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AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURES

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. 2072

APRIL 24, 2001.—Referred to the Committee on the Judiciary and ordered to be printed

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SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 23, 2001.

Hon. J. DENNIS HASTERT,
Speaker of the House of Representatives,
Washington, DC.

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 Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

The Supreme court also approved the abrogation of the Rules of Practice and Procedure under section 25 of an Act to Amend and Consolidate the Acts Respecting Copyright promulgated by the Court on June 1, 1909.

Sincerely,

WILLIAM H. REHNQUIST.

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 5, 6, 65, 77, 81, and 82.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2001, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings 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.

4. That the Rules for Practice and Procedure under section 25 of An Act To Amend and Consolidate the Acts Respecting Copyright, approved March 4, 1909, promulgated by this Court on June 1, 1909, effective July 1, 1909, as revised, be, and they hereby are, abrogated, effective December 1, 2001.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 5. Service and Filing of Pleadings and Other Papers

* * * * *

(b) Making Service.

(1) Service under Rules 5(a) and 77(d) on a party represented by an attorney is made on the attorney unless the court orders service on the party.

(2) Service under Rule 5(a) is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.

(C) If the person served has no known address, leaving a copy with the clerk of the court.

(D) Delivering a copy by any other means, including electronic means, consented to in writing by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery.

If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities.

(3) Service by electronic means under Rule 5(b)(2)(D) is not effective if the party making service learns that the attempted service did not reach the person to be served.

* * * * *

Rule 6. Time

* * * * *

(e) Additional Time After Service under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under

Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

Rule 65. Injunctions

* * * * *

(f) Copyright Impoundment. This rule applies to copyright impoundment proceedings.

Rule 77. District Courts and Clerks

* * * * *

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry in the manner provided for in Rule 5(b) upon each party who is not in default for failure to appear, and shall make a note in the docket of the service. Any party may in addition serve a notice of such entry in the manner provided in Rule

5(b) for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

Rule 81. Applicability in General

(a) Proceedings to which the Rules Apply.

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7651-7681. They do apply to proceedings in bankruptcy to the extent provided by the Federal Rules of Bankruptcy Procedure.

* * * * *

Rule 82. Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C., §§ 1391-1392.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

October 20, 2000

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 consideration of the Court proposed amendments to Rules 5, 6, 65, 77, 81, and 82 of the Federal Rules of Civil Procedure and a proposed abrogation of the Copyright Rules. The Judicial Conference recommends that these changes be approved by the Court, and that the amendments to the Federal Rules of Civil Procedure be transmitted to the Congress pursuant to law.

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

Leonidas Ralph Mecham

Attachments

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

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 Rules 5, 6, 65, 77, 81, and 82, and abrogation of the Copyright Rules with a recommendation that they be approved and transmitted to the Judicial Conference. With the exception of the amendments to Rule 82, which involve only a technical conforming change, the amendments were published for comment by the bench and bar in August 1999. The scheduled public hearing was canceled because the single request to testify was withdrawn.

Electronic and Other Service

The proposed amendment of Rule 5(b) (Service and Filing of Pleadings and Other Papers) would permit electronic service on parties who give written consent. Under the amendment, electronic service would be complete on transmission. But service by electronic means is not effective if the party making service learns that the attempted service did not reach the person served. (Civil Rule 5 is cross-referenced in Bankruptcy Rule 7005 and Criminal Rule 49(b), which extend the application of Rule 5 to adversary proceedings in bankruptcy cases and to criminal cases.) The language and formatting of Rule 5(b) also were restyled.

Rule 6(e) (Time) would be amended to provide a party with an additional three days to respond to a paper served by electronic means. Although electronic service often is instantaneous, delays frequently occur. The added three-day response time is consistent with the

three-day "mail rule" and is intended to eliminate any perceived disadvantage in using electronic means.

The proposed amendments to Rule 77(d) (District Courts and Clerks) would permit courts to serve notices by electronic means on parties who have so consented.

Copyright Rules

The Copyright Rules of Practice were prescribed by the Supreme Court and are set out in 17 U.S.C.A. following § 501. They deal only with prejudgment seizure of copies alleged to infringe a copyright. The rules were written for the 1909 Copyright Act and have not been changed to reflect inconsistent provisions in the 1976 Copyright Act. They do not conform to modern concepts of due process. In 1964 the advisory committee challenged the seizure procedure as one that:

> is rigid and virtually eliminates discretion in the court; it does not require the plaintiff to make any showing of irreparable injury as a condition of securing the interlocutory relief; nor does it require the plaintiff to give notice to the defendant of an application for impounding even when an opportunity could feasibly be provided.

These problems prompted the advisory committee in 1964 to recommend that the Copyright Rules be abrogated and that Civil Rule 65 be amended to provide an impoundment procedure for articles involved in an alleged copyright infringement. The recommendation was withdrawn because Congress was considering a thorough revision of the copyright laws that was eventually enacted in 1976.

The advisory committee actively solicited comment in 1997 from organizations and experienced counsel on the need to update the Copyright Rules. The advisory committee notified staff of the House Judiciary Subcommittee on Courts and Intellectual Property of its intent to recommend that the Copyright Rules be abrogated. Representative Howard Coble (R-NC), chairman of the subcommittee, expressed concern that any proposed amendment might interfere

with pending copyright legislation and ongoing United States multilateral treaty obligations. The United States has been actively encouraging all countries to provide effective intellectual property protections. At Chairman Coble's request, the advisory committee deferred recommending publication of the proposals for one year.

During the one-year delay, Congress acted on pending measures. The advisory committee has now concluded that the Copyright Rules should be abrogated and Civil Rule 65 be amended to expressly govern impoundment proceedings. Under the proposed amendments, impoundment may still be ordered on an ex parte basis if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. But the proposed changes would eliminate the concern that the rules may be invalid and will help ensure that the United States is in compliance with its international obligations.

Amendments to Rule 81 (Applicability in General) are proposed to conform to the abrogation of the Copyright Rules, to eliminate an outdated reference to mental health proceedings, and to clarify a reference to the Bankruptcy Rules.

Technical Conforming Amendment

Rule 82 (Jurisdiction and Venue Unaffected) would be amended to correct a citation to a repealed section of title 28 of the United States Code. In accordance with Judicial Conference procedures governing the rulemaking process, the Committee determined that the change need not be published for comment because it was solely a technical conforming amendment.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Civil Procedure and the abrogation of the Copyright Rules are in Appendix B together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 5, 6, 65, 77, 81, and 82, and a proposed abrogation of the Copyright Rules and transmit these changes 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.

* * * * *

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

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

From: Paul V. Niemeyer, Chair, Advisory Committee on the Federal Rules of Civil Procedure

Date: May 2000

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met on April 10 and 11, 2000, at the Administrative Office of the United States Courts in Washington, D.C. It voted to recommend adoption of rules amendments that were published for comment in August 1999, with some modifications in response to the public comments. Part I of this report details these recommendations with respect to two packages. The first package, covering electronic service of papers after initial process, includes changes in Rules 5(b), 6(e), and 77(d). The second package, covering abrogation of the obsolete Copyright Rules of Practice, includes abrogation of those rules, a new Rule 65(f), and a corresponding change in Rule 81(a)(1). A third proposal for adoption included in this package would make an overdue technical correction to Rule 82; it is recommended that it be adopted without publication for comment.

* * * * *

I Action Items: Amendments Proposed for Adoption

The Advisory Committee recommends that each of the amendments discussed in this section be transmitted to the Judicial Conference with recommendations for adoption. The electronic service and copyright proposals were published for comment in August 1999. The changes made in response to the public comments are described with each package. [The Advisory Committee and Standing Committee did not consider several comments submitted after the expiration of the 6-month public comment period. The comments are summarized at the end of this section. There is little new in these comments, and the Advisory Committee had considered all of the issues raised in them in its earlier deliberations.] The technical conforming change to Rule 82 has not been published for comment, but is recommended for adoption without publication.

A. Electronic and Other Service: Rules 5(b), 6(e), and 77(d)

The proposed amendments to Rules 5(b) and 77(d) were published for comment in August 1999. The Advisory Committee had voted not to recommend any change in Rule 6(e), but also published as an "alternative proposal" the change that it now recommends for adoption.

Rule 5(b) is restyled. Rule 5(b)(1) is clarified by expressly limiting it to service under Rules 5(a) and 77(d). The restyling of Rule 5(b)(2)(A), (B), and (C) is intended to make no change in the meaning of the present rule.

Rule 5(b)(2)(D) is new. Although the proposal emerged from the work of the Standing Committee's Technology Subcommittee and was designed to authorize electronic service, it also reaches service by other means. Written consent of the person served is required.

Rule 6(e) would be amended to allow an additional 3 days to respond when service is made under Rule 5(b)(2)(C) by leaving a copy with the clerk of the court, or by any means consented to under Rule 5(b)(2)(D). This amendment extends the present provision that adds 3 days when service is made by mail.

Rule 77(d) is amended to allow the clerk of court to serve notice of an order or judgment in any manner provided for in Rule 5(b). The immediate purpose is to support notice by facsimile or computer.

The public comments suggested drafting changes that were adopted by the Advisory Committee. These changes are described in the Gap report.

The Advisory Committee deliberations are summarized at pages 4 to 9 of the draft Minutes.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 5. Service and Filing of Pleadings and Other Papers

1 * * * * *

2 ~~**(b) Same: How Made.** Whenever under these rules~~
3 ~~service is required or permitted to be made upon a party~~
4 ~~represented by an attorney the service shall be made upon the~~
5 ~~attorney unless service upon the party is ordered by the court.~~
6 ~~Service upon the attorney or upon a party shall be made by~~
7 ~~delivering a copy to the party or attorney or by mailing it to~~
8 ~~the party or attorney at the attorney's or party's last known~~
9 ~~address or, if no address is known, by leaving it with the clerk~~
10 ~~of the court. Delivery of a copy within this rule means:~~
11 ~~handing it to the attorney or to the party; or leaving it at the~~
12 ~~attorney's or party's office with a clerk or other person in~~
13 ~~charge thereof; or, if there is no one in charge, leaving it in~~

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

14 ~~a conspicuous place therein; or, if the office is closed or the~~
15 ~~person to be served has no office, leaving it at the person's~~
16 ~~dwelling house or usual place of abode with some person of~~
17 ~~suitable age and discretion then residing therein. Service by~~
18 ~~mail is complete upon mailing.~~
19 **(b) Making Service.**
20 (1) Service under Rules 5(a) and 77(d) on a party
21 represented by an attorney is made on the attorney
22 unless the court orders service on the party.
23 (2) Service under Rule 5(a) is made by:
24 (A) Delivering a copy to the person served by:
25 (i) handing it to the person;
26 (ii) leaving it at the person's office with a
27 clerk or other person in charge, or if no one is
28 in charge leaving it in a conspicuous place in
29 the office; or

30 **(iii)** if the person has no office or the office is
31 closed, leaving it at the person's dwelling
32 house or usual place of abode with someone
33 of suitable age and discretion residing there.
34 **(B)** Mailing a copy to the last known address of
35 the person served. Service by mail is complete on
36 mailing.
37 **(C)** If the person served has no known address,
38 leaving a copy with the clerk of the court.
39 **(D)** Delivering a copy by any other means,
40 including electronic means, consented to in
41 writing by the person served. Service by
42 electronic means is complete on transmission;
43 service by other consented means is complete
44 when the person making service delivers the copy
45 to the agency designated to make delivery. If
46 authorized by local rule, a party may make service

47 under this subparagraph (D) through the court's

48 transmission facilities.

49 (3) Service by electronic means under Rule 5(b)(2)(D)

50 is not effective if the party making service learns that

51 the attempted service did not reach the person to be

52 served.

* * * * *

Committee Note

Rule 5(b) is restyled.

Rule 5(b)(1) makes it clear that the provision for service on a party's attorney applies only to service made under Rules 5(a) and 77(d). Service under Rules 4, 4.1, 45(b), and 71A(d)(3) — as well as rules that invoke those rules — must be made as provided in those rules.

Subparagraphs (A), (B), and (C) of Rule 5(b)(2) carry forward the method-of-service provisions of former Rule 5(b).

Subparagraph (D) of Rule 5(b)(2) is new. It authorizes service by electronic means or any other means, but only if consent is obtained from the person served. The consent must be express, and cannot be implied from conduct. Early experience with electronic filing as authorized by Rule 5(d) is positive, supporting service by electronic means as well. Consent is required, however, because it is not yet

possible to assume universal entry into the world of electronic communication. Subparagraph (D) also authorizes service by nonelectronic means. The Rule 5(b)(2)(B) provision making mail service complete on mailing is extended in subparagraph (D) to make service by electronic means complete on transmission; transmission is effected when the sender does the last act that must be performed by the sender. Service by other agencies is complete on delivery to the designated agency.

Finally, subparagraph (D) authorizes adoption of local rules providing for service through the court. Electronic case filing systems will come to include the capacity to make service by using the court's facilities to transmit all documents filed in the case. It may prove most efficient to establish an environment in which a party can file with the court, making use of the court's transmission facilities to serve the filed paper on all other parties. Transmission might be by such means as direct transmission of the paper, or by transmission of a notice of filing that includes an electronic link for direct access to the paper. Because service is under subparagraph (D), consent must be obtained from the persons served.

Consent to service under Rule 5(b)(2)(D) must be in writing, which can be provided by electronic means. Parties are encouraged to specify the scope and duration of the consent. The specification should include at least the persons to whom service should be made, the appropriate address or location for such service — such as the e-mail address or facsimile machine number, and the format to be used for attachments. A district court may establish a registry or other facility that allows advance consent to service by specified means for future actions.

Rule 6(e) is amended to allow additional time to respond when service is made under Rule 5(b)(2)(D). The additional time does not

relieve a party who consents to service under Rule 5(b)(2)(D) of the responsibilities to monitor the facility designated for receiving service and to provide prompt notice of any address change.

Paragraph (3) addresses a question that may arise from a literal reading of the provision that service by electronic means is complete on transmission. Electronic communication is rapidly improving, but lawyers report continuing failures of transmission, particularly with respect to attachments. Ordinarily the risk of non-receipt falls on the person being served, who has consented to this form of service. But the risk should not extend to situations in which the person attempting service learns that the attempted service in fact did not reach the person to be served. Given actual knowledge that the attempt failed, service is not effected. The person attempting service must either try again or show circumstances that justify dispensing with service.

Paragraph (3) does not address the similar questions that may arise when a person attempting service learns that service by means other than electronic means in fact did not reach the person to be served. Case law provides few illustrations of circumstances in which a person attempting service actually knows that the attempt failed but seeks to act as if service had been made. This negative history suggests there is no need to address these problems in Rule 5(b)(3). This silence does not imply any view on these issues, nor on the circumstances that justify various forms of judicial action even though service has not been made.

Changes Made After Publication and Comments

Rule 5(b)(2)(D) was changed to require that consent be "in writing."

Rule 5(b)(3) is new. The published proposal did not address the question of failed service in the text of the rule. Instead, the Committee Note included this statement: "As with other modes of service, however, actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete on transmission. The sender must take additional steps to effect service. Service by other agencies is complete on delivery to the designated agency." The addition of paragraph (3) was prompted by consideration of the draft Appellate Rule 25(c) that was prepared for the meeting of the Appellate Rules Advisory Committee. This draft provided: "Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received." Although Appellate Rule 25(c) is being prepared for publication and comment, while Civil Rule 5(b) has been published and otherwise is ready to recommend for adoption, it seemed desirable to achieve some parallel between the two rules.

The draft Rule 5(b)(3) submitted for consideration by the Advisory Committee covered all means of service except for leaving a copy with the clerk of the court when the person to be served has no known address. It was not limited to electronic service for fear that a provision limited to electronic service might generate unintended negative implications as to service by other means, particularly mail. This concern was strengthened by a small number of opinions that say that service by mail is effective, because complete on mailing, even when the person making service has prompt actual notice that the mail was not delivered. The Advisory Committee voted to limit Rule 5(b)(3) to service by electronic means because this means of service is relatively new, and seems likely to miscarry more frequently than service by post. It was suggested during the Advisory Committee meeting that the question of negative implication could be addressed in the Committee Note. There was little discussion of this

possibility. The Committee Note submitted above includes a "no negative implications" paragraph prepared by the Reporter for consideration by the Standing Committee.

The Advisory Committee did not consider at all a question that was framed during the later meeting of the Appellate Rules Advisory Committee. As approved by the Advisory Committee, Rule 5(b)(3) defeats service by electronic means "if the party making service learns that the attempted service did not reach the person to be served." It says nothing about the time relevant to learning of the failure. The omission may seem glaring. Curing the omission, however, requires selection of a time. As revised, proposed Appellate Rule 25(c) requires that the party making service learn of the failure within three calendar days. The Appellate Rules Advisory Committee will have the luxury of public comment and another year to consider the desirability of this short period. If Civil Rule 5(b) is to be recommended for adoption now, no such luxury is available. This issue deserves careful consideration by the Standing Committee.

Several changes are made in the Committee Note. (1) It requires that consent "be express, and cannot be implied from conduct." This addition reflects a more general concern stimulated by a reported ruling that an e-mail address on a firm's letterhead implied consent to email service. (2) The paragraph discussing service through the court's facilities is expanded by describing alternative methods, including an "electronic link." (3) There is a new paragraph that states that the requirement of written consent can be satisfied by electronic means, and that suggests matters that should be addressed by the consent. (4) A paragraph is added to note the additional response time provided by amended Rule 6(e). (5) The final two paragraphs address newly added Rule 5(b)(3). The first explains the rule that electronic service is not effective if the person making service learns that it did not reach the person to be served. The

second paragraph seeks to defeat any negative implications that might arise from limiting Rule 5(b)(3) to electronic service, not mail, not other means consented to such as commercial express service, and not service on another person on behalf of the person to be served.

Rule 6(e)

The Advisory Committee recommended that no change be made in Civil Rule 6(e) to reflect the provisions of Civil Rule 5(b)(2)(D) that, with the consent of the person to be served, would allow service by electronic or other means. Absent change, service by these means would not affect the time for acting in response to the paper served. Comment was requested, however, on the alternative that would allow an additional 3 days to respond. The alternative Rule 6(e) amendments are cast in a form that permits ready incorporation in the Bankruptcy Rules. Several of the comments suggest that the added three days should be provided. Electronic transmission is not always instantaneous, and may fail for any of a number of reasons. It may take three days to arrange for transmission in readable form. Providing added time to respond will not discourage people from asking for consent to electronic transmission, and may encourage people to give consent. The more who consent, the quicker will come the improvements that will make electronic service ever more attractive. Consistency with the Bankruptcy Rules will be a good thing, and the Bankruptcy Rules Advisory Committee believes the additional three days should be allowed.

Rule 6. Time

1 * * * * *

2 **(e) Additional Time After Service ~~by Mail~~ under**
3 **Rule 5(b)(2)(B), (C), or (D).** Whenever a party has the
4 right or is required to do some act or take some
5 proceedings within a prescribed period after the service of
6 a notice or other paper upon the party and the notice or
7 paper is served upon the party ~~by mail~~ under
8 Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the
9 prescribed period.

Committee Note

The additional three days provided by Rule 6(e) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b), including — with the consent of the person served — service by electronic or other means. The three-day addition is provided as well for service on a person with no known address by leaving a copy with the clerk of the court.

Changes Made After Publication and Comments

Proposed Rule 6(e) is the same as the "alternative proposal" that was published in August 1999.

Rule 77. District Courts and Clerks

1 * * * * *

2 **(d) Notice of Orders or Judgments.** Immediately upon the
3 entry of an order or judgment the clerk shall serve a notice of the
4 entry ~~by mail~~ in the manner provided for in Rule 5(b) upon each
5 party who is not in default for failure to appear, and shall make a
6 note in the docket of the ~~mailing~~ service. Any party may in
7 addition serve a notice of such entry in the manner provided in
8 Rule 5(b) for the service of papers.

9 * * * * *

Committee Note

Rule 77(d) is amended to reflect changes in Rule 5(b). A few courts have experimented with serving Rule 77(d) notices by electronic means on parties who consent to this procedure. The success of these experiments warrants express authorization. Because service is made in the manner provided in Rule 5(b), party consent is required for service by electronic or other means described in Rule 5(b)(2)(D). The same provision is made for a party who wishes to ensure actual communication of the Rule 77(d) notice by also serving notice.

Changes Made After Publication and Comments

Rule 77(d) was amended to correct an oversight in the published version. The clerk is to note "service," not "mailing," on the docket.

B. Abrogate Copyright Rules; Amend Rules 65(g), 81(a)(1)

The proposals published in August 1999 include a package that would abrogate the obsolete Copyright Rules of Practice adopted under the 1909 Copyright Act. A new Rule 65(f) would be added, confirming the common practice that has substituted Rule 65 preliminary relief procedures for the widely ignored Copyright Rules. Rule 81(a)(1) would be amended to delete the obsolete references to the Copyright Rules, and also to improve the expression of the relationship between the Civil Rules and the Bankruptcy Rules. Such little public comment as was provided on these changes was favorable. The Advisory Committee discussion is summarized at page 9 of the draft Minutes.

Rule 65. Injunctions

1 * * * * *

2 **(f) Copyright Impoundment.** This rule applies to

3 copyright impoundment proceedings.

Committee Note

New subdivision (f) is added in conjunction with abrogation of the antiquated Copyright Rules of Practice adopted for proceedings

under the 1909 Copyright Act. Courts have naturally turned to Rule 65 in response to the apparent inconsistency of the former Copyright Rules with the discretionary impoundment procedure adopted in 1976, 17 U.S.C. § 503(a). Rule 65 procedures also have assuaged well-founded doubts whether the Copyright Rules satisfy more contemporary requirements of due process. See, e.g., *Religious Technology Center v. Netcom On-Line Communications Servs., Inc.*, 923 F.Supp. 1231, 1260-1265 (N.D.Cal.1995); *Paramount Pictures Corp. v. Doe*, 821 F.Supp. 82 (E.D.N.Y.1993); *WPOW, Inc. v. MRLJ Enterprises*, 584 F.Supp. 132 (D.D.C.1984).

A common question has arisen from the experience that notice of a proposed impoundment may enable an infringer to defeat the court's capacity to grant effective relief. Impoundment may be ordered on an ex parte basis under subdivision (b) if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. Such no-notice procedures are authorized in trademark infringement proceedings, see 15 U.S.C. § 1116(d), and courts have provided clear illustrations of the kinds of showings that support ex parte relief. See *Matter of Vuitton et Fils S.A.*, 606 F.2d 1 (2d Cir.1979); *Vuitton v. White*, 945 F.2d 569 (3d Cir.1991). In applying the tests for no-notice relief, the court should ask whether impoundment is necessary, or whether adequate protection can be had by a less intrusive form of no-notice relief shaped as a temporary restraining order.

This new subdivision (f) does not limit use of trademark procedures in cases that combine trademark and copyright claims. Some observers believe that trademark procedures should be adopted for all copyright cases, a proposal better considered by Congressional processes than by rulemaking processes.

Changes Made After Publication and Comments

No change has been made.

Rule 81. Applicability in General

1 **(a) ~~To What~~ Proceedings to which the Rules**
2 **Apply~~icable~~.**

3 **(1)** These rules do not apply to prize proceedings in
4 admiralty governed by Title 10, U.S.C., §§ 7651-
5 7681. They do ~~not~~ apply to proceedings in bankruptcy
6 to the extent provided by the Federal Rules of
7 Bankruptcy Procedure ~~or to proceedings in copyright~~
8 ~~under Title 17, U.S.C., except in so far as they may be~~
9 ~~made applicable thereto by rules promulgated by the~~
10 ~~Supreme Court of the United States. They do not~~
11 ~~apply to mental health proceedings in the United~~
12 ~~States District Court for the District of Columbia~~.

13 * * * * *

Committee Note

Former Copyright Rule 1 made the Civil Rules applicable to copyright proceedings except to the extent the Civil Rules were inconsistent with Copyright Rules. Abrogation of the Copyright Rules leaves the Civil Rules fully applicable to copyright proceedings. Rule 81(a)(1) is amended to reflect this change.

The District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub.L. 91-358, 84 Stat. 473, transferred mental health proceedings formerly held in the United States District Court for the District of Columbia to local District of Columbia courts. The provision that the Civil Rules do not apply to these proceedings is deleted as superfluous.

The reference to incorporation of the Civil Rules in the Federal Rules of Bankruptcy Procedure has been restyled.

Changes Made After Publication and Comments

The Committee Note was amended to correct the inadvertent omission of a negative. As revised, it correctly reflects the language that is stricken from the rule.

~~**RULES OF PRACTICE AS AMENDED**~~

~~**Rule 1**~~

~~Proceedings in actions brought under section 25 of the Act of March 4, 1909, entitled "An Act to amend and consolidate the acts respecting copyright", including proceedings relating to the perfecting of appeals, shall be governed by the Rules of Civil Procedure, in so far as they are not inconsistent with these rules.~~

~~**Rule 3**~~

~~Upon the institution of any action, suit or proceeding, or at any time thereafter, and before the entry of final judgment or decree therein, the plaintiff or complainant, or his authorized agent or attorney, may file with the clerk of any court given jurisdiction under section 34 of the Act of March 4, 1909, an affidavit stating upon the best of his knowledge, information and belief, the number and location, as near as may be, of the alleged infringing~~

17 ~~copies, records, plates, molds, matrices, etc., or other~~
18 ~~means for making the copies alleged to infringe the~~
19 ~~copyright, and the value of the same, and with such~~
20 ~~affidavit shall file with the clerk a bond executed by at~~
21 ~~least two sureties and approved by the court or a~~
22 ~~commissioner thereof.~~
23 ~~**Rule 4**~~
24 ~~Such bond shall bind the sureties in a specified sum,~~
25 ~~to be fixed by the court, but not less than twice the~~
26 ~~reasonable value of such infringing copies, plates, records,~~
27 ~~molds, matrices, or other means for making such~~
28 ~~infringing copies, and be conditioned for the prompt~~
29 ~~prosecution of the action, suit or proceeding; for the~~
30 ~~return of said articles to the defendant, if they or any of~~
31 ~~them are adjudged not to be infringements, or if the action~~
32 ~~abates, or is discontinued before they are returned to the~~
33 ~~defendant; and for the payment to the defendant of any~~

34 ~~damages which the court may award to him against the~~
35 ~~plaintiff or complainant. Upon the filing of said affidavit~~
36 ~~and bond, and the approval of said bond, the clerk shall~~
37 ~~issue a writ directed to the marshal of the district where~~
38 ~~the said infringing copies, plates, records, molds,~~
39 ~~matrices, etc., or other means of making such infringing~~
40 ~~copies shall be stated in said affidavit to be located, and~~
41 ~~generally to any marshal of the United States, directing~~
42 ~~the said marshal to forthwith seize and hold the same~~
43 ~~subject to the order of the court issuing said writ, or of the~~
44 ~~court of the district in which the seizure shall be made.~~

45 ~~**Rule 5**~~

46 ~~The marshal shall thereupon seize said articles or any~~
47 ~~smaller or larger part thereof he may then or thereafter~~
48 ~~find, using such force as may be reasonably necessary in~~
49 ~~the premises, and serve on the defendant a copy of the~~
50 ~~affidavit, writ, and bond by delivering the same to him~~

51 ~~personally, if he can be found within the district, or if he~~
52 ~~can not be found, to his agent, if any, or to the person~~
53 ~~from whose possession the articles are taken, or if the~~
54 ~~owner, agent, or such person can not be found within the~~
55 ~~district, by leaving said copy at the usual place of abode~~
56 ~~of such owner or agent, with a person of suitable age and~~
57 ~~discretion, or at the place where said articles are found,~~
58 ~~and shall make immediate return of such seizure, or~~
59 ~~attempted seizure, to the court. He shall also attach to~~
60 ~~said articles a tag or label stating the fact of such seizure~~
61 ~~and warning all persons from in any manner interfering~~
62 ~~therewith.~~

63 ~~**Rule 6**~~

64 ~~A marshal who has seized alleged infringing articles,~~
65 ~~shall retain them in his possession, keeping them in a~~
66 ~~secure place, subject to the order of the court.~~

67 ~~**Rule 7**~~

68 ~~Within three days after the articles are seized, and a~~
69 ~~copy of the affidavit, writ and bond are served as~~
70 ~~hereinbefore provided, the defendant shall serve upon the~~
71 ~~clerk a notice that he excepts to the amount of the penalty~~
72 ~~of the bond, or to the sureties of the plaintiff or~~
73 ~~complainant, or both, otherwise he shall be deemed to~~
74 ~~have waived all objection to the amount of the penalty of~~
75 ~~the bond and the sufficiency of the sureties thereon. If the~~
76 ~~court sustain the exceptions it may order a new bond to be~~
77 ~~executed by the plaintiff or complainant, or in default~~
78 ~~thereof within a time to be named by the court, the~~
79 ~~property to be returned to the defendant.~~

80 ~~**Rule 8**~~

81 ~~Within ten days after service of such notice, the~~
82 ~~attorney of the plaintiff or complainant shall serve upon~~
83 ~~the defendant or his attorney a notice of the justification~~

84 ~~of the sureties, and said sureties shall justify before the~~

85 ~~court or a judge thereof at the time therein stated.~~

86 ~~**Rule 9**~~

87 ~~The defendant, if he does not except to the amount of~~

88 ~~the penalty of the bond or the sufficiency of the sureties of~~

89 ~~the plaintiff or complainant, may make application to the~~

90 ~~court for the return to him of the articles seized, upon~~

91 ~~filing an affidavit stating all material facts and~~

92 ~~circumstances tending to show that the articles seized are~~

93 ~~not infringing copies, records, plates, molds, matrices, or~~

94 ~~means for making the copies alleged to infringe the~~

95 ~~copyright.~~

96 ~~**Rule 10**~~

97 ~~Thereupon the court in its discretion, and after such~~

98 ~~hearing as it may direct, may order such return upon the~~

99 ~~filing by the defendant of a bond executed by at least two~~

100 ~~sureties, binding them in a specified sum to be fixed in the~~

101 ~~discretion of the court, and conditioned for the delivery of~~
102 ~~said specified articles to abide the order of the court. The~~
103 ~~plaintiff or complainant may require such sureties to~~
104 ~~justify within ten days of the filing of such bond.~~

105 ~~**Rule 11**~~

106 ~~Upon the granting of such application and the~~
107 ~~justification of the sureties on the bond, the marshal shall~~
108 ~~immediately deliver the articles seized to the defendant.~~

109 ~~**Rule 12**~~

110 ~~Any service required to be performed by any marshal~~
111 ~~may be performed by any deputy of such marshal.~~

112 ~~**Rule 13**~~

113 ~~For services in cases arising under this section the~~
114 ~~marshal shall be entitled to the same fees as are allowed~~
115 ~~for similar services in other cases.~~

Changes Made After Publication and Comments

No change has been made.

C. Rule 82

Rule 82 concludes by referring to 28 U.S.C. §§ 1391 to 1393. Section 1393 was repealed in 1988. The Advisory Committee recommends correction of the anomaly as a technical conforming change that can be adopted without publication for comment. As revised, the final sentence of Rule 82 would read:

Rule 82. Jurisdiction and Venue Unaffected

1 These rules shall not be construed to extend or limit the
2 jurisdiction of the United States district courts or the venue of
3 actions therein. An admiralty or maritime claim within the
4 meaning of Rule 9(h) shall not be treated as a civil action for
5 the purposes of Title 28, U.S.C., §§ 1391-~~93~~1392.

Committee Note

The final sentence of Rule 82 is amended to delete the reference to 28 U.S.C. § 1393, which has been repealed.

Style Comment

The recommendation that the change be made without publication carries with it a recommendation that style changes not be made.

Styling would carry considerable risks. The first sentence of Rule 82, for example, states that the Civil Rules do not "extend or limit the jurisdiction of the United States district courts." That sentence is a flat lie if "jurisdiction" includes personal or quasi-in rem jurisdiction. The styling project on this rule requires publication and comment.

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