



SUPREME COURT OF THE UNITED STATES

April 11, 1997

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Civil Rules 9 and 73, and abrogation of Rules 74, 75, and 76, and amendments to Forms 33 and 34.

[See infra., pp. ___ ___.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 1997, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE**

Rule 9. Pleading Special Matters

* * * * *

(h) ADMIRALTY AND MARITIME CLAIMS. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

2 FEDERAL RULES OF CIVIL PROCEDURE

Rule 73. Magistrate Judges; Trial by Consent and Appeal

(a) Powers; Procedure. * * * * * A record of the proceedings shall be made in accordance with the requirements of Title 28, U.S.C. § 636(c)(5).

* * * * *

(c) Appeal. In accordance with Title 28, U.S.C. § 636(c)(3), appeal from a judgment entered upon direction of a magistrate judge in proceedings under this rule will lie to the court of appeals as it would from a judgment of the district court.

[**(d) Optional Appeal Route.**] (Abrogated)

[**Rule 74. Method of Appeal From Magistrate Judge to District Judge Under Title 28, U.S.C. § 636(c)(4) and Rule 73(d)**] (Abrogated)

[**Rule 75. Proceedings on Appeal From Magistrate Judge to District Judge Under Rule 73(d)**] (Abrogated)

[**Rule 76. Judgment of the District Judge on the Appeal Under Rule 73(d) and Costs**] (Abrogated)

APPENDIX OF FORMS

Form 33. Notice of Availability of Magistrate Judge to Exercise Jurisdiction

* * * * *

An appeal from a judgment entered by a magistrate judge may be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court.

Copies of the Form for the "Consent to Jurisdiction by a United States Magistrate Judge" are available from the clerk of the court.

Form 34. Consent to Exercise of Jurisdiction by a United States Magistrate Judge

* * * * *

CONSENT TO JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of Title 28, U.S.C. § 636(c), the undersigned party or parties to the above-captioned civil matter hereby voluntarily consent to have a United States magistrate judge conduct any and all further proceedings in the case, including trial, and order the entry of a final judgment.

_____ Date _____ Signature

Note: Return this form to the Clerk of the Court if you consent to jurisdiction by a magistrate judge. Do not send a copy of this form to any district judge or magistrate judge.



LEONIDAS RALPH MECHAM
Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

CLARENCE A. LEE, JR.
Associate Director

WASHINGTON, D.C. 20544

March 11, 1997

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE
ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to Rules 9 and 73, the abrogation of Rules 74, 75, and 76, and amendments to Forms 33 and 34 of the Federal Rules of Civil Procedure. The Judicial Conference approved amendments to Rule 9 at its meeting in September 1996, and amendments to Rule 73, the abrogation of Rules 74, 75, and 76, and amendments to Forms 33 and 34 at its meeting in March 1997. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am also transmitting excerpts from Reports of the Committee on Rules of Practice and Procedure to the Judicial Conference and Reports of the Advisory Committee on the Federal Rules of Civil Procedure.

A handwritten signature in black ink, appearing to read "Ralph", written over a horizontal line.

Leonidas Ralph Mecham

Attachments

**EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
SEPTEMBER 1996**

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES**

* * * * *

**AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE**

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted to your committee proposed amendments to Civil Rules 9 and 48* together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in September 1995. Public hearings were held in Oakland, California; New Orleans, Louisiana; and Atlanta, Georgia.

Rule 9(h) (*Pleading Special Matters*) would be amended to resolve the ambiguity that arises from interlocutory appeals in cases that involve both admiralty and nonadmiralty claims by clarifying that "a case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3)."

* * * * *

The proposed amendments to the Federal Rules of Civil Procedure, as recommended by your committee, are in Appendix E together with an excerpt from the

*At its September 1996 session the Judicial Conference did not approve the proposed amendments to Civil Rule 48.

advisory committee report.

RECOMMENDATION: That the Judicial Conference approve the proposed amendments to Civil Rules 9 and 48** and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

**At its September 1996 session the Judicial Conference did not approve the proposed amendments to Civil Rule 48.

Agenda F-18 (Appendix E)
Rules
September 1996

To: **Honorable Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules**

DATE: **May 17, 1996**

Re: **Report of the Advisory Committee on Civil Rules**

I. Introduction

The Advisory Committee on Civil Rules met on April 18 and 19, 1996, at the Administrative Office of the United States Courts in Washington, D.C. The Committee considered public comments on four rules that had been published for comment in September, 1995: Civil Rules 9(h), 26(c), 47(a), and 48. In part II(A) of this Report, the Committee recommends that the amendments to Rules 9(h) and 48 be submitted unchanged to the Judicial Conference with a recommendation for adoption. For reasons discussed in this Introduction, the Committee concluded that Rule 26(c) should be held for further consideration as part of a new project to study the general scope of discovery authorized by Rule 26(b)(1) and the scope of document discovery under Rules 34 and 45. (This project is described further in Part III.) This Introduction also will describe the Committee conclusion that amendment of Rule 47(a) should be postponed in favor of efforts to encourage mutual education and communication between bench and bar on the values of lawyer participation in the voir dire examination of prospective jurors.

* * * * *

II. ACTION ITEMS

***A. Rules Transmitted for Judicial Conference Approval
Rules 9(h), 48***

(a) Rule 9(h)

28 U.S.C. § 1292(a)(3) provides for interlocutory appeals in "admiralty cases." Rule 9(h) now provides that "admiralty cases" in this statute "shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h)." Because an admiralty case may include nonadmiralty claims, this language is not easily applied when a district court disposes of a nonadmiralty claim advanced in an admiralty case by an order that otherwise fits the requirements of § 1292(a)(3). The amendment resolves the question by allowing an appeal without regard to whether the order disposes of an admiralty claim or a nonadmiralty claim.

**EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
MARCH 1997**

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES**

*** * * * ***

**AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE**

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Federal Rules of Civil Procedure 73 and proposed amendments abrogating Rules 74, 75, and 76, and revisions of Forms 33 and 34, together with Committee Notes explaining their purpose and intent. These changes are proposed to conform to the provisions in the Federal Courts Improvement Act, Pub. L. No. 104-317 (effective October 19, 1996), which eliminate the alternative appeal to a district judge from a decision entered by a magistrate judge under 28 U.S.C. § 636(c). Consistent with the Act, the proposed amendments would eliminate the alternative appeal route and permit appeals only to the court of appeals.

Since the provisions eliminating the alternative appeal route took effect immediately, the chair of the Committee on Administration of the Magistrate Judges System requested the rules committees to take quick action to reconcile the inconsistency between the rules and the statutory changes.

Under the Judicial Conference's Procedures for the Conduct of Business by the Judicial Conference Committee on Rules of Practice and Procedure, "the Standing Committee may eliminate the public comment requirement if, in the case of a technical or conforming (statutory)

amendment, it determines that notice and comment are not appropriate or necessary.” On the recommendation of the advisory committee, your committee agreed that the proposed amendments were technical or conforming and need not be published for comment. If approved by the Judicial Conference and the Supreme Court by May 1, 1997, the proposed amendments could take effect on December 1, 1997, instead of December 1, 1998, when they would otherwise take effect if they were published for comment.

The proposed amendments to the Federal Rules of Civil Procedure and to the Forms, as recommended by your committee, appear in Appendix A together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve proposed amendments to Civil Rule 73, proposed amendments abrogating Rules 74, 75, and 76, and revision of Forms 33 and 34, and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Agenda F-18 (Appendix A)
Rules
March 1997

To: Honorable Alicemarie H. Stotler, Chair,
Standing Committee on Rules of Practice and
Procedure

From: Paul V. Niemeyer, Chair, Advisory Committee on
Civil Rules

Date: December 6, 1996

Re: Report of the Advisory Committee on Civil Rules

I Introduction

The Advisory Committee on Civil Rules met on October 17 and 18, 1996, at the Administrative Office of the United States Courts in Washington, D.C. A brief summary of the topics considered at the meeting is provided in this Introduction. Part II recommends that this Committee transmit to the Judicial Conference changes to conform the Civil Rules to the repeal of the statutory provision that allowed parties that had agreed to trial before a magistrate judge to agree also that the first appeal would be taken to the district court.

* * * * *

II ACTION ITEMS

Rules Transmitted for Judicial Conference Approval

Rules 73, 74, 75, 76

Section 207 of S. 1887, the Federal Courts Improvement Act of 1996, Act of October 19, 1996, reshapes the 28 U.S.C. § 636 provisions for appeal from a judgment entered by a magistrate judge following consent to trial before the magistrate judge. Section 636(c) formerly provided two alternative appeal paths. Appeal could be taken to the court of appeals, or, alternatively, the parties could agree at the time of consenting to trial before a magistrate judge that any appeal would be taken to the district court. The judgment of the district court on appeal from the

magistrate judge could be reviewed only by petition to the court of appeals for leave to appeal. This second appeal path has been rescinded, leaving only the path of direct appeal to the court of appeals.

Portions of Civil Rule 73 refer to the former provision for appeal to the district court. Civil Rules 74, 75, and 76 establish the procedure for appeal to the district court. Rule 73 must be conformed to the statute as amended, and Rules 74, 75, and 76 must be abrogated. Portions of Forms 33 and 34 also must be changed to conform to the statutory and rules changes. To conform these rules to the statutory changes, the Advisory Committee recommends the changes shown below in the usual form.

The Advisory Committee also recommends that these changes be transmitted to the Judicial Conference without any period of public comment, with the recommendation that they be sent on to the Supreme Court for submission to Congress. Part I(4)(d) of the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure authorizes this Committee to "eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary. Whenever such an exception is made, the Standing Committee shall advise the Judicial Conference of the exception and the reasons for the exception."

Parties no longer can consent to appeal from the judgment of a magistrate judge to the district court. Perpetuation of the Civil Rules describing such appeals serves no purpose and may mislead some parties to consent to trial before a magistrate judge for the purpose of also achieving a hoped-for speedy and inexpensive opportunity to appeal "at home." Even if the comment and hearing requirement is excused, conforming amendments can become effective only on December 1, 1997, more than a full year after the statutory change. With comment and hearing, the date would be pushed back to December 1, 1998. Once Congress has made the decision to abolish this means of appeal, the only question for the Enabling Act Process is the technical one of making the right conforming changes. The Advisory Committee believes that the conforming changes are sufficiently clear to justify prompt action.

It is possible that on December 1, 1997, some cases will remain pending before magistrate judges in which the parties have consented to appeal to the district court. There is no need to

defer conforming changes for fear of the impact on these cases. The retroactive effect of the statutory change is not a matter to be resolved by court rule. The effect of the conforming rules changes will be governed by the Supreme Court order making the amendments; the usual provision in rules orders is that the changes take effect on December 1 and "govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." 28 U.S.C.A. § 2074(a) provides that changes do not apply to pending proceedings "to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies."

* * * * *

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE***

Rule 9. Pleading Special Matters

* * * * *

1 **(h) ADMIRALTY AND MARITIME CLAIMS.** A pleading or
2 count setting forth a claim for relief within the admiralty and
3 maritime jurisdiction that is also within the jurisdiction of the
4 district court on some other ground may contain a statement
5 identifying the claim as an admiralty or maritime claim for the
6 purposes of Rules 14(c), 38(e), 82, and the Supplemental
7 Rules for Certain Admiralty and Maritime Claims. If the
8 claim is cognizable only in admiralty, it is an admiralty or
9 maritime claim for those purposes whether so identified or
10 not. The amendment of a pleading to add or withdraw an
11 identifying statement is governed by the principles of Rule 15.
12 ~~The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty~~
13 ~~cases shall be construed to mean admiralty and maritime~~

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

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14 ~~claims within the meaning of this subdivision (h)~~ A case that
15 includes an admiralty or maritime claim within this
16 subdivision is an admiralty case within 28 U.S.C.
17 § 1292(a)(3).

Committee Note

Section 1292(a)(3) of the Judicial Code provides for appeal from "[i]nterlocutory decrees of * * * district courts * * * determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

Rule 9(h) was added in 1966 with the unification of civil and admiralty procedure. Civil Rule 73(h) was amended at the same time to provide that the § 1292(a)(3) reference "to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of Rule 9(h)." This provision was transferred to Rule 9(h) when the Appellate Rules were adopted.

A single case can include both admiralty or maritime claims and nonadmiralty claims or parties. This combination reveals an ambiguity in the statement in present Rule 9(h) that an admiralty "claim" is an admiralty "case." An order "determining the rights and liabilities of the parties" within the meaning of § 1292(a)(3) may resolve only a nonadmiralty claim, or may simultaneously resolve interdependent admiralty and nonadmiralty claims. Can appeal be taken as to the nonadmiralty matter, because it is part of a case that includes an admiralty claim, or is appeal limited to the admiralty claim?

The courts of appeals have not achieved full uniformity in applying the § 1292(a)(3) requirement that an order "determin[e] the rights and liabilities of the parties." It is common to assert that the statute should be construed narrowly, under the general policy that exceptions to the final judgment rule should be construed narrowly. This policy would suggest that the ambiguity should be resolved by limiting the interlocutory appeal right to orders that determine the rights and liabilities of the parties to an admiralty claim.

A broader view is chosen by this amendment for two reasons. The statute applies to admiralty "cases," and may itself provide for appeal from an order that disposes of a nonadmiralty claim that is joined in a single case with an admiralty claim. Although a rule of court may help to clarify and implement a statutory grant of jurisdiction, the line is not always clear between permissible implementation and impermissible withdrawal of jurisdiction. In addition, so long as an order truly disposes of the rights and liabilities of the parties within the meaning of § 1292(a)(3), it may prove important to permit appeal as to the nonadmiralty claim. Disposition of the nonadmiralty claim, for example, may make it unnecessary to consider the admiralty claim and have the same effect on the case and parties as disposition of the admiralty claim. Or the admiralty and nonadmiralty claims may be interdependent. An illustration is provided by *Roco Carriers, Ltd. v. M/V Nurnberg Express*, 899 F.2d 1292 (2d Cir. 1990). Claims for losses of ocean shipments were made against two defendants, one subject to admiralty jurisdiction and the other not. Summary judgment was granted in favor of the admiralty defendant and against the nonadmiralty defendant. The nonadmiralty defendant's appeal was accepted, with the explanation that the determination of its liability was "integrally linked with the determination of non-liability" of the admiralty defendant, and that "section 1292(a)(3) is not limited to admiralty *claims*; instead, it refers to admiralty *cases*." 899 F.2d at 1297. The advantages of

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permitting appeal by the nonadmiralty defendant would be particularly clear if the plaintiff had appealed the summary judgment in favor of the admiralty defendant.

It must be emphasized that this amendment does not rest on any particular assumptions as to the meaning of the § 1292(a)(3) provision that limits interlocutory appeal to orders that determine the rights and liabilities of the parties. It simply reflects the conclusion that so long as the case involves an admiralty claim and an order otherwise meets statutory requirements, the opportunity to appeal should not turn on the circumstance that the order does — or does not — dispose of an admiralty claim. No attempt is made to invoke the authority conferred by 28 U.S.C. § 1292(e) to provide by rule for appeal of an interlocutory decision that is not otherwise provided for by other subsections of § 1292.

GAP REPORT ON RULE 9(h)

No changes have been made in the published proposal.

Rule 73. Magistrate Judges; Trial by Consent and Appeal Options

1 (a) Powers; Procedure. * * * * * A record of the proceedings shall
2 be made in accordance with the requirements of Title 28, U.S.C. §
3 636(c)(75).

4 * * * * *

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5 **(c) Normal Appeal Route.** In accordance with Title 28, U.S.C. §
6 636(c)(3), ~~unless the parties otherwise agree to the optional appeal~~
7 ~~route provided for in subdivision (d) of this rule,~~ appeal from a
8 judgment entered upon direction of a magistrate judge in proceedings
9 under this rule will lie to the court of appeals as it would from a
10 judgment of the district court.

11 ~~**(d) Optional Appeal Route.** In accordance with Title 28, U.S.C.~~
12 ~~§ 636(c)(4), at the time of reference to a magistrate judge, the parties~~
13 ~~may consent to appeal on the record to a district judge of the court~~
14 ~~and thereafter, by petition only, to the court of appeals.~~

COMMITTEE NOTE

The Federal Courts Improvement Act of 1996 repealed the former provisions of 28 U.S.C. § 636(c)(4) and (5) that enabled parties that had agreed to trial before a magistrate judge to agree also that appeal should be taken to the district court. Rule 73 is amended to conform to this change. Rules 74, 75, and 76 are abrogated for the same reason. The portions of Form 33 and Form 34 that referred to appeals to the district court also are deleted.

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~~Rule 74. Method of Appeal From Magistrate Judge to District Judge Under Title 28, U.S.C. § 636(c)(4) and Rule 73(d)~~

1 ~~(a) When Taken.~~ When the parties have elected under Rule
2 ~~73(d) to proceed by appeal to a district judge from an~~
3 ~~appealable decision made by a magistrate judge under the~~
4 ~~consent provisions of Title 28, U.S.C. § 636(c)(4), an appeal~~
5 ~~may be taken from the decision of a magistrate judge by filing~~
6 ~~with the clerk of the district court a notice of appeal within 30~~
7 ~~days of the date of entry of the judgment appealed from, but~~
8 ~~if the United States or an officer or agency thereof is a party,~~
9 ~~the notice of appeal may be filed by any party within 60 days~~
10 ~~of such entry. If a timely notice of appeal is filed by a party,~~
11 ~~any other party may file a notice of appeal within 14 days~~
12 ~~thereafter, or within the time otherwise prescribed by this~~
13 ~~subdivision, whichever period last expires.~~
14 ~~The running of the time for filing a notice of appeal is~~

15 ~~terminated as to all parties by the timely filing of any of the~~
16 ~~following motions with the magistrate judge by any party, and~~
17 ~~the full time for appeal from the judgment entered by the~~
18 ~~magistrate judge commences to run anew from entry of any of~~
19 ~~the following orders: (1) granting or denying a motion for~~
20 ~~judgment under Rule 50(b); (2) granting or denying a motion~~
21 ~~under Rule 52(b) to amend or make additional findings of~~
22 ~~fact, whether or not an alteration of the judgment would be~~
23 ~~required if the motion is granted; (3) granting or denying a~~
24 ~~motion under Rule 59 to alter or amend the judgment; (4)~~
25 ~~denying a motion for a new trial under Rule 59.~~

26 ~~—An interlocutory decision or order by a magistrate judge~~
27 ~~which, if made by a district judge, could be appealed under~~
28 ~~any provision of law, may be appealed to a district judge by~~
29 ~~filing a notice of appeal within 15 days after entry of the~~
30 ~~decision or order, provided the parties have elected to appeal~~
31 ~~to a district judge under Rule 73(d). An appeal of such~~

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32 ~~interlocutory decision or order shall not stay the proceedings~~
33 ~~before the magistrate judge unless the magistrate judge or~~
34 ~~district judge shall so order.~~

35 ~~Upon a showing of excusable neglect, the magistrate judge~~
36 ~~may extend the time for filing a notice of appeal upon motion~~
37 ~~filed not later than 20 days after the expiration of the time~~
38 ~~otherwise prescribed by this rule.~~

39 ~~(b) Notice of Appeal; Service.~~ The notice of appeal shall
40 specify the party or parties taking the appeal, designate the
41 judgment, order or part thereof appealed from, and state that
42 the appeal is to a judge of the district court. The clerk shall
43 mail copies of the notice to all other parties and note the date
44 of mailing in the civil docket.

45 ~~(c) Stay Pending Appeal.~~ Upon a showing that the
46 magistrate judge has refused or otherwise failed to stay the
47 judgment pending appeal to the district judge under Rule
48 73(d), the appellant may make application for a stay to the

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49 ~~district judge with reasonable notice to all parties. The stay~~
50 ~~may be conditioned upon the filing in the district court of a~~
51 ~~bond or other appropriate security.~~

52 ~~(d) Dismissal. For failure to comply with these rules or any~~
53 ~~local rule or order, the district judge may take such action as~~
54 ~~is deemed appropriate, including dismissal of the appeal. The~~
55 ~~district judge also may dismiss the appeal upon the filing of~~
56 ~~a stipulation signed by all parties, or upon motion and notice~~
57 ~~by the appellant.~~

COMMITTEE NOTE

Rule 74 is abrogated for the reasons described in the Note to Rule 73.

~~Rule 75. Proceedings on Appeal From Magistrate Judge to District Judge Under Rule 73(d)~~

1 ~~(a) Applicability. In proceedings under Title 28, U.S.C. §~~
2 ~~636(c), when the parties have previously elected under Rule~~
3 ~~73(d) to appeal to a district judge rather than to the court of~~

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4 ~~appeals, this rule shall govern the proceedings on appeal.~~

5 **~~(b) Record on Appeal:~~**

6 ~~(1) Composition.~~ The original papers and exhibits
7 filed with the clerk of the district court, the transcript
8 of the proceedings, if any, and the docket entries shall
9 constitute the record on appeal. In lieu of this record
10 the parties, within 10 days after the filing of the notice
11 of appeal, may file a joint statement of the case
12 showing how the issues presented by the appeal arose
13 and were decided by the magistrate judge, and setting
14 forth only so many of the facts averred and proved or
15 sought to be proved as are essential to a decision of
16 the issues presented.

17 ~~(2) Transcript.~~ Within 10 days after filing the notice
18 of appeal the appellant shall make arrangements for
19 the production of a transcript of such parts of the
20 proceedings as the appellant deems necessary. Unless

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21 ~~the entire transcript is to be included, the appellant,~~
22 ~~within the time provided above, shall serve on the~~
23 ~~appellee and file with the court a description of the~~
24 ~~parts of the transcript which the appellant intends to~~
25 ~~present on the appeal. If the appellee deems a~~
26 ~~transcript of other parts of the proceedings to be~~
27 ~~necessary, within 10 days after the service of the~~
28 ~~statement of the appellant, the appellee shall serve on~~
29 ~~the appellant and file with the court a designation of~~
30 ~~additional parts to be included. The appellant shall~~
31 ~~make arrangements for the inclusion of all such parts~~
32 ~~unless the magistrate judge, upon motion, exempts the~~
33 ~~appellant from providing certain parts, in which case~~
34 ~~the appellee may provide for their transcription:~~

35 ~~(3) *Statement in Lieu of Transcript.* If no record of~~
36 ~~the proceedings is available for transcription, the~~
37 ~~parties shall, within 10 days after the filing of the~~

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38 ~~notice of appeal, file a statement of the evidence from~~
39 ~~the best available means to be submitted in lieu of the~~
40 ~~transcript. If the parties cannot agree they shall~~
41 ~~submit a statement of their differences to the~~
42 ~~magistrate judge for settlement.~~

43 ~~(c) Time for Filing Briefs. Unless a local rule or court~~
44 ~~order otherwise provides, the following time limits for filing~~
45 ~~briefs shall apply:~~

46 ~~(1) The appellant shall serve and file the appellant's~~
47 ~~brief within 20 days after the filing of the transcript,~~
48 ~~statement of the case, or statement of the evidence.~~

49 ~~(2) The appellee shall serve and file the appellee's~~
50 ~~brief within 20 days after service of the brief of the~~
51 ~~appellant.~~

52 ~~(3) The appellant may serve and file a reply brief~~
53 ~~within 10 days after service of the brief of the~~
54 ~~appellee.~~

55 ~~(4) If the appellee has filed a cross-appeal, the~~
 56 ~~appellee may file a reply brief limited to the issues on~~
 57 ~~the cross-appeal within 10 days after service of the~~
 58 ~~reply brief of the appellant.~~

59 ~~(d) Length and Form of Briefs. Briefs may be typewritten.~~
 60 ~~The length and form of briefs shall be governed by local rule.~~

61 ~~(e) Oral Argument. The opportunity for the parties to be~~
 62 ~~heard on oral argument shall be governed by local rule.~~

COMMITTEE NOTE

Rule 75 is abrogated for the reasons described in the Note to Rule 73.

Rule 76. Judgment of the District Judge on the Appeal Under Rule 73(d) and Costs

1 ~~(a) Entry of Judgment. When the parties have elected~~
 2 ~~under Rule 73(d) to appeal from a judgment of the magistrate~~
 3 ~~judge to a district judge, the clerk shall prepare, sign, and~~
 4 ~~enter judgment in accordance with the order or decision of the~~

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5 ~~district judge following an appeal from a judgment of the~~
6 ~~magistrate judge, unless the district judge directs otherwise.~~
7 ~~The clerk shall mail to all parties a copy of the order or~~
8 ~~decision of the district judge.~~

9 ~~(b) Stay of Judgments. The decision of the district judge~~
10 ~~shall be stayed for 10 days during which time a party may~~
11 ~~petition the district judge for rehearing, and a timely petition~~
12 ~~shall stay the decision of the district judge pending disposition~~
13 ~~of a petition for rehearing. Upon the motion of a party, the~~
14 ~~decision of the district judge may be stayed in order to allow~~
15 ~~a party to petition the court of appeals for leave to appeal.~~

16 ~~(c) Costs. Except as otherwise provided by law or ordered~~
17 ~~by the district judge, costs shall be taxed against the losing~~
18 ~~party; if a judgment of the magistrate judge is affirmed in part~~
19 ~~or reversed in part, or is vacated, costs shall be allowed only~~
20 ~~as ordered by the district judge. The cost of the transcript, if~~

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21 ~~necessary for the determination of the appeal, and the~~
22 ~~premiums paid for bonds to preserve rights pending appeal~~
23 ~~shall be taxed as costs by the clerk.~~

COMMITTEE NOTE

Rule 76 is abrogated for the reasons described in the Note to Rule 73.

Form 33. Notice of Availability of Magistrate Judge to Exercise Jurisdiction and Appeal Option

* * * * *

An appeal from a judgment entered by a magistrate judge may be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court. ~~Alternatively, upon consent by all parties, an appeal from a judgment entered by a magistrate judge may be taken directly to a district judge. Cases in which an appeal is taken to a district judge may be reviewed by the United States court of appeals for this judicial circuit only by way of petition for leave to appeal.~~

Copies of the Form for the "Consent to Jurisdiction by a United States Magistrate Judge" and "Election of Appeal to a District Judge" are available from the clerk of the court.

Form 34. Consent to Exercise of Jurisdiction by a United States Magistrate Judge, Election of Appeal to District Judge

* * * * *

~~ELECTION OF APPEAL TO DISTRICT JUDGE~~

~~{Do not execute this portion of the Consent Form if you desire that the appeal lie directly to the court of appeals.}~~

~~In accordance with the provisions of Title 28, U.S.C. § 636(c)(4), the undersigned party or parties elect to take any appeal in this case to a district judge of this court.~~

Date Signature

Note: Return this form to the Clerk of the Court if you consent to jurisdiction by a magistrate judge. Do not send a copy of this form to any district judge or magistrate judge.