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Rule 58's Dirty Little Secret: The Problematic Lack of Uniform Enforcement of Federal Rule of Civil Procedure 58 Within the Federal Court System

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RULE 58'S DIRTY LITTLE SECRET: THE PROBLEMATIC LACK OF UNIFORM ENFORCEMENT OF FEDERAL RULE OF CIVIL PROCEDURE 58 WITHIN THE FEDERAL COURT SYSTEM

A conflict on an issue such as [Rule 58] is of importance and concern to every litigant in a federal court, since . . . the timeliness of appeals, as well as the timeliness of post-trial motions, may turn on the question of when judgment is entered.[1]

I. INTRODUCTION: PREMATURE OR UNTIMELY: CONFLICTING APPELLATE APPROACHES UNDER RULE 58

Josh Moss filed a petition for a writ of habeas corpus seeking to challenge a sentence imposed following his guilty plea to two counts of burglary.[2] The federal district court entered a memorandum opinion and order denying his writ, but did not file a separate document judgment order. More than a year later, Moss filed a document entitled "Late Notice of Appeal." Although the appellate court requested that Moss attach a memorandum addressing the reasons behind his late appeal, he neglected to do so. However, the appellate court did not dismiss Moss' claim for being untimely. Instead, the court remanded Moss' claim to the district court for a judgment order to be entered. Moss was given yet another thirty days to file a new notice of appeal after the district court filed the judgment order.

In a different federal district court, Donna Lyman's employer has just won a motion for summary judgment against her in a sexual harassment claim. Lyman filed her notice of appeal thirty-three days after summary judgment was entered in the court docket. In Lyman's case, as in Moss' case, the judge or her clerk did not file a separate document judgment order. Lyman's attorneys have researched Moss'

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[1] United States v. Indrelunas, 411 U.S. 216, 217-18 (1973) (per curiam).

[2] Although the two scenarios that follow are based loosely on the experiences of the appellants in *Armstrong v. Ahitow*, 36 F.3d 574 (7th Cir. 1994), and *Reynolds v. Golden Corral Corp.*, 213 F.3d 1344 (11th Cir. 2000), they are purely hypothetical. They are useful for illustrating the complex issues when courts try to balance both equity and uniformity. They are created from the author's imagination and are not intended to reflect any one person or case.

case and feel quite certain that her claim will also be remanded to the district court for entry of a judgment order. Instead, the district court dismisses Lyman's appeal as untimely. Lyman finds her case finished and wonders how it is that her notice of appeal can be untimely when it was only three days late while Moss' notice of appeal was too early even though he filed it more than a year after the judge's opinion.

Although hypothetical, these two situations illustrate the current tension within the federal appellate courts regarding jurisdiction over untimely appeals where the district court judge or clerk has not entered a separate document judgment order. Following a trial court's decision, a party has a limited amount of time in which to appeal.[3] The date runs

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[3] *See* Allan Ides, *The Authority of a Federal District Court to Proceed After a Notice of Appeal Has Been Filed*, 143 F.R.D. 307, 307 (1992) (tracing the Federal Rules of Appellate Procedure to show when a party can appeal from a final judgment and exactly when jurisdiction passes from the district to the appellate court). Federal Rule of Appellate Procedure 4(a) states in pertinent part:

> (a) Appeal in a Civil Case.-
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> (1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date when the clerk received the notice and send it to the clerk of the district court and the notice will be treated as filed in the district court on the date so noted.
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> (2) A notice of appeal filed after the court announces a decision or order but before the entry of judgment or order is treated as filed on the date of and after the entry.
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> (3) 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 last expires.
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> (4) If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:
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> (A) for judgment under Rule 50(b);
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> (B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;
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> (C) to alter or amend the judgment under Rule 59;

from the filing of the judgment order. The date this time begins to run is extremely important to the appellant. If the appellate court declares an earlier order as final, the opportunity to appeal is lost.[4]

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

(E) a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is served within 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before dispostion of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions 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 an 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. No additional fees will be required for filing an amended notice.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before the expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) The district court, if it finds (a) 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 and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

FED. R. APP. P. 4(a). *See generally* Charles W. Adams, *The Timing of Appeals Under Rule 4(a)(4) of the Federal Rules of Appellate Procedure*, 123 F.R.D. 371 (1989) (providing more information on the application of Appellate Rule 4(a)).

[4] *See* Ides, *supra* note 3, at 313 (stating that a notice of appeal prior to the entry of an appealable judgment is a nullity). However, if the notice is filed outside the parameters established by Federal Rule of Appellate Procedure 4(a), then the appellate court is without jurisdiction, and the district court may proceed as if no appeal had been filed. *Id.*

Federal Rule of Civil Procedure 58 (Rule 58) attempts to solidify this date to establish judicial certainty.[5] Rule 58 states that a judge or his or her clerk must file a single page separate document judgment order at the end of every case.[6] This alerts the parties that the trial court has made a final decision in their case and it also signals that the time to file an appeal has begun.[7] Without this judgment order, parties may be unsure whether the district court's order was meant to adjudicate all the claims or whether the court still intended to hear post-trial motions and motions on other claims within the case. Without the certainty of a Rule 58 judgment order, cases can linger for years; notices of appeal, which would normally be considered untimely, could be considered premature because they are filed before the district court files the Rule 58 judgment order.[8] The lack of a Rule 58 order often adds to party confusion over filing dates and renders judicial certainty unascertainable.

This Note begins by presenting a background of the Federal Rules of Civil Procedure, focusing on Rule 58 and the developing Supreme Court jurisprudence.[9] Part III charts the confusion in the lower federal courts and discusses an amendment proposed to the Civil Rules Advisory

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[5] Federal Rule of Civil Procedure 58 states:

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except under direction of the court, and these directions shall not be given as a matter of course.

FED. R. CIV. P. 58.

[6] *See id.*; *see also supra* note 5 (reproducing Rule 58).

[7] *See, e.g.*, Shalala v. Schaefer, 509 U.S. 292, 302-03 (1993); Bankers Trust Co. v. Mallis, 435 U.S. 381, 382-84 (1978); United States v. Indrelunas, 411 U.S. 216, 217-18 (1973); Jung v. K. & D. Mining Co., 356 U.S. 335, 336-37 (1958); United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 231-33(1958).

[8] Ides, *supra* note 3, at 313.

[9] *See infra* Part II.

Committee that will eliminate a majority of the confusion.[10] Finally, Part IV proffers an addition to the proposed amendment that will leave the courts some opportunity for equity when applying Rule 58.[11]

II. LEGAL BACKGROUND OF FEDERAL RULE OF CIVIL PROCEDURE 58

Before analyzing the current state of Rule 58 jurisprudence, one must understand the reasoning behind the enactment of the Federal Rules of Civil Procedure and the history of Rule 58 specifically. Part A traces the history of the passage of the Federal Rules of Civil Procedure.[12] Part B explores the text of Rule 58.[13] Finally, Part C traces and discusses the Supreme Court's decisions on the application of Rule 58, as well as the legislature's reactions to those decisions.[14]

A. History and Passage of the Federal Rules of Civil Procedure

> *[I]t was inevitable that federal procedure along with substantially all other modern systems should eventually jettison the unseemly practice of turning a suitor out of court because he had come in at the wrong door; and that it should recognize that the fact-situations of life often embrace both legal and equitable issues which demand the simple practice of affording complete relief, legal and equitable, in one action.*[15]

In 1792, the Permanent Process Act made the first step toward what have become the Federal Rules of Civil Procedure by conferring upon the Supreme Court the power to create rules for the federal courts.[16] However, Congress withdrew this power from the Court eighty years

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[10] *See infra* Part III.
[11] *See infra* Part IV.
[12] *See infra* Part IV.A.
[13] *See infra* Part IV.B.
[14] *See infra* Part IV.C.
[15] Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 415 (1935) (tracing the history of the merger between law and equity).
[16] Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?*, 21 SUFFOLK U. L. REV. 351, 353 (1987). Following passage of the Permanent Process Act, the Court promulgated two sets of equity rules, one in 1822 and one twenty years later. Clark & Moore, *supra* note 15, at 398. These sets of equity rules did not establish a new equity procedure but were mainly declaratory of the old. *Id.* It was not until the current Equity Rules were promulgated in 1912 that equity procedure was completely modernized. *Id.* The adoption of the Federal Rules of Civil Procedure marked the end of a long struggle for reform aimed at providing uniform procedural rules for more efficient federal court practice. Goodman, *supra*, at 351.

later by passing the Conformity Act of 1872.[17] Under the Conformity Act, the federal courts were required to follow "as near as may be" the practices and procedures of the state in which they sat.[18]

The ambiguities that grew around the Conformity Act's application and varying results made federal practice confusing and frustrating for attorneys and judges.[19] Although the Conformity Act perpetuated the distinction between law and equity, a majority of the states began to abandon the Act in favor of their own codes.[20] In 1848, New York adopted the Field Code, which represented a reformed code of civil procedure.[21] This code was adopted with little change in a number of

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[17] Clark & Moore, *supra* note 15, at 392. Section Five of the Conformity Act reads:

> That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding: *Provided, however,* That nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof.

Id. at 401; *see id.* at 401-09 (discussing the Conformity Act and its purported inadequacies); *see also* Goodman, *supra* note 16, at 353.

[18] EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY 54 (1992). The statute exempted the rules of evidence from its coverage. *Id.* During the following years, decisions by federal courts carved out other exemptions from the rule, weakening its impact on the federal court system. *Id.* For example, "in 1889 the Supreme Court declared that the statute did not apply to a federal judge's general administration of his court or limit his inherent common law powers to process cases." *Id.*; *see also* Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORNELL L.Q. 443, 451 (1934-35) [hereinafter Clark, *Challenge*] (describing the limits of the Conformity Act, especially under its "as near as may be" requirement).

[19] PURCELL, *supra* note 18, at 54. To successfully litigate a case removed to federal court, an attorney either had to have knowledge of the workings of the local federal system or had to perform some serious research. *Id.* This often resulted in cases costing much more than they were worth in hours of research alone. *Id.*

[20] Goodman, *supra* note 16, at 354. In fact, by 1930 only five or six states still had divided law and equity systems. Clark, *Challenge*, *supra* note 18, at 450.

[21] LEWIS MAYERS, THE MACHINERY OF JUSTICE 34 (1973); *see also* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 21-23 (2d ed. 1947) [hereinafter CLARK, HANDBOOK] (describing the passage and characteristics of the 1848 Field Code). Although the Field Code of 1848 merged law and equity, it should not be read as a parent to the Federal Rules. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 932 (1987). Subrin contends that the Field Code contained more concern for common law procedure than most scholars believe. *Id.* Rather than seeing the Field Code as a system that threw out the legal court system and replaced it with one completely comprised of equity, the framers of the Field Code were trying to return to the time when equity was not so complicated as it was in 1848. *Id.* at 933. According to Subrin, instead of equity's ideas of discretion and flexibility,

other states and represented the first major step in the process of rationalizing and modernizing civil procedure.[22] Additionally, in 1886 the American Bar Association endorsed a proposal to create a federal code in response to growing pressures for a uniform system for federal procedure.[23]

To achieve partial reform, the American Bar Association drafted and sponsored the Law and Equity Act of 1915 (Act), which created modern procedures and provided a code system for the equity courts.[24] Despite

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the Field Code revolved around "swift, economic, and predictable enforcement of discrete, carefully articulated rights." *Id.* at 935.

[22] MAYERS, *supra* note 21, at 34. However, the code quickly degenerated into a complex system attorneys would have to wade through to find answers to procedural questions. I. P. CALLISON, COURTS OF INJUSTICE 452 (1956). Originally, the code contained only 391 sections, but by 1920 it had gained over 3000 new sections and comprised over 1000 finely printed pages. *Id.* This was at least partially attributable to the 1877 passage of the Throop Code in New York that contained amendments to the Field Code, completely riddling it with unnecessary confusion. *Id.* at 625. The Throop Code was supported by formalists who were seemingly unhappy without a multiplicity of technical rules that could cover absolutely any situation. *Id.*

[23] Goodman, *supra* note 16, at 354. The American Bar Association's drive against the Conformity Act gained momentum when Thomas W. Shelton was named head of the American Bar Association's Committee on Uniform Judicial Procedure. *Id.* Shelton was one of a number of national bar leaders, including William Howard Taft, who worked toward code reform and procedural reform. *Id.* The goal of these bar leaders was to place the rule-making authority directly in the United States Supreme Court. *Id.* Taft complained about the lack of continuity in the federal judicial system as well as the tendency of each federal judge to insist on "paddling his own canoe." Warren E. Burger, *The Courts on Trial, in* DELIVERY OF JUSTICE 5 (1990). Taft delivered an address at the 1922 meeting of the American Bar Association, discussing the feasibility of abolishing the distinctions between law and equity altogether. Edson R. Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116, 1120 (1933-34). Additionally, Taft urged that, if such a reform were to be undertaken, it should be done by the Supreme Court and not by Congress. *Id.* This suggestion met with the immediate approval of the Committee on Uniform Judicial Procedure, and the bill granting the rule-making power to the Supreme Court was amended to include a provision authorizing the promulgation of rules unifying legal and equitable procedure. *Id.*

[24] PURCELL, *supra* note 18, at 207. This was certainly not the end of the reform efforts. *Id.* Four systems remained in contention within the federal system: state rules under the Conformity Act; a general federal system, which combined federal statutes and provisions that limited the Conformity Act; the antiquated English chancery system as modernized by the Equity Rules of 1812; and the new unified code system. Clark, *Challenge*, *supra* note 18, at 451; *see also* Clark, *Challenge*, *supra* note 18, at 453-55 (listing eight sample problems which had arisen under the Conformity Act); Goodman, *supra* note 16, at 354 (discussing additional information on the resolution of the four-system controversy). For example, "[i]n the event of a mistake in the choice of a form of action, even though the suit should now not fail, a formal transfer to the other 'side' of court" was required under the Conformity Act. Clark, *Challenge*, *supra* note 18, at 453. This prevented a "speedy dispatch of business and occasion[ed] much difficulty for the court in deciding first as to the

its general utility, the Act created some procedural confusion and discrepancy.[25] By the end of 1918, forty-six state bar associations supported proposed changes to the federal system, pressuring the federal government for reform.[26] However, opposition within the Senate blocked the passage of a proposed enabling act that would have given the Supreme Court power to create a federal system of procedural rules for almost twenty years.[27] The opposition reasoned that a federal uniform system would destroy uniformity in each state court, resulting in confusion for lawyers practicing within each affected state; whereas under the Conformity Act, attorneys could rely on their familiar state rules when litigating in the federal system.[28]

After almost two decades of resistance within the Senate, the reform movement gained strength with prominent supporters, including President Franklin Roosevelt and Attorney General Homer S. Cummings, and Congress passed the Enabling Act of 1934.[29] The

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necessity of a transfer and then as to the effect of the mistake in the form of trial and the appeal." *Id.* at 453-54. When Clark was writing, considerable differences still existed on these points in the lower federal courts. *Id.* at 453-55. The creation of a set of federal rules of civil procedure had been an issue of interest to the American Bar Association practically from the time of its formation in 1873. CLARK, HANDBOOK, *supra* note 21, at 34 (tracing the history of the Federal Rules of Civil Procedure, beginning in 1912 with the formation of the Committee on Uniform Judicial Procedure).

[25] PURCELL, *supra* note 18, at 207. William Howard Taft, then-Chief Justice of the Supreme Court, admitted that the Law and Equity Act was far from perfect in a speech given at the 1914 annual meeting of the American Bar Association. *Id.* However, he explained that it would not disadvantage plaintiffs as it would save them the delay and expense of defending a separate suit in equity. *Id.* In 1922, Taft recommended abolishing entirely the distinction between law and equity. Goodman, *supra* note 16, at 354-55.

[26] Goodman, *supra* note 16, at 354 (tracing the history of the reformation of the Federal Rules of Civil Procedure).

[27] Clark, *Challenge*, *supra* note 18, at 446-47; Goodman, *supra* note 16, at 355. The opposition was led by Senator Thomas Walsh of Montana, who had long been a chairman of the Senate Committee on the Judiciary and argued against forcing local attorneys to learn a new procedure for practice in the federal courts. Clark, *Challenge*, *supra* note 18, at 446-47. Some of his objections seemed to suggest that the fairly satisfactory system of the western states should not be superseded in the federal courts by an unsatisfactory system, probably that of New York. *Id.* at 447. Senator Walsh died as he was at the point of assuming office as Attorney General of the United States. *Id.* In his place, Homer Cummings was appointed Attorney General and quickly began pushing for federal procedural reform. *Id.*; *see* Goodman, *supra* note 16, at 355 (discussing the history of the passage of the Federal Rules of Civil Procedure).

[28] Goodman, *supra* note 16, at 355. Walsh contended that a lawyer would have to know the federal and state rules in order to practice law in any given state rather than knowing only one system that could be used in either court system within the state. *Id.*

[29] PURCELL, *supra* note 18, at 227. The Enabling Act reads:

Enabling Act empowered the Supreme Court to create a system of general rules of pleading and practice in civil actions.[30] The Court was

> Be it enacted ... That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.
> *Section 2.* The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.

Supreme Court Adopts Rules for Civil Procedure in Federal District Courts, 24 A.B.A. J. 97, 101 (1938) [hereinafter *Supreme Court Adopts Rules*]. The first section of the Enabling Act provides that the statutes authorizing the drafting of equity and admiralty rules by the Court "shall take effect six months after their promulgation." CLARK, HANDBOOK, *supra* note 21, at 42. Additionally, this section has the important provision, "and thereafter all laws in conflict therewith shall be of no further force or effect." *Id.* Because the clear intent of the Enabling Act was to provide for a complete system of rule-making in civil actions, the two sections should be construed as not in opposition to each other, but as making an integrated whole covering the entire subject. *Id.* at 43. Connor Hall, a West Virginia lawyer who staunchly opposed the Enabling Act, argued that its supporters had not thought through the process one follows to apply law to a case. Subrin, *supra* note 21, at 994. Hall argued that, although practice is merely a tool, "there must be a way to bring causes to the attention of the court; to adduce proof; to bear argument; to conclude the cause; to give the proper judgment; to take the proper steps for enforcing it...." *Id.* Hall did not believe in the idea of throwing out the contemporary system and starting over because the past reformers had thought this problem through just as thoroughly as they were doing. *Id.* Hall continued:

> [T]he attempt to obtain entire simplicity and lack of technicality through rules is a will-o'-the-wisp.... If a group of mariners tired of studying their complicated charts should decide to throw them away and adopt more simple maps, they would not thereby do away with the air and water currents through which they must pass, or the icebergs or the reefs in their course.

Id. at 995; *see also* Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1057-58 (1955) [hereinafter Holtzoff, *Origin*] (tracing the struggle Congress faced in enacting the Enabling Act). *See generally* Sunderland, *supra* note 23 (discussing the passage of the Enabling Act).

[30] PURCELL, *supra* note 18, at 232-33. The existence of a rule-making power in the courts has been recognized as a historical development stemming from early English law. Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 624 (1957). This power may date back as far as 1457, the thirty-fifth year of the reign of Henry VI. *Id.*

also given the authority to unite the rules of equity and law into a single procedural system.[31]

After Congress passed the Enabling Act, the Supreme Court appointed a fourteen-member Advisory Committee on Rules for Civil Procedure.[32] The duties of the Advisory Committee included: first,

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[31] PURCELL, *supra* note 18, at 232-33. In a 1935 speech to the American Law Institute, Chief Justice Charles Evans Hughes spoke of the goals of the Supreme Court in considering the rules to be proscribed:

> It is manifest that the goal we seek is a simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances. It is also apparent that in seeking that end we should not be fettered by being compelled to maintain the historic separation of the procedural systems of law and equity.

Goodman, *supra* note 16, at 355-56. Additionally, Hughes stated:

> After careful consideration, the Court has decided not to prepare rules limited to common law cases but to proceed with the preparation of a unified system of rules for cases in equity and actions at law, 'so as to secure one form of civil action and procedure for both,' so far as this may be done without the violation of any substantive right.
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> In entering upon this task, the Court will welcome the aid of the Bench and Bar, of the Department of Justice, and of all those interested in the improvement of procedure. It is manifest, however, that the Court must itself assume the responsibility of preparing the rules.
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> In order that the Court may be suitably aided in this undertaking, the Court will shortly announce the appointment of an Advisory Committee, responsible to the Court, which will be called upon for such assistance as the Court may from time to time require. The Committee will be in touch with all helpful agencies, with the Department of Justice, with lawyers and expert students of procedure, and will be able to bring to the Court aid and advice of the highest value.

Clark, *Challenge*, *supra* note 18, at 458; *see* KENNETH BERNARD UMBREIT, OUR ELEVEN CHIEF JUSTICES 452-500 (1938) (giving more biographical information on Chief Justice Hughes). Certain expressions in the Constitution had been thought to cast doubt on the validity of the union between law and equity, but these were not more explicit than similar provisions in state constitutions which did not prevent the union. Clark & Moore, *supra* note 15, at 394. These expressions include the phrase in Article Three, Section Two, Clause One, extending the judicial power of the United States "to all cases, in Law and Equity"; the phrase in the Seventh Amendment preserving the right of trial by jury in actions at law; and the phrase in the Eleventh Amendment providing that the federal judicial power shall not be construed to extend "to any suit in law or equity" against a state by a citizen of another state or a foreign country. *Id.* at 394-95.

[32] *Supreme Court Adopts Rules*, *supra* note 29, at 97 (celebrating the great task of reforming the federal rules accomplished by a combination of the bench and the bar). The Advisory Committee was comprised of: William D. Mitchell of New York City, New York, Chairman; Scott M. Loftin of Jacksonville, Florida, President of the American Bar Association; George W. Wickersham of New York City, New York, President of the

ensuring conformity between state and federal courts sitting in the same state; second, regulating the procedure in the federal courts by court rules rather than by legislation; and third, establishing uniformity in practice among all the various federal courts.[33] Professor Charles E. Clark, who drafted many of the Federal Rules of Civil Procedure, believed that procedure should be completely separate from substance, and this translated into his continued effort to merge law and equity into a single civil action instead of separate special or fact pleading.[34]

The Advisory Committee drafted a complete set of rules and, in 1938, submitted the proposed rules to Congress.[35] These rules set forth a

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American Law Institute; Wilbur H. Cherry of Minneapolis, Minnesota, Professor of Law at the University of Minnesota; Charles E. Clark of New Haven, Connecticut, Dean of the Law School of Yale University; Armistead M. Dobie of University, Virginia, Dean of the Law School of the University of Virginia; Robert G. Dodge of Boston, Massachusetts; George Donworth of Seattle, Washington; Joseph G. Gamble of Des Moines, Iowa; Monte M. Lemann of New Orleans, Louisiana; Edmund M. Morgan of Cambridge, Massachusetts, Professor of Law at Harvard University; Warren Orney, Jr., of San Francisco, California; Edson R. Sunderland of Ann Arbor, Michigan, Professor of Law at the University of Michigan; and Edgar B. Tolman of Chicago, Illinois, Secretary. *Id.* at 97-98. Chairman Mitchell was a former Attorney General of the United States. Goodman, *supra* note 16, at 356. Mitchell was chosen as the chairman at least in part because of a powerful letter he wrote to Chief Justice Charles Evans Hughes setting forth the need for full reform rather than reformation in small piecemeal steps. Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 439 (1958) [hereinafter Clark, *Two Decades*]. Although the committee was composed of both conservatives and liberals, there was no one on the committee to speak up for the small firm, the small case, or the small client. Subrin, *supra* note 21, at 971-72. The committee met for the first time in Chicago on June 20, 1935. *Supreme Court Adopts Rules*, *supra* note 29, at 98; *see* Clark, *Two Decades*, *supra*, at 435-51 (giving a first-hand account of the struggles of the Advisory Committee).

[33] Sunderland, *supra* note 23, at 1128 (tracing the history of the Enabling Act and its effect on the power of the Supreme Court). These goals were indicated by the report of the Committee on Uniform Judicial Procedure. *Id.* In the face of such conflicting objectives, the committee faced the challenge of selecting a solution which would offer the best balance of advantages. *Id.*

[34] *See* Clark, *Two Decades*, *supra* note 32, at 435-51 (showing the success of the Federal Rules of Civil Procedure after their first twenty years). Clark was a professor at the Yale University Law School and was the driving force behind the majority of the rules. *Id.* Clark also believed in the freedom to join diverse claims and various parties in a single action. *Id.* at 438. Clark tirelessly drafted and re-drafted the rules for the Advisory Committee. Goodman, *supra* note 16, at 356-57 (following the building of the reform movement from the passage of the Enabling Act to the formation of the Advisory Committee); Subrin, *supra* note 21, at 961-71 (providing biographical information on Charles E. Clark, including his early interest in procedure and his part in judicial reform).

[35] Goodman, *supra* note 16, at 357. The rules were presented to Congress in a 126-page booklet, supplemented by a 95-page document with the Advisory Committee's Notes to accompany the rules. *Id.* at 358-59. Although this seemed like the logical end to the work of the Advisory Committee, Charles E. Clark still believed there to be a need for the Advisory Committee twenty years after the rules had been adopted. Clark, *Two Decades*,

uniform federal procedural system to operate in all federal courts, representing a complete separation from the Conformity Act.[36] For example, Rule 2 abolished the distinction between law and equity by creating one form of action, a "civil action."[37]

By the time the rules reached Congress, most of the objectionable parts had been favorably amended.[38] Concerns remained, however, that the new rules would have an adverse effect on state attorneys who would now be required to learn an entirely new set of rules in order to litigate federal trials.[39] Additionally, critics voiced concern over whether

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supra note 32, at 443-47. Clark argued that there should be a body under the auspice of the judicial branch to look at complaints and suggestions about the rules without the Supreme Court having to take time away from its other duties to perform the kind of research some of the suggestions may entail. *Id.* at 443. In May 1936, the Advisory Committee had suggested in its first report that there be established a standing committee, meeting annually (or more often) and submitting annual reports to the Supreme Court. *Id.* at 445. This idea was supported quite widely and was the basis of a resolution adopted by the American Bar Association in 1942. *Id.*

[36] PURCELL, *supra* note 18, at 233 (tracing the question of the effect which the merger of law and equity would have on the right to a jury trial).

[37] *Id.* However, there was some question as to the survival of the right to a jury trial both because of the supposedly equitable nature of declaratory relief and because of the complete merger of law and equity in the federal system. *Id.* For two decades, the Supreme Court refused to resolve the question of the scope of the right to a jury trial in light of the new rules. *Id.* However, many lower federal courts were protecting the right to jury trials in declaratory judgment actions. *Id.* Finally, between 1959 and 1962, the Supreme Court answered the question, actually broadening the right. *Id.* The Court abandoned the historical approach the lower courts had been using and replaced it with a new dynamic approach that expanded the category of issues that warranted a jury trial and also ensured that any factual issue in a case that bore on a legal claim would be tried by a jury. *Id.* In the new rules, Rules 18 through 20 allowed for more liberal joinder of parties and claims, and Rules 26 through 37 represented radical changes in the deposition and discovery provisions. Goodman, *supra* note 16, at 359. Before the new rules, federal discovery was almost nonexistent. *Id.* at 360. The federal system allowed only four possible sources of discovery, all of which were limited. *Id.* At law, statutes allowed the taking of depositions only under court order and only for the preservation of testimony. *Id.* Only Equity Rule 58 allowed for pretrial discovery by interrogatories, but only by parties. *Id.* These very limited federal rules could not be supplemented by more liberal state rules because the Supreme Court had held that the federal statutes were controlling on these points. *Id.*

[38] Goodman, *supra* note 16, at 360 (illustrating the contents of the new Federal Rules of Civil Procedure). Despite opposition from groups such as the then rival AFL and CIO, the testimony before the committee mostly supported adoption of the rules. *Id.*

[39] *Id.* at 361 (tracing the arguments on each side of the question of whether attorneys should be required to learn a separate system to litigate in federal rather than state courts).

the new liberal rules would increase either litigation or the number of unfounded claims brought in the federal system.[40]

In March of 1938, the House Judiciary Committee held hearings on the proposed rules.[41] The testimony heard by the committee overwhelmingly supported the rules' adoption.[42] In April and May of 1938, a subcommittee of the Senate Judiciary Committee held hearings on the new rules, questioning many of the same witnesses as the House Committee.[43] Those in favor of the rules vocalized their support, saying that the proposed rules should be passed as soon as possible.[44] Congress

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[40] *Id.* at 360. Judge Edward R. Finch of the New York Court of Appeals voiced his concern that the rules, particularly the discovery rules, would add to the nuisance of litigation and that defendants would not have the protection they had under the previous rules. *Id.* Additionally, Finch believed that the incentive to settle cases would increase because plaintiffs had more advantages. *Id.* Finch's solution to his concerns was to award fees to defense counsel if they prevailed. *Id.*

[41] *Id.* at 361. The same questions were raised in the House committee's hearings regarding whether the rules would be unfair to state attorneys. *Id.* The advocates of the Rules frequently cited the case of *Jarndyce v. Jarndyce* in Charles Dickens' novel *Bleak House* as the kind of technicality-driven procedural system they were trying to avoid. Subrin, *supra* note 21, at 982 (showing how courts had to cope with an undisciplined equity system). Dickens wrote *Bleak House* to mirror the problems of the Chancery Court in England at the time. WILLIAM S. HOLDSWORTH, CHARLES DICKENS AS A LEGAL HISTORIAN 85 (1972). The practice at Chancery Court "had become so technical, and its procedure had become so slow, that the length of time taken to decide even uncontested cases amounted to a denial of justice." *Id.* at 86. This resulted because "for centuries, there had been no adequate supervision either of the officials, or of the procedural rules of the court." *Id.*

> 'Not [heard] of Jarndyce and Jarndyce?' . . . 'Not [heard] of one of the greatest Chancery suits known? Not of Jarndyce and Jarndyce – the – a – in itself a monument of Chancery practice. In which (I would say) every difficulty, every contingency, every masterly fiction, every form of procedure known in that court, is represented over and over again? It is a cause that could not exist, out of this free and great country. I should say that the aggregate of costs in Jarndyce and Jarndyce . . . amounts at the present hour to from SIX-TY TO SEVEN-TY THOUSAND POUNDS.'

CHARLES DICKENS, BLEAK HOUSE 68 (Norman Page ed., Penguin Books 1985) (1853).

[42] Goodman, *supra* note 16, at 362 (discussing the few negative comments on the rules).

[43] *Id.* The Enabling Act called for adoption to take place ninety days after the adjournment of the Seventy-Fifth Congress, while Senator William H. King of Utah recommended that be changed to a year. *Id.* However, Senator King and his supporters were unable to gain much support for the delay and the original date was maintained. *Id.*

[44] *Id.* at 363. House Judiciary Committee Chairperson Hatton W. Sumners noted that the rules would "materially reduce the uncertainty, delay, expense, and the likelihood that cases may be decided on technical points and procedure [having] no relation to the just determination of the controversy on its merits." *Id.*

subsequently adopted the Federal Rules of Civil Procedure, which became effective on September 16, 1938.[45]

B. *The Text of Federal Rule of Civil Procedure 58*

> *[T]he purpose of the administration of justice is to assure to every individual the substantive rights accorded to him by law. This objective, however, cannot be successfully attained unless an efficient machinery is established for this purpose .... Without an effective machinery for their enforcement ... substantive rights become but dross.*[46]

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[45] Clark, *Two Decades*, *supra* note 32, at 436 n.8. The original rules were adopted on December 20, 1937, and received some minor changes before going into effect on September 16, 1938. *Id.* The adoption of these initial rules "went far toward settling the manner of proceeding and the validity of various provisions, including not only the union of law and equity, but also rules of evidence and of appellate procedure ..., service of process, ... extensive examination, and the like." *Id.* at 441. The majority of the ideas in the Federal Rules of Civil Procedure come from equity, rather than common law, including the flexibility and permissiveness in pleading, joinder, and discovery. Subrin, *supra* note 21, at 922 (illustrating the dominance of equity within the current Federal Rules of Civil Procedure); *see also* Goodman, *supra* note 16, at 364 (giving a history of the initial adoption of the Rules). Although under attack today for being too cumbersome and adding undue cost to litigation, the rules when adopted were hailed as being a savior to the federal judicial system and were copied by the states. Warren E. Burger, *A Generation of Change*, *in* DELIVERY OF JUSTICE, *supra* note 23, at 62, 66; *see also* Clark, *Two Decades*, *supra* note 32, at 435 (stating that within the first twenty years of the Federal Rules of Civil Procedure, one quarter of the states had adopted the entire set of rules, nearly half the states had adopted substantial portions of the rules, and hardly a local jurisdiction remained unaffected by the passage of the rules). Clark lists Alaska, Arizona, Colorado, Delaware, Hawaii, Idaho, Kentucky, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Puerto Rico, Utah, and Wyoming as jurisdictions that had adopted the rules completely before 1958. *Id.* at n.2. Substantial provisions had also been adopted in Alabama, California, Connecticut, Florida, Illinois, Iowa, Louisiana, Maryland, Missouri, New York, Pennsylvania, South Dakota, Texas, and Washington. *Id.* Also, Clark stated that Alabama had proposed the rules, but they had not yet been adopted by the state legislature in 1958. *Id.* Additionally, although there had been many congressional proposals for change within the Rules during the first twenty years of their existence, Congress withstood all attempts to obtain passage of any procedural statutes of any consequence. *Id.* at 443; *see also* Charles E. Clark, *The Proper Function of the Supreme Court's Federal Rules Committee*, 28 A.B.A. J. 521, 521-25 (1942) [hereinafter Clark, *Function*] (supporting a permanent Advisory Committee to deal with any problems that came up with interpretation or enforcement of the Federal Rules of Civil Procedure). For more information on the immediate acceptance of the rules, see generally Charles E. Clark & Charles Alan Wright, *The Judicial Council and the Rule-Making Power: A Dissent and a Protest*, 1 SYRACUSE L. REV. 346 (1949-50); Alexander Holtzoff, *A Judge Looks at the Rules After Fifteen Years of Use*, 15 F.R.D. 155 (1954) [hereinafter Holtzoff, *Judge*].

[46] Holtzoff, *Judge*, *supra* note 45, at 155. "Dross" is defined as: (1) a waste product or an impurity, especially an oxide, formed on the surface of molten metal; (2) worthless,

Rule 58 is intended to resolve the "old, old question of when a judgment [is] a judgment."[47] Clause one of the first sentence of Rule 58 states that upon a general verdict of a jury or upon a decision by the court, a party shall recover or shall have all relief be denied and the clerk shall sign and enter the judgment without awaiting direction by the court.[48] Clause two asserts that if the court grants other relief or if there is a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the judgment and the clerk shall enter it.[49] Rule 58 specifically states that a judgment shall be set forth on a separate document in every case and shall not be effective if not entered as provided in Rule 79(a), which gives instructions to the court clerk on how to enter the judgment into the docket.[50] The entry of

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commonplace, or trivial matter: "He was wide-awake and his mind worked clearly, purged of all dross." (Vladimir Nabokov). THE AMERICAN HERITAGE DICTIONARY 565 (3d ed. 1992).

[47] CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 6 (1995) (citing Cedar Creek Oil & Gas Co. v. Fidelity Gas Co., 238 F.2d 298 (9th Cir. 1956)). In *Cedar Creek*, the district judge signed a fourteen page memorandum on June 12, 1956, which constituted his opinion in the case and not a judgment order. Cedar Creek Oil & Gas Co. v. Fidelity Gas Co., 238 F.2d 298, 299 (9th Cir. 1956). Simultaneously, the judge also signed a fifteen page document titled "Findings of Fact and Conclusions of Law" that concluded with the statement "Judgement [sic] is hereby Ordered to be entered accordingly." *Id.* The judge's clerk filed both papers and mailed copies to each party. *Id.* On June 19, the defendants filed their tax cost bill, assuming the case was finished. *Id.* On July 2, the judge signed a formal written judgment that was prepared for the judge by the defendant's counsel. *Id.* This document was filed July 3. *Id.* The plaintiffs filed an appeal on July 27, and the defendants filed a motion to dismiss on the grounds that the appeal was more than thirty days past the filing of the judgment. *Id.* at 298-99. The court looked to the wording of the June 12 documents and saw that the wording was forward looking: "Ordered to be entered." *Id.* at 300. Despite the court's desire to grant the motion to dismiss, the document of July 2 was held to be the judgment order in the matter and the motion to dismiss the appeal was denied. *Id.* at 301.

[48] *See* FED. R. CIV. P. 58; *see also supra* note 5 (reproducing Rule 58).

[49] FED. R. CIV. P. 58; *see also supra* note 5 (reproducing Rule 58).

[50] Federal Rule of Civil Procedure 79(a) states:

> (a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an

judgment shall not be delayed in order to tax costs or award fees unless a timely motion for attorneys' fees is made under Rule 54(d)(2).[51] In such cases, the court may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59.[52]

> order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

FED. R. CIV. P. 79(a). *See generally* Michael Zachary, *Article: Rules 58 and 79(a) of the Federal Rules of Civil Procedure: Appellate Jurisdiction and the Separate Judgment and Docket Entry Requirements*, 40 N.Y.L. SCH. L. REV. 409 (1996) (discussing the interplay between Rules 58 and 79(a)).

[51] Federal Rule of Civil Procedure 54(d)(2) states:

> (2) Attorneys' Fees
>
> (A) Claim for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.
>
> (B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after the entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which the claim is made.
>
> (C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which the court imposes liability. The court shall find the facts and state its conclusions of law as provided in Rule 52(a), and a judgment shall be set forth in a separate document as provided in Rule 58.
>
> (D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provision of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.
>
> (E) The provisions of subparagraph (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. § 1927.

FED. R. CIV. P. 54(d)(2).

[52] Federal Rule of Civil Procedure 59 states:

C. *The Development of Rule 58 Jurisprudence*

The Supreme Court was first confronted with Rule 58 controversy in *United States v. F.& M. Schaefer Brewing Co.*,[53] decided in April 1958.[54] The Court granted certiorari to reconcile an asserted conflict between the

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> New Trial; Amendment of Judgments
> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in action at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.
> (b) Time for Motion. A motion for a new trial shall be filed no later than 10 days after the entry of the judgment.
> (c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.
> (d) On Initiative of Court. No later than 10 days after 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 new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in the motion, the court shall specify the ground in its order.
> (e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

FED. R. CIV. P. 59.

[53] 356 U.S. 227 (1958).

[54] *Id.* The F. & M. Schaefer Brewing Company sued the United States government for money that was allegedly illegally assessed and collected as federal stamp taxes and for the interest on that money. *Id.* at 228. The district court judge made no finding of the dates of the alleged payments but rather deferred to an earlier decision by a colleague and granted the Schaefer's motion for summary judgment. *Id.* at 229. The civil docket read: "April 14, 1955. Rayfiel, J. Decision rendered on motion for summary judgment. Motion granted. See opinion on file." *Id.* On May 24, 1955, Schaefer's counsel presented the judge with a form captioned "Judgment," which the judge signed. *Id.* The clerk filed this paper along with a decree against the government for the amount of $7769.37. *Id.* On July 21, 1955, the government filed its notice of appeal from the order entered on May 25, 1955. *Id.* at 230. Schaefer's attorney moved to dismiss the appeal, arguing that the order of April 14 was the true order and, therefore, the sixty days in which to appeal had passed. *Id.* The appellate court agreed with Schaefer and dismissed the appeal. *Id.*

circuits as to when an appeal could be brought.[55] At that time, the proper interpretation and uniform application of the provisions of the Federal Rules were in jeopardy.[56] The Court held that the requirements of Rule 58 have not been met if an opinion does not resolve the appellate court's question whether the judge intended the judgment to be his final act in the case.[57]

Less than one month later, in *Jung v. K. & D. Mining Co.*,[58] the Court issued another decision regarding Rule 58.[59] In *Jung*, the Court held that

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[55] *Id.* at 230-31. Additionally, the Court granted certiorari because of the importance of the proper interpretation and uniform application of the Federal Rules of Appellate and Civil Procedure governing the time in which appeals may be brought. *Id.*

[56] *Id.* at 232-33. The Court stated:

> While an opinion may embody a final decision, the question whether it does so depends upon whether the judge has or has not clearly declared his intention in this respect in his opinion. Therefore, when, as here, the action is for money only – whether for a liquidated or an unliquidated amount, as Rule 58 makes no such distinction – it is necessary to determine whether the language of the opinion embodies the essential elements of a judgment for money and clearly evidences the judge's intention that it shall be his final act in the case.

Id. at 232.

[57] *Id.* at 233. The Court reversed the appellate court's decision as to what constituted a Rule 58 separate judgment order. *Id.* The Court specifically mentioned that actions for money are not resolved until the amount to be awarded is determined either expressly or by reference. *Id.* Schaefer argued that the decision of April 14 mentioned the amount of money that would be awarded because it mentioned the amount that he was suing for, including the interest, but the court held that that was not enough because the judge would not necessarily have to award Schaefer that much. *Id.* at 234. The dissent agreed with Schaefer that he filed his claim for $7769.37 and that was the amount of money that the judgment would have been for, even if it did not specifically say that within the April 14 decision. *Id.* at 237-38 (Frankfurter, J., dissenting). The dissent argued that the 1946 amendment to Rule 58 made it clear that the clerk was supposed to enter the judgment into the docket immediately without waiting for the filing of a formal judgment approved by the court. *Id.* at 241. The 1946 amendment replaced "there be no recovery" with "all relief be denied." *Id.* Additionally, the dissent argued that the deletion of the words "the entry of a judgment" made it clear that it is the direction to recover that was the essential act and not a direction to enter judgment or a direction framed in any particular manner. *Id.*

[58] 356 U.S. 335 (1958).

[59] *Id.* On May 10, 1955, the district court dismissed Jung's first amended complaint and granted twenty days from that date to file an amended complaint. *Id.* at 336. On May 27, 1955, the district court overruled Jung's motion to vacate that order but granted another twenty days from that date to file an amended complaint. *Id.* On March 25, 1957, Jung filed a paper electing to stand on his first amended complaint instead of filing an amended complaint. *Id.* That day, the district court dismissed the cause of action. *Id.* On April 16, 1957, Jung filed a notice of appeal from the judgment of March 25, 1957. *Id.* However, the appellate court held that the order of May 27, 1955, became the final judgment when Jung failed to file an amended complaint within the twenty days granted by the court. *Id.* Therefore, the court dismissed the appeal as untimely. *Id.*

a judgment that failed to direct that "all relief be denied" could not constitute a final judgment.[60] Therefore, even though the notice of appeal came almost two years after the filing of what the court of appeals considered to be the final judgment order, the appeal filed was still considered timely.[61]

The Court's strong reliance on the phrase "all relief be denied" is rooted in the 1946 amendments to Rule 58.[62] In that year, two changes were made in the wording of the rule to clarify the practice prescribed by the original rule.[63] First, the words "there be no recovery" were replaced with the broader phrase "all relief be denied."[64] The second amendment to Rule 58 was the clarification that judgments are to be entered promptly by the clerk without waiting for the taxing of the costs.[65]

The Supreme Court did not address Rule 58 directly again until *United States v. Indrelunas*[66] in 1973.[67] In *Indrelunas*, the civil docket entry

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[60] *Id.* at 337. Without the phrase "all relief be denied," the Court noted that the suit would still be left pending for further proceedings either by amendment or the complaint or entry of a final judgment. *Id.*

[61] *Id.* The Court noted that neither the appellee nor the district court - exercising power *sua sponte* over its own calendar - took any step in the two years to put a definitive end to the case and thereby fix an unequivocal terminal date for appealability. *Id.* Additionally, the Court stated that the undesirability of useless delays in litigation is more than offset by the hazards of confusion or misunderstanding as to the time for appeal. *Id.* The Court stated that the appellate court's decision left the case unresolved because the complaint could have been amended or a final judgment could have been entered. *Id.*

[62] *Id.*

[63] 28 U.S.C. app. at 784 (1994).

[64] *Id.* This more inclusive phrase made it clear that the clerk must immediately enter the judgment in the specified situations without awaiting the filing of a formal judgment approved by the court. *Id.* This phrase encompasses cases such as the denial of a bankrupt's discharge where the relief sought is refused but there is not a literal denial of recovery. *Id.*

[65] *Id.* In passing this amendment, the Advisory Committee noted that certain district court decisions contradicted this rule, but the federal practice was long standing and well settled. *Id.* The Advisory Committee noted that such district court rules contradicted the spirit of Rule 58. *Id. See generally* Fowler v. Hamill, 139 U.S. 549 (1891) (dismissing an appeal from a decree for the dismissal of a bill and for costs where the papers on appeal were not filed in the circuit court within two years after the decree).

[66] 411 U.S. 216 (1973) (per curiam).

[67] *Id.* Indrelunas and a fellow corporate officer named Foiles brought action against the government over a dispute relating to their responsibility to pay withholding taxes on a corporation in which they were officers. *Id.* The district court found for Indrelunas and the government appealed. *Id.* The court of appeals dismissed the appeal as untimely, holding that the government had missed the window in which to file its notice of appeal pursuant to Federal Rule of Appellate Procedure 4. *Id.* In reviewing the case, the Supreme Court looked at the activities in the district court immediately preceding the questionable final judgment order. *Id.* The Court found that the court of appeals had mistakenly believed

for the District Court for the Northern District of Illinois contained the language, "Enter judgment on the verdict. Jury discharged."[68] The Court of Appeals for the Seventh Circuit held that the government's appeal was untimely because it came nearly two years after the jury verdict and its district court's civil docket entry.[69] The appellate court held that the separate document requirement of Rule 58 only applied to the "complex" judgments described in clause two of that Rule.[70]

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that Rule 58 did not apply to this case because it did not fit into any of the categories listed in clause two of the first sentence of the rule. *Id.* at 217. In fact, the appellate court had admitted that it differed in opinion from the Third, Fifth, and Tenth Circuits in regard to this belief. *Id.* The Court stated that:

> [A] conflict on an issue such as this is of importance and concern to every litigant in a federal court, since, as this case makes clear, the timeliness of appeals, as well as the timeliness of post-trial motion, may turn on the question of when judgment is entered. Consideration of the petition for certiorari and the response has led us to conclude that further briefs and oral arguments would not materially assist in our disposition of the case and, for the reasons hereafter stated, we grant certiorari and reverse the judgment of the Court of Appeals.

Id. at 217-18.

[68] *Id.* at 218. In the district court, verdicts were returned in favor of both Indrelunas and his fellow corporate officer Foiles and against the government, using the wording:

> 'We, the jury, find for the plaintiff, Harry H. Foiles, and against the defendant, United States of America, in the amount claimed...,'
> 'We, the jury, find against the defendant, United States of America, on the counterclaim, and in favor of the plaintiff, Harry H. Foiles...,'
> 'We, the jury, find against the third-party plaintiff, United States of America, and in favor of the third-party defendant, Alphonse T. Indrelunas.'

Id. Following these jury verdicts and the entry in the district court civil docket, there was disagreement over the amount that Indrelunas and Foiles were to receive from the jury verdict. *Id.* at 219. Some fourteen months later, on May 14, 1970, a stipulation was filed in the district court specifying the amount of refund the men were to receive. *Id.* Within sixty days, the government filed a notice of appeal, but this appeal was not pursued. *Id.* Eight months later, on February 25, 1971, on motion by the government, the district court filed final judgment orders. *Id.* The government again filed a notice of appeal and it was this notice that brought the case to the Court of Appeals for the Seventh Circuit. *Id.*

[69] *Id.*

[70] *Id.* The appellate court stated:

> [W]hen the jury verdict is clear and unequivocal, setting forth a general verdict with reference to the sole question of liability and where nothing remains to be decided and when no opinion or memorandum is written, as is the situation described in clause (1) of Rule 58, there is no requirement for a separate document to start the time limits for appeal running.

Id.; *see also* FED. R. CIV. P. 58 (listing the "complex" judgments in Rule 58, clause two); *supra* note 5 (reproducing Rule 58).

In *Indrelunas*, the Supreme Court observed that the separate document requirement must be "mechanically applied" to all cases in order to avoid new uncertainties as to the date of judgment.[71] Specifically, the Court noted that Rule 58 had been amended in 1963 to remove uncertainties as to when a judgment is entered.[72] Clause one of Rule 58 sets out simple judgments with recovery of a sum certain, of costs, or of nothing, while clause two sets out more complex forms of judgment.[73] Prior to 1963, there was considerable uncertainty over what comprised an entry of judgment.[74] To combat this uncertainty, amended Rule 58 stated that a judgment was effective only when recorded on a separate document.[75]

The *Indrelunas* Court found that the recording of "Enter judgment on the verdict. Jury discharged," which had been entered almost two years earlier, did not meet the separate document requirement of Rule 58.[76]

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[71] *Indrelunas*, 411 U.S. at 222. The Court stated:

> [The 1963 amendment to Rule 58] represents a mechanical change that would be subject to criticism for its formalism were it not for the fact that something like this was needed to make certain when a judgment becomes effective, which has a most important bearing, inter alia, on the time for appeal and the making of post-judgment motions that go to the finality of the judgment for purposes of appeal. . . . Although confusion may still arise at times, the current [post-1963] version of Rule 58 provides a greater degree of certainty as to when a judgment has been rendered and becomes effective. Thus, as previously pointed out, when the court's decision, whether written or oral, is a simple grant of a sum certain or cost or that all relief be denied, the clerk is to prepare forthwith and sign a judgment which must be set forth on a separate document. Thereafter, the clerk is immediately to enter the judgment in the civil docket.

Id. at 221 (citing 6A J. MOORE, MOORE'S FEDERAL PRACTICE 58.04 (4-2), at 58-161 (1972)).

[72] *Id.* at 219-20. The Court noted that "Rule 58 was substantially amended in 1963 to remove uncertainties as to when a judgment is entered and to expedite the entry of judgment by limiting the number of situations in which the court need rely on counsel for the prevailing party to prepare a form of judgment." *Id.*

[73] *Id.* at 220. The Court noted that the sentence within Rule 58 following the description of simple and complex judgments states that "every judgment shall be set forth on a separate document" and that "a judgment is effective only when so set forth and when entered as provided in Rule 79(a)." *Id.*

[74] *Id.* This reasoning was taken from the notes of the Advisory Committee to the 1963 amendment. *Id.*; *see* 28 U.S.C. app. at 784-85 (1994) (setting forth the notes of the Advisory Committee).

[75] *Indrelunas*, 411 U.S. at 220; *see also* WRIGHT, ET AL., *supra* note 47, at 9 (examining the effects of the 1963 amendments).

[76] *Indrelunas*, 411 U.S. at 221. The Court held that the document of February 25, 1971, was the first document that would have met the requirements of Rule 58. *Id.* According to the Court, the civil docket entry was merely a reflection of the district court's determination as to the liability of the parties and, most importantly, was not recorded on a separate

The Court additionally stated that the 1963 amendments to Rule 58 illustrated that the rule was to be "mechanically applied" to all cases in order to avoid new uncertainties as to the date on which a judgment is entered, rather than using a case-by-case tailoring method to decide whether an appeal is timely.[77]

The Supreme Court took its most recent look at Rule 58 in *Bankers Trust Co. v. Mallis*[78] in 1978.[79] The Court noted that the appellate court's refusal to remand the case for a separate judgment order conflicted with other appellate court decisions, which had concluded that separate judgment orders are an absolute prerequisite to appellate jurisdiction.[80] However, the Court agreed with this refusal and permitted the case to go forward without remanding it for a separate judgment order, stating that the "separate document" requirement of Rule 58 could not have been intended to create such a categorical imperative that parties are not free to waive it.[81] The Court stated that certainty as to timeliness is not advanced by holding that appellate jurisdiction does not exist absent a separate judgment.[82] The Court further declared that only delay would result from requiring the appellate courts to dismiss appeals where a

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document per Rule 58. *Id.* The Court stated that the Seventh Circuit appeared to be motivated at least partly by a desire to punish the government for ignoring the district court's requests for amended complaints. *Id.* Instead of replying to the district court's requests, the government waited almost two years to request final judgments to be filed so the government could appeal the holding in the case. *Id.*

[77] *Id.*

[78] 435 U.S. 381 (1978) (per curiam).

[79] *Id.* Although the Court originally granted certiorari to decide if Mallis was a purchaser of securities, the Court first had to decide a question of federal appellate jurisdiction. *Id.* at 382. Mallis sued Bankers Trust Company under Section 10(b) of the Securities Exchange Act of 1934 to recover for alleged fraudulent statements. *Id.*

[80] *Id.* at 382-83. The District Court for the Southern District of New York dismissed the action on the ground that the fraud alleged had not occurred "in connection with the purchase or sale of a security," as required by §10(b). *Id.* "The Court of Appeals for the Second Circuit reversed, holding that respondents were 'purchasers [of securities] by virtue of their acceptance of [a] pledge' of stock and that petitioner was 'a seller by virtue of its release of [a] pledge.'" *Id.* (citations omitted). The appellate court stated that a thorough search of the district court's records revealed nothing that could be considered a judgment document but considered *Mallis* on its merits, regardless, because both parties and the district court proceeded with the assumption that there was an "adjudication of dismissal." *Id.*

[81] *Id.* at 383. The Court noted that the sole purpose of the 1963 addition of the "separate document" requirement to Rule 58 was to clarify when the time for appeal begins to run. *Id.*

[82] *Id.* at 385.

separate judgment order had not been filed, yet both parties and the district court had proceeded as if it had been.[83]

The *Mallis* Court then noted its ruling in *Indrelunas*, recognizing that the five-year old decision required a "mechanical" application of Rule 58 to every case.[84] The Court recognized that a mechanical application of Rule 58 would still be necessary in cases where there was uncertainty as to when an appeal could be brought.[85] However, the Court stated that the need for certainty as to the timeliness of an appeal should not prevent parties from waiving the separate judgment requirement when one has inadvertently not been entered.[86]

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[83] *Id.* Upon dismissal, the district court would simply file and enter the separate judgment from which a timely appeal could then be made, thus making the extra steps unnecessary and impractical. *Id.* The Court also stated that strict compliance with the separate judgment requirement would not aid in the appellate court's determination of whether the decision of the district court was final. *Id.* Even if a separate judgment is filed, the appellate court still must determine whether the district court intended the judgment to represent the final decision in the case. *Id.*

[84] Bankers Trust Co. v. Mallis, 435 U.S. 381, 386 (1978) (per curiam).

[85] *Id.* The Court did note, however, that the first paragraph of *Indrelunas* could be read as holding that the separate judgment must be filed in compliance with Rule 58 before a decision is final for the purposes of 28 U.S.C. § 1291. *Id.* at 386 n.7. To the extent that the decision in *Mallis* is inconsistent with the first paragraph of *Indrelunas*, the Court disavowed the earlier text. *Id.*

[86] *Id.* This waiver rule resolved an inter-circuit split concerning appellate jurisdiction. Zachary, *supra* note 50, at 410. Until *Mallis*, some circuit courts had been dismissing appeals if they found the judgment order to be a jurisdictional requirement and it was lacking, while other circuits were allowing appeals even without a judgment order and declaring that Rule 58 had been waived. *Id.* Although the Supreme Court agreed with the latter courts, it also stressed that the finality of the order being appealed and the waiver of the requirement had to be clear. *Id.* As it had done before in *Indrelunas*, the Court cited MOORE'S FEDERAL PRACTICE:

> '[T]here would appear to be no point in obliging the appellant to undergo the formality of obtaining a formal judgment. . . . [I]t must be remembered that the rule is designed to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced. . . . The rule should be interpreted to prevent loss of the right to appeal, not to facilitate loss.'

Mallis, 435 U.S. at 386. In addition, the Court stated that the Federal Rules of Civil Procedure are "construed to secure the just, speedy, and inexpensive determination of every action." *Id.* at 386-87 (citing Foman v. Davis, 371 U.S. 178 (1962)). In a separate opinion, Justice Ruth Bader Ginsburg observed that Rule 58 "must be applied in such a way as to favor the right to appeal." Elijah Yip & Eric K. Yamamoto, *Justice Ruth Bader Ginsburg's Jurisprudence of Process and Procedure*, 20 U. HAW. L. REV. 647, 653 (1998) (citing Ctr. for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n, 781 F.2d 935 (D.C. Cir. 1986)). Ginsburg went on to say that as long as "it is clear that the district court has intended a final, appealable judgment, mechanical application of the separate-judgment rule should not be used to require the pointless formality of returning to the

In *Mallis*, the Court used "commonsense interpretation" to conclude that where the notice did not mislead or prejudice the appellee, the parties could waive the separate judgment requirements of Rule 58.[87] The Court then held that the district court clearly demonstrated its intention that the order was the final decision in *Mallis*.[88] The Court held that the parties had deemed the separate judgment requirement of Rule 58 to be waived because the petitioner did not object to the taking of an appeal in the absence of a final judgment order.[89]

III. THE SUPREME COURT GIVETH AND THE SUPREME COURT TAKETH AWAY: THE CONFUSION WITHIN THE CIRCUITS FOLLOWING *INDRELUNAS* AND *MALLIS*

> *In the short time this court has been in existence we have seen a disproportionate number of cases which have contained jurisdictional issues stemming from lack of finality of the judgment.*[90]

To properly investigate the current status of Rule 58 doctrine within the circuits, it is necessary to evaluate the circuits individually and look at the decisions within the circuits both before and after the Supreme Court decided *Mallis*. Part A discusses the five different approaches taken to Rule 58 by different circuits.[91] Part B explores the necessity for

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district court for ministerial entry of judgment; instead, the right to immediate appeal is favored." *Id.*

[87] *Mallis*, 435 U.S. at 387. "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Id.* (citing Foman v. Davis, 371 U.S. 178, 183 (1962)).

[88] *Id.* The court came to this conclusion because a judgment of dismissal was recorded in the clerk's docket. *Id.*

[89] *Id.* at 388. The Court went on to say that, although the appellate court did have jurisdiction over the merits, the Supreme Court's decision did not reach the merits. *Id.* Instead, the Court dismissed the writ of certiorari because counsel brought up a new theory for affirming the decision of the Court of Appeals that changed the posture of the case between the time of the decision of the Court of Appeals and the time when the case was presented to the Supreme Court. *Id.* The Court dismissed the action. *Id.* The Court stated that there was proper appellate court jurisdiction under 28 U.S.C. § 1291. *Id.* Following *Mallis*, courts have interpreted this waiver to only apply where: (1) the district court's opinion was clearly intended to be the final decision of that court; (2) the judgment has been recorded in the docket; or (3) the appellee did not object to the taking of the appeal in the absence of a Rule 58 document. *See, e.g.*, Barber v. Whirlpool Corp., 34 F.3d 1268, 1274-75 (4th Cir. 1994).

[90] Merchant v. Nanyo Realty, Inc., No. CVA96-005, 1997 WL 1051628, at *3 (Guam Dec. 31, 1997) (per curiam) (stating that Rule 58 should be expressly honored).

[91] *See infra* Part III.A.

uniformity throughout the federal courts.[92] Part C investigates the positive and negative aspects of a Rule 58 amendment that was proposed in August 2000 by the Committee on Rules of Practice and Procedure.[93]

A. Lack of Rule 58 Uniformity Within the Circuits

The Supreme Court decided *Mallis* five years after *Indrelunas*, reducing the urgency it had accorded Rule 58 without overturning *Indrelunas*.[94] The tension between the "mechanically applied" *Indrelunas* decision, which requires a strict interpretation of Rule 58 in every claim, and the waiver-friendly *Mallis* decision, which allows courts to waive the requirements of Rule 58, has caused confusion and disparity among the circuits.[95] It has also led to some creative solutions not yet mandated or reviewed by the Supreme Court.[96] The majority of the conflicts arise from situations in which parties are considered to have waived their right to object to an appeal, as well as how to manifest such an objection. Additionally, much confusion exists over whether *Mallis* gave courts the power to accept jurisdiction without remand in all cases or only in the specific situation that faced the *Mallis* Court.

1. The First Circuit: Ingenuity is the Mother of Invention

In *Fiore v. Washington County Community Mental Health Center*,[97] the First Circuit attempted to resolve discrepancies in the application of Rule 58 in the federal courts.[98] A panel of the court stated that the lower

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[92] *See infra* Part III.B.

[93] *See infra* Part III.C.

[94] *See, e.g.*, Hanson v. Town of Flower Mound, 679 F.2d 497, 502 (5th Cir. 1982) (stating that *Indrelunas* is still good law despite the holding in *Mallis*).

[95] *See supra* notes 66-89 and accompanying text (discussing the Supreme Court's holdings in *Indrelunas* and *Mallis*).

[96] *See infra* Part III.A.1 (discussing the First Circuit's approach to Rule 58).

[97] 960 F.2d 229 (1st Cir. 1992).

[98] *Id.* at 231. Fiore brought an action alleging that the Washington County Community Mental Health Center and its employees had treated his young daughter negligently by erroneously teaching her that her father had engaged in "sexually inappropriate behavior" toward her. *Id.* In March 1990, the district court granted summary judgment for the defendants. *Id.* Fiore filed a motion to vacate the summary judgment under Rule 60(b) and for leave to file a third amended complaint. *Id.* On June 27, 1990, the district court denied the petition by stamping "Denied" above the judge's signature on a photocopy of Fiore's motion. *Id.* On July 17, Fiore filed a motion for reconsideration or, alternatively, explanation of the court's reason for denying the 60(b) motion. *Id.* On September 21, the district court, without discussion, denied the motion by making a margin notation. *Id.* at 231-32. On October 22, Fiore sought entry of a final judgment on the June 27 denial of his Rule 60(b) motion. *Id.* at 232. He argued that the decision was not final for purposes of

courts should meticulously comply with Rule 58.[99] After a rehearing *en banc*, however, the full court determined that Rule 58 should be treated with more flexibility.[100] The panel's view prevailed and the Rule 58 separate document requirement was held to mechanically apply to all appealable post-judgment orders in the First Circuit.[101]

The court then stated that the sole purpose for the separate document requirement was to establish a reference point for determining the timeliness of post-judgment motions and appeals.[102] This made the court feel even more strongly that the requirements of Rule 58 needed to be followed in every claim to avoid uncertainties as to the date of appeal.[103] To avoid ambiguity and uncertainty, the court considered it a necessity to have a separate document originated by the court containing only the judgment.[104]

The First Circuit next looked to the Supreme Court's decisions for guidance as to the degree of importance to be placed on Rule 58.[105] The

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appellate review because the denial had not been set forth on a separate document as required by Rule 58. *Id.*

[99] *Id.*

[100] *Id.* at 232. The district court had issued a memorandum following Fiore's motion for entry of a final judgment. *Id.* In the memorandum, the court stated that finality of the June 27 decision "is a matter for the First Circuit Court of Appeals to consider when and if Mr. Fiore appeals that decision." *Id.*

[101] *Id.* at 231.

[102] *Id.* at 233 (citing Alman v. Taunton Sportswear Mfg. Corp., 857 F.2d 840, 843 (1st Cir. 1988)). The court looked at the uncertainty that may occur when a Rule 58 separate document is not filed, noting that the uncertainty may be less likely with post-judgment orders than for original judgments. *Id.* at 234. The court considered the words of the Advisory Committee from the 1963 amendment requiring the separate document. *Id.* The Advisory Committee was particularly concerned about the occasions in which courts issued opinions containing dispositive words and then signed formal judgment papers later. *Id.* With both documents, the Advisory Committee was concerned that the parties would be unsure which document to follow when measuring the time in which to appeal. *Id.*

[103] Fiore v. Washington County Cmty. Mental Health Ctr., 960 F.2d 229, 233 (1st Cir. 1992). The court stated that Rule 58 was especially necessary in the context of Rule 60(b) motions, as they neither affect the finality of the original judgment nor extend the time for appealing the judgment. *Id.* Because the Rule 60(b) motion can be completely separate from the original judgment, the necessity of a final separate judgment order document becomes all the more necessary so that the parties know the specific dates in which they can appeal the judgment. *Id.*

[104] *Id.* at 234-35. In *Fiore*, the district court clerk photocopied a motion, which the appellant submitted to the court. *Id.* at 234. At the top of the photocopy, the clerk typed the word "Denied" and filed that as the separate judgment order. *Id.* Upon appeal, the appellate court found that this did not satisfy Rule 58. *Id.*

[105] *Id.* at 235.

Fiore court stated that the "mechanically applied" doctrine of *Indrelunas* had been relaxed in *Mallis*, but the court believed that the relaxation only applied when there was a need to alleviate inconvenience or hardship caused by the rule's "hypertechnicality."[106] Despite this discussion, however, the court held that there was no reason to remand to the district court for the separate judgment to be entered.[107] The court found that remanding could possibly result in long dormant cases being reopened and exposing unwilling and unwary appellees to litigation that they believed to be over.[108]

Instead, the First Circuit created its own system to determine the timeliness of an appeal: if an appeal is brought within thirty days of the filing of a Rule 58 separate judgment order document, the appeal is timely.[109] If there was no separate document that met the strict

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[106] *Id.* The court stated that a standard rule, which assigned finality to a marginal denial of a post-trial motion, could not serve the purpose of alleviating inconvenience, even if the marginal denial was technically on a separate piece of paper, i.e., a photocopy of Fiore's motion. *Id.* In addition, the court stated that a party could find itself in an awkward position if, after filing a notice of appeal, the district court then issued an explanatory memorandum of the marginal denial. *Id.*

[107] *Id.* at 236-37. The court stated that, absent exceptional circumstances, it is appropriate "to infer waiver where a party fails to act within three months of the court's last order in a case." *Id.*

[108] *Id.* The court noted:

> When a party allows a case to become dormant for such a prolonged period of time, it is reasonable to presume that it views the case as over. A party wishing to pursue an appeal and awaiting the separate document of judgment can, and should, within that period file a motion for entry of judgment. This approach will guard against the loss of review for those actually desiring a timely appeal while preventing resurrection of litigation long treated as dead by the parties.

Id.

[109] Fiore v. Washington County Cmty. Mental Health Ctr., 960 F.2d 229, 239 (1st Cir. 1992). In *Fiore*, the First Circuit set forth its rules for entering judgment:

> 1. Any order denying (as well as granting) post-judgment motions under Rules 50(b), 52(b), 59(b) and (e), and 60(b) of the Federal Rules of Civil Procedure must be set forth on a "separate document."
> 2. A "separate document" is a document originated by the court, not a party, separate from any other paper filed in the case. A marginal note on a copy of a motion, for example, will not suffice. Normally, under Rule 58(1), clerks should draft the document for the judge's approval.
> 3. If a party appeals a judgment that complies with the requirements of Rule 58 except that for a separate document
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> a. within a period that would make the appeal timely if judgment had been entered on a "separate document," we will not dismiss the appeal for lack of such a document but will deem the appellant to have waived his right to it.

requirements of Rule 58, however, then the parties would have ninety days from the final action in the case in which to appeal, making Rule 58 no more than a procedural technicality which could be ignored.[110] No other circuit has followed this approach and the Supreme Court has yet to review the ninety-day rule; therefore, it is only mandatory authority within the First Circuit.[111]

2. The Second and D.C. Circuits: Rule 58 is Not a "Categorical Imperative"[112]

The same year the Supreme Court decided *Mallis*, the Second Circuit handed down a decision in *Turner v. Air Transport Lodge 1894 of International Ass'n of Machinists and Aerospace Workers.*[113] *Turner* illustrated the effect that *Mallis* had on the circuit's appellate courts.[114]

> b. after the period in subparagraph (a) but within three months of the final action in the case, as set forth in subparagraph (a), we will deem appellant to have waived the right to a "separate document." If, however, no appeal has been filed, the party will be free to argue that judgment has not yet been "entered" as Rule 58 requires, and that the time to file an appeal therefore has not yet begun to run. If, before appealing, the party files a motion to set forth the judgment on a "separate document," the district court should do so.
>
> c. more than three months after the last action in the case, we shall, absent exceptional circumstances, deem the party to have waived his right to a judgment entered on a separate document. Such an appeal therefore will be dismissed as untimely.

Id.

[110] *Id.*

[111] *See* New Shows v. Don King Prods., Inc., Nos. 99-9019, 99-9069, 2000 WL 354214, at *5-6 (2d Cir. Apr. 6, 2000) (refusing to follow *Fiore* because the appellant's motion was timely regardless of the approach); United States v. Haynes, 158 F.3d 1327, 1330-31 (D.C. Cir. 1998) (refusing to follow *Fiore* because it would be fatal to the appeal); Hammack v. Baroid Corp., 142 F.3d 266, 270 (5th Cir. 1998) (refusing to follow *Fiore* because it extinguishes claims to promote certainty); Rubin v. Schottenstein, Zox & Dunn, 110 F.3d 1247, 1253 & n.4 (6th Cir. 1997), *vacated in part on other grounds*, 143 F.3d 263 (6th Cir. 1998) (declining to follow *Fiore* because the First Circuit system was not supported by Rule 58 or the Supreme Court's comments).

[112] Spann v. Colonial Vill., Inc., 899 F.2d 24, 32 (D.C. Cir. 1990) (citing Bankers Trust Co. v. Mallis, 435 U.S. 381, 384 (1978)) (holding an appeal was not premature even though the district court had not filed a separate document judgment order pursuant to Federal Rule of Civil Procedure 58).

[113] 585 F.2d 1180 (2d Cir. 1978).

[114] *Id.* at 1181. Recognizing the availability of the *Mallis* waiver, the court did not encourage such a practice. *Id.* The court instead remanded the case to the district court for a more complete explanation of the judgment with the stipulation that, after the more explicit judgment was entered, the case would return to the appellate court promptly for a decision on the appeal. *Id.* Turner was a member of defendant Air Transport Lodge 1894 which was affiliated with another defendant, International Association of Machinists and

Although the appellate court remanded *Turner* for clarification from the district court, it was swayed enough by *Mallis* to recognize that Rule 58 could now be waived in certain circumstances.[115]

Two years later, in *Leonhard v. United States*,[116] the Second Circuit held that Rule 58 is meant only to pinpoint the commencement of time for filing an appeal and that *Mallis* prohibited remanding cases unless there was some uncertainty as to finality.[117] In *Leonhard*, the appellate

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Aerospace Workers. *Id.* Turner was expelled from his union on January 28, 1976. *Id.* He brought an action under the Labor-Management Reporting and Disclosure Act of 1959 asking for: (1) a permanent injunction against enforcing his expulsion; (2) a declaratory judgment that his expulsion was void; (3) a permanent injunction against infringement by defendants of his rights under LMRDA; (4) a declaratory judgment that Article L § 3 of the constitution of the International union was void to the extent specified; and (5) for attorney's fees. *Id.* After the defendant's answer, Turner moved for entry of judgment for the relief demanded in the complaint. *Id.* The defendants in turn moved for summary judgment. *Id.* at 1182. On March 31, 1978, Judge Constantino filed his "memorandum and order" from which the two lodges appealed. *Id.*

[115] *Id.* The appellate court stated that it had difficulty determining the decision of the district court because the terms of the decision were not spelled out in the document and there was no Rule 58 separate document judgment order. *Id.*

[116] 633 F.2d 599 (2d Cir. 1980).

[117] *Id.* at 611 (accepting appellate jurisdiction despite the lack of a Rule 58 order). Leonhard's ex-wife had remarried a man who had information about organized crime. *Id.* at 605. The government agreed to hide Leonhard's ex-wife, her new husband, and Leonhard's children if the man testified. *Id.* Leonhard was never consulted about the deal. *Id.* After the testimony, Leonhard lost contact with his children. *Id.* In June 1971, Leonhard was granted custody of the three children. *Id.* In July 1971, Leonhard brought an action against officers of the Department of Justice, demanding that they disclose where his children were located now that he had official custody over the children. *Id.* The district court ruled that Leonhard had no constitutional right to custody of his children or even to visitation rights, and that the officers were doing what was in the best interests of the children. *Id.* As evidence of this, the defendants produced a "murder contract" that had been placed on his ex-wife and the children. *Id.* On July 11, 1975, Leonhard was reunited with his children. *Id.* On June 30, 1978, he filed the current suit on behalf of himself and his children, seeking money damages for the violation of his and his children's constitutional rights and for torts committed against the children as a result of the separation from their father. *Id.* at 604. The defendants moved to dismiss the complaint on the grounds that it failed to state a claim and that all claims asserted were barred by the applicable statutes of limitations. *Id.* at 607. Eventually, the claims against all defendants were dismissed, except those against Leonhard's ex-wife's new husband, who had never been served and had never appeared. *Id.* at 608. The appellate court stated that normally when a dismissal remains subject to revision until all the liability of all the defendants has been determined, an immediate appeal is not available. *Id.* However, in a circumstance where the only remaining defendant has never been served, the circumstances are materially different. *Id.* In this case, the remaining defendant was not considered to be a party for the purposes of the dismissal and there was no reason to leave the dismissal open for revision. *Id.* Therefore, the court held that the absence of a non-served party was not an impediment to Leonhard's present appeal. *Id.* at 609.

court asked the district court to make corrections on its final order so that it would meet Rule 58 requirements and the appellate court could accept jurisdiction immediately.[118]

The Second Circuit later dismissed all the requirements of Rule 58 and construed a trial court decision to comply with the requirements of the separate document judgment order section of Rule 58.[119] Additionally, as long as the appellee does not object, the Second Circuit allows appellate courts to accept jurisdiction without remanding to the district courts.[120] In *New Shows v. Don King Productions*,[121] the Second

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[118] *Id.* at 612. The court also found that the absence of a Rule 58 separate document judgment order from the district court was not an impediment to the appellate jurisdiction. *Id.* at 611. The court stated that although Rule 58 required a separate document order, this requirement is intended "merely to pinpoint, principally for the benefit of the appellant, the commencement of time for filing a notice of appeal." *Id.* The court found that certainty as to the date of appeal would not be advanced by holding that appellate jurisdiction did not exist without the Rule 58 document. *Id.* The court noted that Leonhard had not objected to the appeal despite the lack of a judgment order from the court below. *Id.* at 612. Although the defendant-appellees objected, they failed to show any respect in which they were prejudiced by the taking of the appeal without a judgment order, so the court dismissed their objections. *Id.*

[119] Great Am. Audio Corp. v. Metacom, Inc., 938 F.2d 16 (2d Cir. 1991). Although no separate document judgment order was entered in *Great American*, the court construed the decision to be a Rule 58 order, citing *Mallis* as authority for its decision. *Id.* at 18. Great American had appealed from a district court decision denying its request for an injunction against Metacom under the Lanham Act in connection with the marketing of a toy bus containing audio cassettes. *Id.* at 17. Great American claimed that Metacom's toy bus was confusingly similar to Great American's, including the facts that both buses were of a similar size and both had openings in the top for four cassettes. *Id.* At the end of the hearing, the district court denied Great American's request for injunctive relief. *Id* at 18. The district court judge signed his decision, which was entered into the district court docket. *Id.*

[120] Seletti v. Carey, 173 F.2d 104 (2d Cir. 1999). Seletti claimed to be the author of Mariah Carey's hit song titled, "Hero." *Id.* at 106. He filed a complaint in early 1996 claiming violations of the Copyright Act and the Lanham Act. *Id.* On May 21, 1997, the district court ordered Seletti to pay $5000 for discovery abuses and to post a $50,000 bond as security for defendant's costs and attorney's fees which are potentially recoverable under the Copyright Act. *Id.* The sanctions were partially in response to Seletti's discussion of the case during an appearance on an NBC television show and for inviting a reporter to a pre-trial conference. *Id.* Seletti filed a notice of appeal that was dismissed by the clerk of the appellate court for failure to submit the proper docketing fee. *Id.* On June 26, 1997, the district court dismissed the complaint with prejudice due to plaintiff's failure to pay the sanction or post the bond ordered in May 1997. *Id.* at 107. Seletti filed an appeal on February 18, 1998. *Id.* at 108. The appellate court first considered whether it had jurisdiction over the decisions of May 21, 1997, and June 26, 1997, because neither had been accompanied by a Rule 58 judgment order. *Id.* at 109. The court held that appellate jurisdiction existed over the June 26 decision despite the absence of a separate judgment order. *Id.* The court reasoned that when an order clearly represents a court's final decision and the appellees do not object to the taking of an appeal, the separate document judgment

Circuit considered whether to follow the First Circuit's holding in *Fiore*. After finding that every other circuit that had considered the *Fiore* scheme had rejected it, the Second Circuit rejected it as well.[122]

The D.C. Circuit followed the *Mallis* decision faithfully throughout the 1980s, holding that Rule 58 is only meant to determine the time of the appeal, not to deny appellate jurisdiction.[123] Additionally, the D.C. Circuit has held that Rule 58 must be read to favor appeals.[124] Most

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rule is deemed to have been waived and the assumption of appellate jurisdiction is proper. *Id.* at 109-10.

[121] Nos. 99-9019, 99-9069, 2000 WL 354214, at *5-6 (2d Cir. Apr. 6, 2000).

[122] *Id.* (citing United States v. Haynes, 158 F.2d 1327, 1330-31 (D.C. Cir. 1998); Hammack v. Baroid Corp., 142 F.3d 266, 270 (5th Cir. 1998); Rubin v. Schottenstein, Zox & Dunn, 110 F.3d 1247, 1253 & n.4 (6th Cir. 1997), *vacated in part on other grounds*, 143 F.3d 263 (6th Cir. 1998)).

[123] *See, e.g.*, Diamond v. McKenzie, 770 F.2d 225, 230 (D.C. Cir. 1985) (per curiam). Diamond, a severely learning disabled and emotionally disturbed teenager, and his mother filed a complaint charging that the District of Columbia Board of Education and various District of Columbia officials had violated Diamond's rights under several federal statutes and the United States Constitution. *Id.* at 226. Defendants moved to dismiss or, in the alternative, moved for summary judgment. *Id.* On December 21, 1984, the district court filed an order that accomplished several things: (1) it dismissed all claims under the Civil Rights Act of 1871, the Rehabilitation Act of 1973, and the Fifth Amendment; (2) it dismissed the District of Columbia Board of Education as a party; and (3) it ordered defendants to place Diamond at a residential placement in Florida and for the District of Columbia Public Schools to pay for the placement and to reimburse Diamond's mother for any previous tuition payments. *Id.* at 227. In addition, the order stated that a memorandum would follow with reasons for the decision, but it also purported to be "the final order of the Court." *Id.* On January 7, 1985, defendants moved for relief from the order, requesting that they not be forced to pay for Diamond's move or tuition until the memorandum was filed, as it was impossible for them to appeal until they knew the reasons for the decision. *Id.* On January 23, 1985, the district court filed its memorandum setting forth both findings of fact and conclusions of law. *Id.* On January 31, 1985, defendants filed their notice of appeal. *Id.* The appellate court issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction because it came more than thirty days after the order from the district court. *Id.* However, citing to Rule 58, the court stated that there was never a separate document judgment order filed along with the December 21 decision. *Id.* at 228. The court looked specifically to *Indrelunas*, stating that an appeal is not untimely if Rule 58 has not been satisfied by the district court. *Id.* Additionally, the court looked to *Mallis* for support that dismissing the appeal would not be appropriate. *Id.* at 230. The court considered the combination of the order and the memorandum to be proof that the district court had issued a final judgment in the case and also considered the fact that the appellees did not effectively object to the taking of the appeal. *Id.* Therefore, the court accepted jurisdiction. *Id.*; *see also id.* at 231-35 (Robinson, J., concurring) (discussing the history of Rule 58 and the various amendments to the rule).

[124] *See, e.g.*, Spann v. Colonial Vill., Inc., 899 F.2d 24, 32 (D.C. Cir. 1990) (holding that Rule 58 is not a "categorical imperative"). In *Spann*, the plaintiff-appellants sought to pursue claims that real estate advertisements placed by defendant-appellants featuring white models to the exclusion of black models violated the Fair Housing Act of 1968. *Id.* at 25-26.

recently, the D.C. Circuit's 1997 decision in *Pack v. Burns International Security Service*[125] asserted that appellate courts should exercise jurisdiction over appeals where no Rule 58 order has been filed from the district court below, even if the appellee objected to the appellate jurisdiction.[126] The court held that jurisdiction was proper even over the objections of the appellee after an examination of other circuit decisions

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After two cases were consolidated in January 1987, the district court scheduled briefing on dispositive motions. *Id.* at 26. The district court, in May 1987, ruled in favor of the defendant by: (1) dismissing plaintiffs' pleas under 42 U.S.C. §§ 1981 and 1982 for failure to state a claim upon which relief can be granted, and (2) granting summary judgment striking out the FHA claims as time-barred. *Id.* Plaintiffs planned to appeal, but their plans were aborted when Colonial Village filed in the appellate court a motion to dismiss for want of the requisite finality. *Id.* Colonial pointed out that the district court had not addressed a co-defendant's objection as to service. *Id.* The appellate court dismissed the appeal without prejudice for lack of a final order under Federal Rule of Civil Procedure 54(b). *Id.* The district court then made efforts to finalize the judgment. *Id.* When another notice of appeal was filed, a co-defendant challenged the appeal as premature. *Id.* at 31. The appellate court stated that the appeal was not premature even though the district court had not filed a separate document judgment order pursuant to Federal Rule of Civil Procedure 58. *Id.* After discussing the purpose of the Rule 58 separate document requirement as seen through the 1963 amendments, the court held that Rule 58 is not a "categorical imperative." *Id.* at 32 (citing Bankers Trust Co. v. Mallis, 435 U.S. 381, 384 (1978)). The appellate court stated that nothing but delay would result from remanding and that Rule 58 must be read "in such a way as to favor the right to appeal." *Id.* (citation omitted).

[125] 130 F.3d 1071 (D.C. Cir. 1997).

[126] *Id.* at 1072. Pack filed a *pro se* complaint after a September 1995 encounter at Union Station with Amtrak guards and employees of the Burns International Security Service. *Id.* at 1071. Burns in turn filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted. *Id.* Pack failed to file a timely response to the motion and the district court issued an order directing him to respond by a particular future date. *Id.* Two weeks prior to the deadline, Pack filed an opposition to the dismissal motion. *Id.* Apparently unaware of Pack's filing, the district court subsequently entered an order stating that the motion to dismiss would be treated as conceded and granted. *Id.* at 1071-72. The district court's order provided several grounds for dismissal, and directed that the case be "dismissed with prejudice from the docket of this court." *Id.* at 1072. No separate judgment in compliance with Federal Rule of Civil Procedure 58 was entered. *Id.* Forty-eight days later, Pack filed a notice of appeal. *Id.* Burns responded with a motion to dismiss the appeal, arguing that the notice of appeal was untimely and that the district court judge's notation of "Let this be filed" on the notice of appeal was ineffective to extend Pack's appeal time in the absence of a motion requesting an extension. *Id.* The appellate court first stated that Pack's notice of appeal could not be considered late because of the "mechanically applied" rule of *Indrelunas*. *Id.* The court stated that "[a]n appellant may, therefore, safely wait until a conforming judgment has been entered and file an appeal at that time." *Id.* (citing Shalala v. Schaefer, 509 U.S. 292 (1993)). However, the appellate court found the more difficult question to be whether the court had jurisdiction to hear Pack's appeal because the appeal was technically "premature." *Id.*

on whether cases should be remanded to district courts for appropriate Rule 58 orders to be entered.[127]

3. The Third, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits: Why Go Back When You Can Go Forward?

> *[Presently a] party safely may defer the appeal until Judgment Day if that is how long it takes to enter the document.*[128]

a. Conformity in Result Throughout the Seven Circuits

The Supreme Court's decision in *Mallis* has changed the way several circuits approach appellate jurisdiction in cases where the district courts have not properly filed Rule 58 separate document judgment orders.[129]

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[127] *Id.* at 1072. Citing *Mallis*, the court stated that, in certain circumstances, parties could waive Rule 58 requirements and an appellate court could exercise jurisdiction over an appeal even though no judgment had been entered. *Id.* The court found very persuasive the wording from *Mallis*: "Upon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose." *Id.* (citing Banker's Trust Co. v. Mallis, 435 U.S. 381, 385 (1978)). The appellate court agreed with the other circuit courts, which had read *Mallis* to require an appellate court to exercise jurisdiction over an appeal from a nonconforming judgment notwithstanding an appellant's failure to file a notice of appeal within the applicable time period following entry of judgment. *Id.* at 1073. The appellate court assumed jurisdiction over Pack's appeal despite Burns' protests. *Id.*

[128] *In re* Kilgus, 811 F.2d 1112, 1117 (7th Cir. 1987) (stating that the more mechanical the application of Rule 58, the better).

[129] *See, e.g.*, Sears v. Austin, 282 F.2d 340 (9th Cir. 1960) (providing an example of how circuits treated appeals that did not come from Rule 58 orders before *Mallis*). In *Sears*, on March 1, 1960, the trial court judge signed and entered "Findings of Fact and Conclusions of Law." *Id.* at 341. The final words of the document were: "Let judgment be entered accordingly." *Id.* The judge also signed a written judgment that was, on its face, final in form. *Id.* On March 9, defendants filed a motion to amend the findings of fact and to set aside the judgment and enter judgment for the defendants. *Id.* On March 30, defendants filed a notice of appeal. *Id.* However, on April 1, the trial court judge entered an order denying the defendants' motion. *Id.* The appellate court read this new order as replacing the order of March 1. *Id.* The order of April 1 again concluded with "Let judgment be entered accordingly," but judgment was never entered on the April 1 order. *Id.* The appellate court held that there was something left for the trial court judge to do before the case would be completed at that level and, therefore, dismissed the notice of appeal until the trial court judge had entered a judgment order to satisfy Federal Rule of Civil Procedure 58. *Id.*; *see also* Philhall Corp. v. United States, 546 F.2d 210, 213-14 (5th Cir. 1976) (stating that the 1963 amendment to Rule 58 had made it imperative that any document not meeting the requirements of Rule 58 not be considered a final judgment); Dougherty v. Harper's Magazine Co., 537 F.2d 758, 762 (3d Cir. 1976) (dismissing as premature an appeal where the district court clerk had not entered a judgment as required by Rule 58, leaving the appellate court without jurisdiction); Chicago Housing Tenants Org. v. Chicago Housing Auth., 512 F.2d 19, 21 (7th Cir. 1975) (dismissing appeal because preliminary injunction order was not sufficient to constitute a final judgment order pursuant to Rule

In circumstances where these seven circuits previously remanded cases that did not meet Rule 58's requirements, appellate jurisdiction is often now accepted.[130] The courts cite various reasons and stipulations for accepting appellate jurisdiction, but all cite to *Mallis* when allowing the waiver of Rule 58's requirements.[131] Several of the circuits state that appellate jurisdiction cannot be considered to be waived if the appellee objects, but rarely do the courts act on this, and at least one circuit has allowed an appeal over the objections of the appellee.[132]

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58); State Nat'l Bank of El Paso v. United States, 488 F.2d 890, 892-93 (5th Cir. 1974) (stating that appeal would be dismissed where trial court judge tacked judgment on the end of a memorandum opinion instead of filing a separate document judgment order pursuant to Rule 58); Levin v. Wear-Ever Aluminum, Inc., 427 F.2d 847, 848-49 (3d Cir. 1970) (dismissing as premature an appeal where the district court clerk had not entered a judgment as required by Rule 58, leaving the appellate court without jurisdiction); Green v. Reading Co., 180 F.2d 149, 150 (3d Cir. 1950) (dismissing as premature an appeal where the district court had not entered a Rule 58 judgment order, and a motion for judgment remained to be acted on in the district court); McAlister v. C.J. Dick Towing Co., 175 F.2d 652, 654 (3d Cir. 1949) (dismissing as premature an appeal where the district court clerk inadvertently neglected to enter a judgment on the verdict, leaving the appellate court without jurisdiction). *But see* Blanchard v. Commonwealth Oil Co., 294 F.2d 834, 837 (5th Cir. 1961) (holding that the final order of the district court can be construed as the judgment order to satisfy Rule 58); Neely v. Merchants Trust Co. of Red Bank, N.J., 110 F.2d 525, 526 (3d Cir. 1940) (stating that a remand is not necessary just because the Rule 58 order did not have a date on it).

[130] *See, e.g.*, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., Local 249 v. W. Pa. Motor Carriers Ass'n, 660 F.2d 76 (3d Cir. 1981) (accepting appellate jurisdiction despite lack of Rule 58 judgment order); *see also infra* Part III.A.3.b (examining changes in Rule 58 jurisdiction since the *Mallis* decision).

[131] *See infra* Part III.A.3.b (discussing decisions waiving Rule 58 because of the *Mallis* test).

[132] *See* Reynolds v. Golden Corral Corp., 213 F.3d 1344, 1344 (11th Cir. 2000) (noting that a remand to enter a Rule 58 judgment order would be a waste of judicial resources); Block v. Allstate Ins. Co., No. 98-2034, 1999 WL 1267346, at *2 (4th Cir. Dec. 29, 1999) (stating that although the appeal would seem to be premature, the appellate court would consider the appeal because neither party had objected to the appeal); Green v. Seymour, 59 F.3d 1073, 1076 (10th Cir. 1995) (holding that appellant did not object to the lack of a Rule 58 order and therefore waived the right to object); Bonin v. Calderon, 59 F.3d 815, 847 (9th Cir. 1995) (stating that the lack of a Rule 58 order should not preclude the appellate court from considering issues of Rules 15(a) or 60(b)); Barber v. Whirlpool Corp., 34 F.3d 1268, 1274-75 (4th Cir. 1994) (waiving the Rule 58 separate document requirement where all three parts of the *Mallis* test were met: (1) the district court's opinion was clearly intended to be the final decision of that court; (2) the judgment had been recorded in the docket; and (3) the appellee did not object to the taking of the appeal in the absence of a Rule 58 document); Blazak v. Ricketts, 971 F.2d 1408, 1410 n.2 (9th Cir. 1992) (stating that appellate court has jurisdiction where objecting party cannot show any prejudice by lack of Rule 58 order); Clough v. Rush, 959 F.2d 182, 185 (10th Cir. 1992) (holding that Rule 58's requirements do not apply where there is no question as to the district court's intention of finality); United States v. Hawaiian Art Corp., No. 90-16381, 1991 WL 260004, at *1 (9th Cir. Dec. 5, 1991) (stating that appellate court has jurisdiction where the objecting party cannot show any

b. Distinctions Between the Seven Circuits

Before *Mallis*, the Third Circuit remanded or dismissed as premature those claims that were not appeals from a Rule 58 order.[133] However,

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prejudice by lack of a Rule 58 order); Bank v. Pitt, 928 F.2d 1108, 1111 (11th Cir. 1991) (holding that an appellate court can accept jurisdiction where the parties did not object to the appeal on Rule 58 grounds); Sanders v. Clemco Indus., 862 F.2d 161, 166 (8th Cir. 1988) (holding that parties had waived the separate document requirement because neither party raised the question of noncompliance with Rule 58); Noli v. Comm'r of Internal Revenue, 860 F.2d 1521, 1525 (9th Cir. 1988) (stating that appellate court has jurisdiction where the objecting party cannot show any prejudice by lack of a Rule 58 order); Lupo v. R. Rowland & Co., 857 F.2d 482, 484 (8th Cir. 1988) (holding Rule 58 requirement waived where neither party brought up the issue); Hall v. Bowen, 830 F.2d 906, 911 n.7 (8th Cir. 1987) (stating that the Rule 58 requirement was clearly waived when neither party objected to the appeal being taken); Finn v. Prudential-Bache Sec., Inc., 821 F.2d 581, 585 (11th Cir. 1987) (holding that appellate court can accept jurisdiction where the parties did not object to the appeal on Rule 58 grounds); Vernon v. Heckler, 811 F.2d 1274, 1276-77 (9th Cir. 1987) (holding that appellate jurisdiction was acceptable where the government objected to an appeal due to timeliness, but not due to lack of a Rule 58 order); Harris v. McCarthy, 790 F.2d 753, 756 (9th Cir. 1986) (holding that Rule 58 requirements can be dismissed despite appellee's asserted objections when appellee cannot show a claim of prejudice); French v. Merrill Lynch, 784 F.2d 902, 905 n.2 (9th Cir. 1986) (stating that Rule 58 requirements are not a categorical imperative and may be waived); Composite Tech., Inc. v. Underwriters at Lloyd's of London, Ltd. 762 F.2d 708, 709 n.3 (8th Cir. 1985) (holding that Rule 58 can be waived provided both parties agree to the waiver); Diaz v. Schwerman Trucking Co., 709 F.2d 1371, 1372 n.1 (11th Cir. 1983) (holding that an appellate court can accept jurisdiction where parties did not object to the appeal on Rule 58 grounds); Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683, 691 (4th Cir. 1978) (waiving the Rule 58 requirement where defendants objected based only on untimeliness and not on the grounds that no Rule 58 order was entered by the district court). *But see* Nat'l Distribution Agency v. Nationwide Mut. Ins. Co., 117 F.3d 432, 434 (9th Cir. 1997) (dismissing appeal because the district court's documentation suggested that more rulings were forthcoming); Barber v. Cincinnati Bengals, Inc., 41 F.3d 553, 556 (9th Cir. 1994) (holding that the lack of a Rule 58 order left uncertainty as to intent of district court so that case had to be remanded to district court for entry of a Rule 58 order); Ozark Rest. Equip. Co. v. Anderson, 761 F.2d 481, 484 (8th Cir. 1985) (holding that it is better practice to remand the case to the district court for entry of Rule 58 judgment order than to accept appeal, even when appellee concedes that appellant has waived the Rule 58 requirement by filing the notice of appeal); Gioia v. Blue Cross Hosp. Serv., Inc. of Mo., 641 F.2d 540, 544 (8th Cir. 1980) (holding that appellant did not waive Rule 58 requirement because appellant ceased the action voluntarily and did not consider it to be an order from the court).

[133] *See, e.g.*, Dougherty v. Harper's Magazine Co., 537 F.2d 758, 762 (3d Cir. 1976) (remanding where the district court entered no Rule 58 order); Levin v. Wear-Ever Aluminum, Inc., 427 F.2d 847, 849 (3d Cir. 1970) (finding no appellate jurisdiction without a Rule 58 order from the district court); Danzig v. Virgin Isle Hotel Inc., 278 F.2d 580, 582 (3d Cir. 1960) (noting that an unambiguous Rule 58 order must be entered prior to an appeal to prevent confusion); Green v. Reading Co., 180 F.2d 149, 150 (3d Cir. 1950) (holding that a Rule 58 order is necessary to appellate jurisdiction); McAlister v. C. & J. Dick Towing Co., 175 F.2d 652, 654 (3d Cir. 1949) (stating that a rule 58 order is a "vital element" to an appeal and cannot be ignored). *But see* Neely v. Merchants Trust Co., 110 F.2d 525, 526 (3d Cir.

three years after *Mallis*, the Third Circuit experienced a reversal of opinion in Rule 58 jurisprudence.[134] In 1981, the Third Circuit found that Rule 58 was intended solely to avoid the inequities when a party appeals from what appears to be a final judgment only to have the appellate court announce that an earlier document was the judgment and then dismiss the appeal.[135] The court found that it would be a waste of time to remand to the district court simply to have a new Rule 58 order

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1940) (holding that clerk's erroneous omission of date on judgment order should not mandate dismissal).

[134] Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. W. Pa. Motor Carriers Ass'n, 660 F.2d 76, 80 (3d Cir. 1981). Following *Mallis*, the *Teamsters* court held that Rule 58 should not be read to defeat the right to appeal. *Id.*

[135] *Id.* Local 249 had been involved in a lengthy labor dispute with the Association over a trucking industry practice known as "spotting." *Id.* at 78. "Spotting" was defined by the court as a practice "whereby a carrier may instruct a driver to leave his trailer at a specified location, and not to remain with it while it is being loaded or unloaded. *Id.* The driver may then be assigned to other duties." *Id.* "Spotting" was prohibited in the jurisdiction of Local 249, but not in any other county in Western Pennsylvania. *Id.* The Association wished to seek relief from the "spotting" restrictions within Local 249's county, Allegheny County. *Id.* In May 1976, the Eastern Conference Joint Area Committee ("ECJAC"), a joint labor-management committee, rendered a decision eliminating all restrictions on "spotting" in Allegheny County. *Id.* On June 18, 1976, Local 249 initiated an action in federal court against the Association seeking to set aside the decision of the committee. *Id.* The district court denied relief and dismissed the complaint on the basis that, because the committee issued a decision as an arbitrator, the federal court had no jurisdiction to review the decision. *Id.* The appellate court reversed, stating that ECJAC lacked jurisdiction over the matter in the first place and vacated that committee's decision. *Id.* On October 16, 1978, the district court entered an injunction that had been agreed to by both parties. *Id.* at 78-79. The Association moved for clarification of the injunction on November 26, 1979, contending that the injunction prohibiting "spotting" had been intended only for Allegheny County members, whereas Local 249 had interpreted the injunction to free all members of the Association whether or not they maintained terminal operations within Allegheny County. *Id.* at 79. The district court heard argument on January 11, 1980, but denied the Association's motion that the court unequivocally state that the injunction was only for Allegheny County. *Id.* Instead, the court agreed that the injunction prohibited "spotting" by all members of the Association in Allegheny County whether or not they maintained terminal operations there. *Id.* On motion from Local 249, the district court issued a memorandum opinion on August 14, 1980, holding the Association in contempt for failing to notify all its members of the terms of the injunction. *Id.* The court awarded attorneys' fees to the local union to defray the cost of prosecuting the contempt proceedings. *Id.* Additionally, the court denied the Association's motion to amend the injunction. *Id.* When the Association appealed, Local 249 challenged the jurisdiction of the appellate court on the basis that the August 14, 1980 memorandum opinion of the district court did not constitute an appealable judgment conforming with Rules 58 and 79(a). *Id.* Local 249 argued that the district court had postponed the entry of a final judgment until a determination could be made regarding the amount of the attorneys' fee award. *Id.* at 79-80.

filed.[136] The Third Circuit has attempted to be faithful to the decisions in both *Indrelunas* and *Mallis*, making it difficult for appellants to predict whether appellate courts will accept jurisdiction.[137]

In 1978, mere months after the Supreme Court decided *Mallis*, the Fourth Circuit analyzed how to proceed when no Rule 58 document had been filed by the district court in *Caperton v. Beatrice Pocahontas Coal Co.*[138] Although the court held that the time for appeal had not yet begun when there was no Rule 58 document order and that appellate courts, therefore, may not have had jurisdiction before *Mallis*, the Fourth Circuit accepted jurisdiction in *Caperton* because of the three-part waiver test from *Mallis*.[139] The court found that when appellees do not object to the appellate court assuming jurisdiction, they lose their right to contest the waiver.[140] Since this decision in 1978, the Fourth Circuit has continued to

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[136] *Id.* at 80. Citing *Mallis*, the appellate court stated that the separate document requirement should not be read so as to defeat the right to appeal. *Id.* Upon reviewing the record, the appellate court was satisfied that the district court intended its August 14, 1980 order to serve as its judgment. *Id.* Therefore, the court held that "there would appear to be no point in obliging appellant to undergo the formality of obtaining a formal judgment." *Id.* (citing 9 MOORE'S FEDERAL PRACTICE §110.08(2), at 120 n.7 (2d ed. 1970)).

[137] *See, e.g.*, Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1006 n.8 (3d Cir. 1994) (waiving Rule 58 per *Mallis* where the district court erroneously neglected to enter a Rule 58 order); Kadelski v. Sullivan, 30 F.3d 399, 402 (3d Cir. 1994) (holding that a notice of appeal filed ninety days after the district court's judgment order was timely because there was no Rule 58 order to start the time for appeal); *cf.* Williams v. Giant Eagle Markets, Inc., 883 F.2d 1184, 1187 (3d Cir. 1989) (accepting jurisdiction after claim was remanded and returned to appellate court following entry of Rule 58 order per *Indrelunas*); Gregson v. Gov't of the Virgin Islands, 675 F.2d 589, 592 (3d Cir. 1982) (dismissing an appeal because *Indrelunas* required a Rule 58 order prior to appellate jurisdiction).

[138] 585 F.2d 683, 688 (4th Cir. 1978). A class of Virginia citizens brought an action against two coal companies and their alleged owners, claiming to have been injured by seismic tremors emanating from mining operations. *Id.* at 685-86. On September 29, 1976, the district court issued an "Opinion and Order" dismissing the cases for lack of subject matter jurisdiction, ruling that the coal companies had their principal places of business in Virginia so there was no diversity. *Id.* at 686. On October 3, plaintiffs served defendants with a "Petition for Relief From Mistake in Judgment," asking the court to amend the earlier order to only dismiss the two coal companies and not their alleged owners. *Id.* The district court judge denied the motion without comment. *Id.* On January 26, 1977, after filing a request to extend the time for filing notices of appeal, appeals were filed as to the question of jurisdiction. *Id.* After studying the documentation, the appellate court realized that the September 29 order had never been properly entered into the docket. *Id.* at 688. Rather than filing a separate document pursuant to Rule 58, the district court judge had merely tacked the order of dismissal onto the end of an opinion. *Id.* at 689. The appellate court stated that this kind of procedure, no matter how explicit the order is, cannot satisfy the requirements of Rule 58. *Id.*

[139] *Id.* at 690-91. The court determined that the three elements of a *Mallis* waiver were met. *Id.* at 691; *see also supra* note 89 (listing the three elements of a *Mallis* waiver).

[140] *Caperton*, 585 F.2d at 691.

follow the three-part *Mallis* test and accept jurisdiction whenever all three prongs are satisfied.[141]

The Seventh Circuit embraced the *Mallis* decision immediately, holding that Rule 58 was waived as long as all parties considered the decision of the district court to be appealable.[142] The appellate court found that Rule 58 did not preclude appellate jurisdiction and should be read with common sense interpretation.[143] The court claimed that "parties are expected to know, or find out, jurisdictional requirements,"[144] yet the appellate court has accepted jurisdiction as long as there is no proven prejudice to either party.[145] The Seventh Circuit has held not only that Rule 58 is not a prerequisite for jurisdiction, but also that the wording of Rule 58 is not important and the district court orders do not even need to follow the separate document requirement.[146] The

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[141] *See, e.g.*, Block v. Allstate Ins. Co., No. 98-2034, 1999 WL 1267346, at *2 (4th Cir. Dec. 29, 1999) (stating that although the appeal would seem to be premature, the appellate court would consider the appeal because neither party objected to the appeal being taken); Barber v. Whirlpool Corp., 34 F.3d 1268, 1274-75 (4th Cir. 1994) (waiving the Rule 58 separate document requirement where the three-part *Mallis* test was met); Hughes v. Halifax County Sch. Bd., 823 F.2d 832, 833-34 (4th Cir. 1987) (denying a *Mallis* waiver where one of the three elements was missing since the appeal was not timely).

[142] *See, e.g.*, United States General, Inc. v. City of Joliet, 598 F.2d 1050, 1051 n.1 (7th Cir. 1979) (stating that because all parties considered the order to be appealable, all parties were considered to have waived their Rule 58 objections).

[143] *See, e.g.*, Local P-171, Amalgamated Meat Cutters and Butcher Workmen of N. Am. v. Thompson Farms Co., 642 F.2d 1065, 1072 (7th Cir. 1981). The appellate court accepted jurisdiction notwithstanding the lack of a Rule 58 judgment order from the court below in the absence of any prejudice to either party or any objection to the appeal. *Id.*

[144] Rosser v. Chrysler Corp., 864 F.2d 1299, 1303 (7th Cir. 1989) (citing Silberstein v. Silberstein, 859 F.2d 40, 43 (7th Cir. 1988)).

[145] *See* TMF Tool Co. v. Muller, 913 F.2d 1185, 1189 (7th Cir. 1990) (accepting appellate jurisdiction where there was no question as to the district court's finality); Wikoff v. Vanderveld, 897 F.2d 232, 237 (7th Cir. 1990) (waiving Rule 58 separate document requirement when final disposition of district court was clearly intended to be the final decision in the case); Frank Rosenberg, Inc. v. Tazewell County, 882 F.2d 1165, 1166 n.1 (7th Cir. 1989) (using the *Mallis* three-part test to explain appellate jurisdiction); Smith-Bey v. Hosp. Adm'r, 841 F.2d 751, 756 (7th Cir. 1988) (holding that district court's failure to enter judgment on separate document will not defeat appellate jurisdiction as long as there is no question as to the finality of the district court's decision); *cf.* Smith v. Vill. of Maywood, 970 F.2d 397, 399-400 (7th Cir. 1992) (declining to use the *Mallis* waiver when there was no indication that appellee waived the Rule 58 requirements).

[146] *See, e.g.*, First Nat'l Bank of Chicago v. Comptroller of the Currency of the United States, 956 F.2d 1360 (7th Cir. 1992). First National Bank brought an action against the Comptroller of the Currency to challenge the comptroller's refusal to allow the bank to distribute individual properties owned by the fund to withdrawing investors in lieu of either cashing them out or giving them proportional interest in the fund's entire portfolio of properties. *Id.* at 1361. The district judge decided the case on the pleadings, but the district court did not enter a separate judgment order because there was another count in

only occasions where the Seventh Circuit has not waived the requirements of Rule 58 are cases in which a waiver would defeat appellate jurisdiction completely.[147] This has allowed the Seventh

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the bank's complaint that was unresolved. *Id.* at 1362. Later, the parties agreed to drop this unresolved count, but a judgment order was never entered. *Id.* The court cited to *Mallis* for the proposal that an appellate court may take jurisdiction if a final judgment can be discerned from the other documentation. *Id.* at 1363. Although the appellate court discussed the importance of Rule 58, the court decided that a Rule 58 judgment order was not necessary for the appellate court to have jurisdiction. *Id.*; *see also* Dickman v. Kramer, 980 F.2d 733, 735-36 (7th Cir. 1993) (holding that district court did not abuse discretion in denying motion to reconsider when the court had decided that Rule 58 was satisfied in at least three final and appealable orders and appellant complained about the lack of a final judgment but never filed a motion to ask for one).

[147] *See, e.g.*, Armstrong v. Ahitow, 36 F.3d 574, 575 (7th Cir. 1994) (per curiam). Armstrong filed a petition for a writ of habeas corpus on December 1, 1992, seeking to challenge an eighteen-year sentence imposed after he pled guilty to two counts of residential burglary. *Id.* The court noted that habeas petitions are civil proceedings to which the rules of civil procedure apply. *Id.* On March 23, 1993, the district court entered a memorandum opinion and order denying his writ. *Id.* On May 2, 1994, Armstrong filed a motion for appointment of counsel and to take judicial notice that he was ineligible for post-conviction relief in Illinois. *Id.* The district court responded with a minute order that denied Armstrong's motions because the district court considered the case terminated in March of 1993. *Id.* On May 23, 1994, Armstrong filed a document entitled "Late Notice of Appeal." *Id.* Because the notice was filed over a year after the denial of Armstrong's petition, the appellate court recommended that he attach a memorandum to his notice of appeal addressing the timeliness of the appeal. *Id.* In addition, the appellate court noted that the district court had not acted to extend the appeal period and that the appellate court lacked the power to do this for Armstrong. *Id.* Instead of addressing the timeliness of the appeal to the appellate court, Armstrong filed a motion before the district court requesting the length of time for appeal be extended. *Id.* Amazingly, the district court granted his motion, despite the requirement of Federal Rule of Appellate Procedure 4(a)(5) that a motion to extend the time for appeal in a civil case must be made within thirty days of the date the time for appeal expires. *Id.* Instead of dismissing Armstrong's notice of appeal as untimely, the appellate court remanded the case to the district court because it considered the appeal to be premature. *Id.* The appellate court examined the district court's March 24, 1993 memorandum opinion and noted that it was not accompanied by a separate document judgment order. *Id.* The court reasoned that because a Rule 58 judgment order had not been entered, the time for appeal had not yet begun for Armstrong. *Id.* Even though the appellate court recognized that the March 24 opinion was clearly meant to mark the end of the case, the court stated that to waive the separate document judgment order would be to defeat appellate jurisdiction. *Id.* Despite the fact that the appeal was filed fourteen months after what the district court believed to be the end of the case and, therefore, thirteen months after the filing date of Appellate Rule 4, the appellate court still did not terminate Armstrong's right to appeal. *Id.* The court dismissed the appeal until the district court entered a Rule 58 judgment order document, from which time Armstrong would have yet another thirty days in which to file his notice of appeal. *Id.* The court stated that if it were to allow a *Mallis* waiver, the appeal would have been untimely and the right to appeal would have been lost. *Id.* In dicta, the court recognized that district courts have only limited time to devote to each of their cases, but the court strongly suggested that the

Circuit to accept appeals months and even years after the final decision of the district court, provided there was no Rule 58 order filed correctly.[148] However, the Seventh Circuit has not allowed an appeal to go forward when the appellee did not agree to waive the right to object to jurisdiction.[149]

The Eighth Circuit has stressed that the *Mallis* waiver needs to be used with discretion because it is not always appropriate.[150] The court refused to use a *Mallis* waiver in *Gioia v. Blue Cross Hospital Service, Inc. of Missouri*,[151] holding that the appellee had not expressly waived the right to object.[152] When the appellees have not given up the right to object, the appellate court has dismissed appeals even though appellants may have actually had claims worth considering.[153] The Eighth Circuit has continued to use the *Mallis* waiver only when the appellee has expressly waived the right to object and when the district court filed the court

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district courts and their clerks needed to file separate document judgment orders more faithfully in order to avoid judicial entanglements like this one. *Id.*

[148] *See, e.g.*, Otis v. City of Chicago, 29 F.3d 1159, 1162 (7th Cir. 1994). The *Otis* court allowed an appeal over two years after the district court filed a dismissal with leave to reinstate; the court deemed the district court's order to be "final." *Id.* at 1165. Because the district court never followed up on the conditional dismissal, there was never a Rule 58 judgment order entered. *Id.* at 1162. The appellate court accepted jurisdiction in the case. *Id.* at 1169.

[149] Reich v. ABC/York-Estes Corp., 64 F.3d 316, 319 (7th Cir. 1995). Reich, the Secretary of Labor, brought a suit against the owners of an entertainment establishment featuring female exotic dancers. *Id.* at 317. The suit alleged that the owners continuously violated the Fair Labor Standards Act by not following guidelines for minimum wage, overtime, and recordkeeping. *Id.* When the owners did not appear in court, the district judge granted Reich a default judgment. *Id.* at 318. This default judgment was rescinded when the owners appeared later and promised to comply with all outstanding obligations and discovery requests. *Id.* These promises were not kept, and Reich moved for sanctions and another default judgment. *Id.* The magistrate judge recommended that Reich's motion be granted. *Id.* At the appeal stage, the owners moved to dismiss for lack of jurisdiction as the district court had never entered a separate document setting forth the judgment enjoining the owners from future violations. *Id.* at 319. The court stated that, without a Rule 58 judgment order, the appellate court can have jurisdiction only where neither party is prejudiced nor objects to the appeal. *Id.* Therefore, the court could not accept jurisdiction. *Id.*

[150] Sanders v. Clemco Indus., 862 F.2d 161, 167 (8th Cir. 1988). Although the appellate court allowed the waiver in *Sanders*, the court stressed that the waiver should not be used as a matter of routine. *Id.*

[151] 641 F.2d 540 (8th Cir. 1981).

[152] *Id.* at 544 (stating that the sole purpose of the separate document requirement was to clarify the date when the time for appeal began to run). The appellate court stated: "While it is with reluctance that we affirm the judgment of dismissal, since there may have been some merit in plaintiff's claims which they will now be foreclosed from pursuing, that result is clearly in accord with previous decisions in this Circuit." *Id.*

[153] *Id.* (citing Engelhardt v. Bell & Howell Co., 299 F.2d 480, 485 (8th Cir. 1962)).

order on the docket.[154] The Eighth Circuit has also stressed that the prevailing attorney at the district court level needs to ensure that Rule 58 is followed correctly in order to avoid any conflict at the appellate level.[155]

Contrary to the Eighth Circuit's requirement for an express waiver of Rule 58 in order to use a *Mallis* waiver, the Ninth Circuit's post-*Mallis* decisions have held that Rule 58 can be waived even over the objections of the appellee.[156] In the 1986 decision of *Harris v. McCarthy*,[157] the court

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[154] *See, e.g.*, Lupo v. R. Rowland & Co., 857 F.2d 482, 484 (8th Cir. 1988) (stating that the Rule 58 requirement was clearly waived as neither party objected to the appeal being taken); Hall v. Bowen, 830 F.2d 906, 911 n.7 (8th Cir. 1987) (holding the separate document requirement clearly waived because neither party raised the question of noncompliance with Rule 58, an entry of the district court's order was recorded in the clerk's docket, and the record indicated that the district court intended the memorandum opinion and order to be its final decision). *But see* Ozark Rest. Equip. Co. v. Anderson, 761 F.2d 481, 484 (8th Cir. 1985) (holding that it is better practice to remand the case to the district court for entry of a Rule 58 separate document judgment order than to accept an appeal even when appellee contends that appellant has waived the Rule 58 requirement by filing the notice of appeal).

[155] *Sanders*, 862 F.2d at 168 (stating that attorneys all too often ignore the requirements of Rule 58). In *Sanders*, the District Court for the Eastern District of Missouri granted summary judgment to defendants in a products liability action and denied plaintiff's motion to reconsider and set aside the judgment. *Id.* at 164. Sanders filed an appeal within thirty days after the district court denied his motion for reconsideration, but more than thirty days after entry of the order for summary judgment. *Id.* Therefore, the appellate court held that Sanders could only appeal the denial of his motion for reconsideration. *Id.* The appellate court briefly considered whether Sanders should be allowed to appeal the motion for summary judgment as well because it was not followed by a Rule 58 judgment order. *Id.* at 167. Although acknowledging that the appeal seemed premature "at first blush," the appellate court determined that Sanders had waived the separate document requirement. *Id.* The court recognized four reasons to consider the requirement to be waived: (1) neither party had raised the question of noncompliance with Rule 58; (2) in his pleading, Sanders had referred to the district court's action as a granting of summary judgment; (3) the trial court considered but rejected the motion to set aside the summary judgment, apparently considering the summary judgment to be a final action; and (4) in an earlier appeal, Sanders did not raise the Rule 58 issue and the appellate court entertained the appeal despite the lack of a separate document. *Id.* at 166-67.

[156] *See* Harris v. McCarthy, 790 F.2d 753, 757 (9th Cir. 1986). The court specifically stated that "[w]here 'nothing but delay would flow' from requiring the district court to enter a judgment 'from which a timely appeal would then be taken,' . . . the court should exercise its discretion to hear the appeal." *Id.* at 756-57 (quoting Bankers Trust Co. v. Mallis, 435 U.S. 381, 385 (1978)); *see also* French v. Merrill Lynch, 784 F.2d 902, 905 n.2 (9th Cir. 1986) (allowing an appeal where neither party objected to lack of separate judgment); Taylor Rental Corp. v. Oakley, 764 F.2d 720, 722 (9th Cir. 1985) (stating that appellants stipulated that no formal order denying post-trial motions needed to be issued, thereby waiving the separate document requirement); *cf.* Herschensohn v. Hoffman, 593 F.2d 893, 899 (9th Cir. 1979) (holding that although Rule 58 had been weakened by the holding in *Mallis*, it must still be viewed as having a bearing on the intent of the trial judge and, thus, the trial court

held that, although the appellee was actively asserting his rights under Rule 58, the court could still waive the rule as long as there was no prejudice to the appellee.[158] Because the appellee did not claim in the objection that there would be prejudice in waiving Rule 58, the court held that the rule could be waived, the appellate court had jurisdiction, and the appeal did not need to be dismissed.[159] In subsequent cases, the court held that Rule 58 is not a necessary prerequisite to jurisdiction, remanding a case to the district court is not necessary, and Rule 58 is not a categorical imperative that needs to be followed every time it arises.[160]

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judge was not finished with the case if he had not filed a separate document judgment order).

[157] *Harris*, 790 F.2d at 753.

[158] *Id.* at 756. Plaintiffs filed their action in district court on December 22, 1981, seeking injunctive and monetary relief for violations of their civil rights. *Id.* at 755. On December 21, 1982, the district court issued a preliminary injunction, stating that the plaintiffs had not shown compelling evidence but had shown they had a fair chance at success. *Id.* On July 2, 1984, the plaintiffs filed a motion to dismiss the case to enable them to pursue a single trial of all the issues in state court. *Id.* The district court granted the motion and dissolved the preliminary injunction. *Id.* On October 1, 1984, plaintiffs filed a motion for attorney's fees that the district court partially awarded on May 24, 1985. *Id.* However, the court did not grant all the plaintiffs' requested attorney's fees as the court found unripe the plaintiffs' claim that their lawsuit had prompted changes in the defendant's behavior. *Id.* at 755-56. Plaintiffs timely filed their notice of appeal. *Id.* at 756. The defendants argued that the appeal had to be dismissed because the district court's order did not conform to Federal Rule of Civil Procedure 58's requirement for a separate document judgment order. *Id.* The court cited *Mallis* and stated that Rule 58's sole purpose was to clarify when the time of appeal begins to run. *Id.* In *Harris*, however, the court grappled with whether formal compliance with Rule 58 is necessary when the appellee asserts, rather than waives, the separate judgment requirement. *Id.*

[159] *Id.* at 756. After considering a Ninth Circuit case where an appeal was entertained over the objection of the appellee and a Fifth Circuit case where the appeal was dismissed because of the objection of the appellee, the appellate court in *Harris* ruled that the appeal should be heard rather than causing unnecessary delay by remanding the case for a final judgment. *Id.* at 756-57. The court commented that the appellees did not show that they would be unfairly prejudiced due to the failure of the trial court to enter a Rule 58 final judgment, leaving open the possibility in future cases for the appellee to show prejudice and have the appeal dismissed. *Id.*

[160] *See, e.g.*, Hollywood v. City of Santa Maria, 886 F.2d 1228 (9th Cir. 1989). On March 19, 1984, Marian Hollywood filed a sex discrimination and retaliation action against the City of Santa Maria and other defendants in the United States District Court for the Central District of California. *Id.* at 1229. Hollywood initially prevailed at trial on her retaliation claim, but the district court ordered the matter to be retried. *Id.* The court found for the defendants and judgment was entered against Hollywood on June 29, 1987. *Id.* The record showed that the judgment was properly entered as required by Federal Rule of Civil Procedure 58. *Id.* at 1229 n.1. On July 9, 1987, Hollywood timely served and filed a motion for a new trial under Federal Rule of Civil Procedure 59. *Id.* at 1230. The district court denied this motion from the bench on September 28, 1987. *Id.* After denial, Hollywood filed her first notice of appeal on October 5, 1987. *Id.* On March 2, 1988, the district court filed a written order denying appellant's motion for a new trial. *Id.* The order was nine pages in length,

The Ninth Circuit has maintained that, in order to assert Rule 58 as an objection to an appeal, there must be actual prejudice to the appellee.[161]

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explained the legal and factual basis for the court's decision, and was signed by the district court judge. *Id.* The order concluded with the statement, "THEREFORE, Plaintiff's motion for a new trial is DENIED. IT IS SO ORDERED." *Id.* Hollywood did not file a new notice of appeal within thirty days of this order and instead filed a second notice of appeal on March 22, 1989. *Id.* The court dismissed the first notice of appeal because it was premature and rendered ineffective by the order that was filed by the district court on March 2, 1988. *Id.* Additionally, the court found that Hollywood should have filed her second notice of appeal within thirty days of the order. *Id.* The court examined the order that had been entered by the district court to see if it complied with the separate document judgment order requirement. *Id.* The appellees argued that Hollywood's notice of appeal was untimely because it was not filed within thirty days, to which Hollywood responded that the time for appeal had not been triggered because the district court's judgment order did not meet the necessary requirements. *Id.* Hollywood argued that, in addition to the nine page opinion, the court needed to file a single page judgment order. *Id.* at 1231. The court examined the nine page order and declared that it "definitively signaled the end of the litigation." *Id.* at 1232. The court noted that the nine page order was entered on the docket as an order denying the motion in compliance with Rule 79(a) and it was properly served on the parties in compliance with Rule 77(d). *Id.* The court held that as long as counsel was put on notice of the new order, the separate document judgment order requirement was satisfied. *Id.* Therefore, the court found that all of the requirements of the Federal Rules of Civil Procedure were met and dismissed Hollywood's appeal as untimely. *Id.*; *see also* Vernon v. Heckler, 811 F.2d 1274, 1276-77 (9th Cir. 1987) (stating that a properly entered separate judgment was not a necessary prerequisite for appellate jurisdiction and therefore it was pointless to remand to the district court); *French*, 784 F.2d at 905 n.2 (allowing an appeal where neither party objected to lack of a separate judgment).

[161] *See generally* Bonin v. Calderon, 59 F.3d 815, 847 (9th Cir. 1995). Bonin, a prisoner at San Quentin State Prison, appealed the district court's denial of two petitions for writ of habeas corpus relief under 28 U.S.C. § 2254. *Id.* at 821. Between 1979 and 1980, Bonin committed a string of brutal murders in Southern California. *Id.* In general, Bonin would pick up boys between the ages of twelve and nineteen years. *Id.* After engaging in various sexual acts with the boys, he would murder them, usually by strangulation. *Id.* Then he would dump their nude bodies along the Southern California freeways. *Id.* Bonin was charged with fourteen counts of murder as well as various other crimes, including robbery, sodomy, and mayhem. *Id.* The jury acquitted Bonin of two of the murder charges as well as one sodomy charge and one mayhem charge, but found him guilty of the remaining charges. *Id.* at 822. Bonin was then sentenced to death for each of the murder convictions. *Id.* On automatic appeal, the convictions and death sentences were affirmed, and the Supreme Court denied Bonin's petitions for writ of certiorari with respect to each case. *Id.* Bonin filed two habeas corpus petitions under 28 U.S.C. § 2254, which were both denied by a district court judge. *Id.* Bonin challenged the district court's denial of a petition to amend an earlier petition. *Id.* at 847. Bonin contended that the judgment in this matter was never entered pursuant to Federal Rule of Civil Procedure 58. *Id.* The appellate court held that Rule 58's technical separate judgment requirement is not jurisdictional and can be waived. *Id.* The court stated that, absent any proof that Bonin had been prejudiced in any way by the district court's failure to enter judgment on a separate document, the appellate court would exercise jurisdiction. *Id.*; *see also* United States v. Hawaiian Art Corp., No. 90-16381, 1991 WL 260004, at *1 (9th Cir. Dec. 5, 1991) (stating that Rule 58 is not a categorical imperative and the parties can waive the requirement provided neither party is prejudiced by the lack of a separate document).

However, in the most recent cases in the Ninth Circuit, the court has held that the time for appeal never began to run when the district court did not enter a separate judgment and has again started remanding appeals.[162]

Until recently, the Tenth Circuit used *Mallis* waivers without hesitation, but in cases where there was uncertainty of judicial finality, the court remanded cases to either: (1) have the case settled, or (2) have a Rule 58 separate judgment order document entered.[163] However, within the last five years the Tenth Circuit has stated that even where there is uncertainty, the appellate court can assert jurisdiction because Rule 58 is not jurisdictional.[164] This has left the circuit in a state of uncertainty and,

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[162] *See* United States v. Lummi Indian Tribe, 235 F.3d 443, 449 (9th Cir. 2000) (holding that a summary judgment order could not have been final because no separate document was entered); Corrigan v. Bargala, 140 F.3d 815, 819 (9th Cir. 1998) (holding that the time for appeal did not begin to run when the clerk failed to enter a separate judgment as required by Rule 58); McCalden v. Cal. Library Ass'n, 955 F.2d 1214, 1218-19 (9th Cir. 1990) (stating that appellant's time for appeal never began to run because the district court never entered a separate judgment); United States v. Carter, 906 F.2d 1375, 1376 (9th Cir. 1990) (stating that the appellate court had jurisdiction where the district court never entered a separate judgment).

[163] *See* Burlington N. R.R. Co. v. Huddleston, 94 F.3d 1413, 1416 n.3 (10th Cir. 1996) (encouraging all district courts to properly enter Rule 58 documents, but accepting jurisdiction, regardless, because the court saw no question of the district court's finality); Crislip v. Shanks, No. 94-2221, 1996 WL 156757, at *1-2 (10th Cir. Apr. 4, 1996) (holding appeal was timely despite the absence of a Rule 58 judgment order from the district court); Green v. Seymour, 59 F.3d 1073, 1076 (10th Cir. 1995) (holding that Rule 58's requirements did not apply when there was no question as to the district court's finality and appellee had not objected to the lack of a Rule 58 document); Clough v. Rush, 959 F.2d 182, 185 (10th Cir. 1992) (holding that Rule 58's requirements did not apply when there was no question as to the district court's intention of finality).

[164] Ladd v. McKune, No. 95-3264 (D.C. No. 95-CV-3181), 1997 WL 153775, at *3 (10th Cir. Apr. 3, 1997). On April 25, 1985, Ladd, an inmate in a correctional facility in Kansas, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 alleging that defendants: (1) transferred him in retaliation for his previous legal actions against defendants; (2) interfered with his access to court by depriving him of legal materials; and (3) denied him due process in the prisoner grievance procedures. *Id.* at *1. The district court entered a memorandum and order stating that Ladd's case was going to be dismissed as frivolous but granted Ladd an extension until August 30, 1995, to show cause why his complaint should not be dismissed. *Id.* On August 21, Ladd filed a notice of appeal purporting to appeal the district court's memorandum and order. *Id.* Three days later, the district court denied Ladd's motion for leave to proceed *in forma pauperis* on appeal. *Id.* The appellate court subsequently granted this motion. *Id.* The court first considered whether it had jurisdiction to hear Ladd's appeal. *Id.* The appellate court stated that the district court's memorandum and order was not a final decision of the court when it was entered. *Id.* at *2. However, the court determined that the memorandum and order had matured into a final decision on August 30 when Ladd failed to cure the deficiencies in his original complaint. *Id.* Therefore, the court found that it had jurisdiction to hear Ladd's appeal. *Id.* The court next turned to the

until the appellate court hands down a decision that states the purpose of Rule 58 within the Tenth Circuit, it currently has no place at all.[165]

The Eleventh Circuit has been using the *Mallis* waiver in almost all situations since the Supreme Court handed down its decision.[166] As long as the parties involved did not expressly object to the appellate court accepting jurisdiction, the case was not remanded to the district court, and it proceeded.[167] The Eleventh Circuit has viewed Rule 58 as a rule

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question of whether the lack of a Rule 58 judgment order would stop the appeal process. *Id.* The appellate court found that the Rule 58 separate document requirement was not a restriction on appellate process and that no separate document must be filed for the appellate court to accept jurisdiction. *Id.* The court found that Rule 58 "only applies when 'there is uncertainty about whether a final judgment has [been] entered.'" *Id.* at *3 (citing Gross v. Burggraf Const. Co., 53 F.3d 1531, 1536 (10th Cir. 1995)). Additionally, the court noted that Rule 58 does not apply where "there is no question about the finality of the court's decision." *Id.* (quoting Slade v. United States Postal Serv., 952 F.2d 357, 359 n.1 (10th Cir. 1991)). Finally, the court stated that nothing but delay would result from remanding the case to the district court for a final judgment order. *Id.*

[165] Hassan v. Allen, No. 97-4005, 1998 WL 339996, at *4 (10th Cir. June 24, 1998). The *Hassan* court recognized that past cases that had stressed the importance of district courts following Rule 58. *Id.* (citing Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc., 479 U.S. 966, 969 (1986) (Blackmun, J., dissenting from the denial of certiorari); United States v. City of Kansas City, 761 F.2d 605, 606-07 (10th Cir. 1985)). However, the court also recognized the recent cases in which the mechanical application of Rule 58 had been overlooked. *Id.* (citing Clough v. Rush, 959 F.2d 182, 185 (10th Cir. 1992); Kline v. Dep't of Health & Human Servs., 927 F.2d 522, 523-24 (10th Cir. 1991)). The *Hassan* court recognized the tension between these two lines of cases. *Id.* The court refused to follow the holdings in *Clough* and *Kline* because doing so would deny the appellants the opportunity for review on the merits. *Id.* (citing Crislip v. Shanks, No. 94-2221, 1996 WL 156757 (10th Cir. Apr. 4, 1996)). Therefore, the court interpreted the district court's last order to be a final judgment and established appellate jurisdiction through that document. *Id.* at *5; *see also* Trotter v. Regents of the Univ. of N.M., 219 F.3d 1179, 1182-83 (10th Cir. 2000) (stating that the last action of the district court could not be considered a final judgment if there was some uncertainty as to whether the appellant could have filed a motion to amend the complaint); Freymiller v. CMS Transp. Serv., Inc., No. 98-6190, 1998 WL 769846, at *1 (10th Cir. Oct. 29, 1998) (stating that nothing but delay would result from remanding a case where no question exists as to the finality of the district court's order notwithstanding a lack of a Rule 58 judgment order).

[166] *See* Finn v. Prudential-Bache Sec., Inc., 821 F.2d 581, 585 (11th Cir. 1987) (holding that the appellate court could have jurisdiction where parties did not object to the appeal on Rule 58 grounds); Diaz v. Schwerman Trucking Co., 709 F.2d 1371, 1372 n.1 (11th Cir. 1983) (stating that although the district court clerk failed to enter the final judgment as required by Rule 58, because the parties had not objected, but rather had treated the order as the entry of final judgment, the parties had waived the right to object).

[167] *See, e.g.*, Bank v. Pitt, 928 F.2d 1108, 1111 (11th Cir. 1991) (holding that the appellate court could have jurisdiction where parties did not object to the appeal).

that merely creates a definition of entry of judgment to clean up confusion.[168]

4. The Fifth Circuit: You Cannot Have a Part Two Until Your Part One is Finished

Before the Supreme Court's decisions in *Indrelunas* and *Mallis*, the Fifth Circuit strictly followed the 1963 amendment to Rule 58, dismissing appeals for lack of jurisdiction.[169] However, following *Mallis*, the court accepted jurisdiction without a Rule 58 document as long as the district court considered the judgment to be final and the parties did not object.[170] The Fifth Circuit held that, in previous cases, the circuit had taken the *Indrelunas* "mechanically applied" test too literally and that *Mallis* undermined the circuit's previous interpretation of *Indrelunas*.[171] However, the court still found that although *Mallis* granted the power to accept jurisdiction without a Rule 58 order, *Mallis* did not require an appellate court to do so.[172] The court noted that *Indrelunas* was still good law, but the court was no longer restrained by its narrow parameters.[173]

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[168] *See, e.g.*, Reynolds v. Golden Corral Corp., 213 F.3d 1344, 1346 (11th Cir. 2000) (stating that a remand to enter a Rule 58 judgment order would be a waste of judicial resources).

[169] *See* Philhall Corp. v. United States, 546 F.2d 210, 213-14 (5th Cir. 1976) (stating that the 1963 amendment to Rule 58 had made it imperative that any document not meeting the requirements of Rule 58 not be considered a final judgment); State Nat'l Bank of El Paso v. United States, 488 F.2d 890, 892-93 (5th Cir. 1974) (stating that appeal would be dismissed when the trial court judge merely tacked judgment on the end of a memorandum opinion instead of filing a separate document judgment order pursuant to Rule 58).

[170] *See, e.g.*, Escamilla v. Santos, 591 F.2d 1086, 1087 (5th Cir. 1979) (holding that a memorandum opinion is "considered a final judgment despite the district court's failure to follow the separate document requirement of Rule 58 if the district court intended the memorandum opinion to represent a final judgment and the parties treated it as such").

[171] Hanson v. Town of Flower Mound, 679 F.2d 497, 500 (5th Cir. 1982). In *Hanson*, the District Court for the Eastern District of Texas, *sua sponte*, dismissed a pro se action for damages for lack of jurisdiction. *Id.* at 499. The district court did not, however, file a Rule 58 judgment order. *Id.*

[172] *Id.* at 500. The appellate court examined the *Indrelunas* requirement of "mechanical application" of Rule 58 in all cases and found that the Fifth Circuit may have been applying the requirement too literally. *Id.* This interpretation of *Indrelunas* was rejected by the Supreme Court in *Mallis*, prompting the appellate court to reexamine its position on the necessity of a Rule 58 judgment order. *Id.* The appellate court found that although *Mallis* permitted the appellate court to accept jurisdiction, it did not require the court to do so. *Id.* Therefore, the question remained whether the Fifth Circuit should adhere to its previous policy under *Indrelunas* or whether the Fifth Circuit should be swayed by *Mallis* to accept a more waiver-friendly policy. *Id.*

[173] *Id.* at 502. The appellate court stated that it was the firm rule of the Fifth Circuit that a panel could not disregard precedent absent an "overriding" Supreme Court decision. *Id.* at 500-01 (citing Washington v. Watkins, 655 F.2d 1346, 1354 n.10 (5th Cir. 1981)). The court

The Fifth Circuit exercised this right to choose whether to accept jurisdiction in *Seal v. Pipeline, Inc.*[174] The *Seal* court held that an appeal must be dismissed when the appellee objects to the jurisdiction.[175] Although *Mallis* had granted the appellate court the power to accept without a Rule 58 order, the court dismissed the appeal as untimely and held that the appeal could return to the appellate court if a proper Rule 58 document was filed in the district court.[176]

The Fifth Circuit did not follow Rule 58 strictly, yet it was not ready to consider Rule 58 to be a purely jurisdictional rule either.[177] In

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found no post-*Mallis* decision from the Fifth Circuit stating that *Mallis* was "overriding." *Id.* at 501. However, the court then found that *Mallis* was an "overriding" change in the law and, therefore, *Mallis* granted an appellate court the ability to accept jurisdiction even though no separate judgment has been entered where the parties fail to raise the issue. *Id.* The court then stressed three points: (1) *Indrelunas* is still good law; (2) the decision did not change the law "when the appellee does object to the failure to enter the judgment as a separate document"; and (3) it remains "better practice to have the judgment entered as a separate document." *Id.* at 502.

[174] 724 F.2d 1166 (5th Cir. 1984).

[175] *Id.* at 1167. Benton Seal was injured while working as a seaman and brought suit under general maritime law. *Id.* Before and after his suit was filed, Seal retained three different attorneys. *Id.* Each retainer agreement provided for a contingency fee of 40%. *Id.* His third attorney ultimately negotiated a $225,000 compromise settlement. *Id.* Seal died before the attorneys' fees issue could be resolved. *Id.* The attorneys were unable to agree on a division of fees. *Id.* Upon referral to a magistrate, the magistrate recommended a division of fees, and the district court issued an order approving the magistrate's findings. *Id.* However, the order was not followed by a judgment order as required by Rule 58. *Id.* One of the three attorneys appealed the decision and another challenged the jurisdiction of the appellate court because the requirements of Rule 58 were not met. *Id.* Because there was no separate judgment and one of the appellees objected, the appellate court dismissed the appeal. *Id.*

[176] *Id.* (citing Taylor v. Sterrett, 527 F.2d 856 (5th Cir. 1976)).

[177] *See, e.g.*, Seiscom Delta, Inc. v. Two Westlake Park, 857 F.2d 279 (5th Cir. 1988). The *Seiscom* court examined how *Mallis* had refined *Indrelunas*. *Id.* at 281. The court cited the three parts of the *Mallis* waiver test. *Id.* at 282. However, the document in front of the appellate court did not meet the third prong of the *Mallis* test because Seiscom objected to the appeal by moving for entry of a separate final judgment in conformance with Rule 58. *Id.* The *Seiscom* court stated that it was not necessary to hold that the Supreme Court had set these three factors, all of which must be present for waiver of the separate judgment requirement. *Id.* at 283. However, the court stated that the party that would have been prejudiced must be shown to have acquiesced to the appeal in order for the appellate court to have jurisdiction. *Id.* After considering both *Indrelunas* and *Mallis*, the court made three statements: (1) *Indrelunas* is still the law in that a timely appeal cannot be defeated by the argument that the time to appeal began to run from some earlier document; (2) this decision does not change the law when the appellee objects to the failure to enter the judgment as a separate document; and (3) it remains the better practice to have the judgment entered as a separate document and, if an appellant realizes that there is no separate document, that appellant should make a motion to have one entered. *Id.* at 284; *see also* Baker v. Mercedes Benz of North Am., 114 F.3d 57, 61 (5th Cir. 1997) (remanding

Hammack v. Baroid Corp.,[178] an appellee tried to rely on the First Circuit's decision in *Fiore*, arguing that an appellant should not be allowed to bring an appeal outside a reasonable amount of time.[179] The court was not swayed by the appellee's arguments in support of adopting the *Fiore* system and stated that appeals have been allowed through a *Mallis* waiver only when neither party objects and strict application of Rule 58 would prove pointless and burdensome.[180]

5. The Sixth Circuit: Try Everything Once and Things That Work, Try Again

The Sixth Circuit has continued to favor *Indrelunas* to *Mallis*, waiving Rule 58 only once and then without discussion.[181] The court has denied

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case to district court to enter a Rule 58 separate document judgment when the status of a post-trial motion is unclear due to the lack of a Rule 58 judgment); Whitaker v. City of Houston, Tex., 963 F.2d 831, 833-34 (5th Cir. 1992) (accepting jurisdiction notwithstanding the lack of a Rule 58 document, but only after stating that the *Mallis* decision leaves the option open to the appellate courts whether they want to accept jurisdiction).

[178] 142 F.3d 266 (5th Cir. 1998).

[179] *Id.* at 268. Joe Hammack sued Baroid Corporation seeking coverage under the company's health plan for his wife's hospital bills. *Id.* at 267. The Hammacks sued in state court and the corporation removed to federal court. *Id.* at 268. Following a bench trial, the District Court for the Southern District of Texas held that Baroid did not abuse its discretion in determining the Hammacks' benefits. *Id.* The court submitted factual findings and conclusions of law in a seven page order on which the court stated: "FINAL JUDGMENT should issue. It is so ORDERED." *Id.* The court failed to file a separate document judgment order pursuant to Rule 58. *Id.* Twenty months after the order was issued, Hammack requested a judgment order be entered by the district court. *Id.* The court then entered a single-page document order. *Id.* Baroid argued that Hammack had waived his right to appeal by waiting twenty months before requesting the entry of a document order. *Id.* The appellate court considered the method employed by the First Circuit under the *Fiore* decision and rejected the method because strict application of a rule like that in *Fiore* would result in extinguishing a party's right to appeal. *Id.* at 269.

[180] *Id.* The court also examined the only other circuit decision at the time regarding *Fiore*. *Id.* at 269 n.4 (citing Rubin v. Schottenstein, Zox & Dunn, 1998 U.S. App. LEXIS 9004, at *20, *vacated in part on other grounds*, 143 F.3d 263 (6th Cir. 1998)). The Sixth Circuit had also refused to follow *Fiore*, finding it to be a pragmatic solution but not a solution yet approved by the Supreme Court. *Id.* The court did note, however, that the twenty-month delay seemed exceptionally long, especially considering the fact that Hammack was completely silent on the lack of a judgment order throughout those months. *Id.* at 269 n.6.

[181] Green v. Nevers, 196 F.3d 627, 631 (6th Cir. 1999). Malice Green died at the hands of several Detroit police officers on November 5, 1992. *Id.* at 629. Green's estate brought wrongful death and 42 U.S.C. § 1983 claims against the City of Detroit, which were settled for $5.25 million. *Id.* The district court finalized this settlement in a consent judgment on July 18, 1994. *Id.* This decision was not filed in compliance with the Rule 58 separate judgment rule. *Id.* at 631. One of the attorneys appealed a subsequent order of the district court denying his motion for discovery concerning the validity of the contingency fee agreement between the estate and the estate's attorneys and denying him any share in the

appeals where there was no apparent reason for the absence of a Rule 58 document from the district court.[182] The court has also consistently dismissed appeals when there was no Rule 58 separate document judgment order from the district courts.[183] Additionally, the court has held that *Mallis* could be used against the appellant unless the appellant could show he was somehow misled, but then the court overturned this reading of Rule 58 and *Mallis*.[184]

B. *The Need for Uniformity Within the Federal Courts*

It is true that uniformity in [procedure] is most desirable.[185]

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accrued interest on the escrow settlement funds. *Id.* at 629. Although the appeal was three days late, the court found that the lack of a Rule 58 judgment order in the district court meant that the time for appeal had not yet begun to run when the notice of appeal was filed. *Id.* at 631. As a result, the court found the appeal timely and declared itself to have jurisdiction. *Id.* In a footnote, the court stated that *Mallis* allows a court to waive the requirements of Rule 58 in cases of "premature" appeals in order to obtain appellate review. *Id.* at 631 n.3.

[182] *See, e.g.*, Anderson v. Pierce, No. 84-5996, 1985 WL 12815, at *1 (6th Cir. July 19, 1985). The court concluded that the lack of a Rule 58 judgment order could not be excused in this case because it would prejudice the appellant and there was some uncertainty about whether the final action of the district court was meant to be a final judgment. *Id.*

[183] *See* Telxon Corp. v. Fed. Ins. Co., No. 00-3596, 2000 WL 1175555, at *2 (6th Cir. Aug. 11, 2000) (dismissing the appeal because it lacked a Rule 58 judgment); Sec. & Exch. Comm'n v. Great Lakes Equities, Co., Nos. 91-1354, 91-1405, 91-1525, 1991 WL 88417, at *1 (6th Cir. May 28, 1991) (granting a motion to dismiss when there was no Rule 58 order and denying a motion to stay as moot); Rapp Bus. Corp. v. Eslinger, No. 87-3727, 1987 WL 38903, at *1 (6th Cir. Nov. 10, 1987) (granting a motion to dismiss until a judgment order was entered in the district court docket pursuant to Federal Rule of Civil Procedure 58); Salyers v. Sec'y of Health and Human Servs., No. 85-5237, 1986 WL 16905, at *3-4 (6th Cir. Apr. 8, 1986) (remanding the case to the district court for prompt entry of an order denying a preliminary injunction and class certification upon a separate document in conformity with Rule 58); *cf.* Reid v. White Motor Corp., 886 F.2d 1462, 1466-67 (6th Cir. 1989) (allowing an untimely appeal where appellant proved that the clerk of the court made an error entering the separate document and, therefore, the appellant was never notified that the judgment was final).

[184] Amoco Oil Co. v. Jim Heilig Oil & Gas Inc., No. 85-1619, 1986 WL 16570, at *1 (6th Cir. Feb. 7, 1986). In *Amoco Oil*, the decision was entered May 21, 1985, and the notice of appeal was filed on July 25, 1985, making it thirty-five days late. *Id.* The court of appeals issued a show cause order, and the appellant responded by stating that the appeal was prematurely filed because no separate document judgment order had been entered by the district court. *Id.* However, a review of the district court record revealed that the appellant was not misled by the failure to enter a separate judgment. *Id.* Appellant's counsel recognized the May 21 decision as a final decision and sought reconsideration of the court's decision. *Id.* Therefore, the appellate court dismissed the appeal for lack of jurisdiction because the appeal was untimely. *Id.*

[185] *Supreme Court Adopts Rules, supra* note 29, at 99 (citing a 1912 resolution presented by Thomas Shelton to the Committee on Judicial Administration and Remedial Procedure).

Prior to the enactment of the Federal Rules of Civil Procedure, uniformity existed in federal courts only in equity.[186] With respect to actions at law, partial compliance to state practice was required.[187] This resulted in forty-nine different types of procedure in the federal courts, one for each state in the union at the time and one for the District of Columbia.[188] One of the preliminary questions the Advisory Committee considered was whether to adopt rules that would unify the federal courts under one system of procedure.[189] The Committee opted for uniformity throughout the federal courts because it would be incongruous and unreasonable for different rules on the same topics to prevail in different districts.[190] The goal was a simplified practice that would strip procedure of unnecessary technicalities.[191]

Uniformity is necessary throughout the federal courts to provide a fixed rule of decision and stability and certainty in claims rather than allowing circuits to create their own jurisprudence.[192] A codification of federal procedure eliminates the confusion resulting from separate courts following their own rules.[193] "[T]he law is meaningless when

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[186] Holtzoff, *Judge*, *supra* note 45, at 157; *see also* Goodman, *supra* note 16, at 353 (stating that the practical result of the Conformity Act was the creation of as many different federal rules for practice as there were different state rules, thus eliminating any uniformity of procedure in the federal courts).

[187] Holtzoff, *Judge*, *supra* note 45, at 157; *see also* notes 17-20 and accompanying text (describing the effects of the Conformity Act and its system of federal courts following "as near as may be" to the state rules).

[188] Holtzoff, *Judge*, *supra* note 45, at 157; *see also* Sunderland, *supra* note 23, at 1117 (commenting on the importance of uniformity to the drafters of the Federal Rules of Civil Procedure after the Conformity Act had failed to bring about a general conformity in federal and state proceedings).

[189] Holtzoff, *Origin*, *supra* note 29, at 1062; *see also* Sunderland, *supra* note 23, at 1117 (stating that all federal statutes in conflict with the rules would be repealed and a five-member Committee on Uniform Judicial Procedure would be elected); *Supreme Court Adopts Rules*, *supra* note 29, at 98 (stating that the duty of the Advisory Committee was to prepare and submit a draft of a uniform system of rules).

[190] Holtzoff, *Origin*, *supra* note 29, at 1062. Additionally, the hope was expressed that if a uniform system were promulgated and were found satisfactory, some of the states might adopt the Rules for their own courts. *Id.* This hope proved to be prophetic as several of the states had already accepted federal civil procedure in its entirety for their local tribunals by 1955. *Id.*; *see also* Sunderland, *supra* note 23, at 1117 (stating that the drafters of the rules believed that the rules would be models for state adoption).

[191] Goodman, *supra* note 16, at 356 (citing a 1935 speech given by Chief Justice Charles Evans Hughes to the American Law Institute).

[192] Subrin, *supra* note 21, at 950 (citing Thomas Shelton, *Simplification of Legal Procedure – Expediency Must Not Sacrifice Principle*, 71 CENT. L. J. 330, 333 (1910)).

[193] Sunderland, *supra* note 23, at 1124.

enforced, without regard to fixed rules of [civil] procedure."[194] Specifically, Rule 58 has been rewritten twice in attempts to eliminate ambiguity and promote uniform application of the rule.[195] The previous uncertainties in Rule 58 caused litigants grief, and the amendments set out to eliminate the discrepancies.[196] A case-by-case approach had not worked in the past, and a mechanical approach was necessary to avoid any new uncertainties.[197]

C. *A Proposed Amendment to Rule 58*

In April 2000, the Civil Rules Advisory Committee met and discussed potential amendments to Rule 58.[198] The proposed changes to

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[194] Subrin, *supra* note 21, at 949 (citing Thomas Shelton, *Simplification of Legal Procedure - Expediency Must Not Sacrifice Principle*, 71 CENT. L. J. 330, 333 (1910)).

[195] Benjamin Kaplan, *Amendments to the Federal Rules of Civil Procedure, 1961-1963 (II)*, 77 HARV. L. REV. 801, 831 (1964); *see also* Sunderland, *supra* note 23, at 1129 (stating that constant attention is required to ensure the Federal Rules of Civil Procedure are adjusted to contemporary needs); *supra* notes 62-75 and accompanying text (discussing the 1946 and 1963 amendments to Rule 58).

[196] United States v. Indrelunas, 411 U.S. 216, 220 (1973) (per curiam).

[197] *Id.* at 221-22. Five years later, the Supreme Court stated that technical application of Rule 58 should not prevent parties from waiving the separate document requirement where one was accidentally not entered. Bankers Trust Co. v. Mallis, 435 U.S. 381, 386 (1978).

[198] COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED REPORT OF THE CIVIL RULES ADVISORY COMMITTEE (proposed May 2000) (to be codified at 28 U.S.C. app. at 783), *available at* http://www.uscourts.gov/rules/comment2001/amendments/cv.pdf (last visited June 11, 2002) [hereinafter Proposed Rule 58]. The committee met on April 10 and 11, 2000, at the Administrative Office of the United States Courts in Washington, D.C. *Id.* The amendments would eliminate the current Rule 58 and replace it with:

> Rule 58. Entry of Judgment
> (a) Separate Document.
> (1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion:
> (A) for judgment under Rule 50(b);
> (B) to amend or make additional findings of fact under Rule 52(b);
> (C) for attorney fees under Rule 54;
> (D) for a new trial, or to alter or amend the judgment, under Rule 59; or
> (E) for relief under Rule 60.
> (2) Subject to Rule 54(b):
> (A) the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

Rule 58(a) would preserve the core of the separate document requirement both for the initial judgment and for any amended judgment.[199] Proposed section 58(a) lists the judgments that would not require a separate document judgment order.[200] Additionally, proposed

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(i) the jury returns a general verdict;
(ii) the the court awards only costs or a sum certain, or denies all relief;
(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:
(i) the jury returns a special verdict or a general verdict accompanied by interrogatories, or
(ii) the court grants other relief not described in Rule 58(a)(2).

(b) Time of Entry. Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62:
(1) when it is entered in the civil docket under Rule 79(a), and
(2) if the separate document is required by Rule 58(a)(1), upon the earlier of these events:
(A) when it is set forth on a separate document, or
(B) when 60 days have run from entry on the civil docket under Rule 79(a).

(c) Cost or Fee Awards.
(1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).
(2) When a timely motion for attorney fees is made under Rule 54(d)(2) the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Rule 4(a)(4) of the Federal rules of Appellate Procedure as a timely motion under Rule 59.

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

Id. Additionally, but separately, the Advisory Committee on Appellate Rules has introduced an amendment to Federal Rule of Appellate Procedure 4, which would allow judgment to be entered on a claim after 150 days when a judgment order was not entered by the district court. JUDICIAL CONFERENCE OF THE UNITED STATES, MINUTES OF FALL 1999 MEETING OF ADVISORY COMMITTEE ON APPELLATE RULES, *available at* 1999 WL 1993044, at *1-2. The accompanying notes to the amendment state that the committee wished to introduce a cap so that appeals would not be allowed to run indefinitely. *Id.* at *4.

[199] *See* Proposed Rule 58, *supra* note 198, § 58(a).

[200] *Id.*

section (a) divides the responsibility for the separate document order between the judge and the clerk of the court.[201]

As proposed, Rule 58(b) discards the attempt to define when a judgment becomes "effective" and instead contains a provision that is aimed directly at the time for making post-trial and post-judgment motions.[202] If judgment is promptly set forth on a separate document, as Rule 58 requires, the new provision will not change the effect of Rule 58.[203] But in the cases in which the court and clerk fail to comply with this simple requirement, the motion time periods set by other procedural rules begin to run after expiration of sixty days from entry of the judgment on the civil docket.[204]

The language in the amendment to section 58(c) preserves the majority of the language from the current Rule 58.[205] The proposed section 58(d) replaces the current provision that does not allow attorneys to submit forms of judgment except on direction of the court.[206] The express direction in Rule 58(a)(2) calls for prompt action by the clerk and the court, thus addressing the concern of inept drafting by attorneys.[207] The new provision allows any party to move for entry of judgment on a separate document, which, the Committee stated, will protect all needs for prompt commencement of the periods for motions, appeals, and execution of other enforcement.[208]

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[201] *Id.* § 58(a)(2). The clerk must promptly prepare, sign and enter the judgment. *Id.* § 58(a)(2)(A). The judge must then approve the document in a timely fashion. *Id.* § 58(a)(2)(B).

[202] *Id.* § 58(b). The Committee acknowledged that the current system under Rule 58 could "cause strange difficulties in implementing pre-trial orders that are appealable under interlocutory appeal provisions or under expansive theories of finality." NOTES FROM THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, *available at* http://www.uscourts.gov/rules/comment2001/amendments/cv.pdf at 112 (last visited June 11, 2002) [hereinafter COMMITTEE NOTES].

[203] *See* Proposed Rule 58, *supra* note 198, § 58(b).

[204] *Id.* The committee specifically mentioned Federal Rules of Civil Procedure 50, 52, 54, 59, and 60. COMMITTEE NOTES, *supra* note 202, at 111. Entry on the civil docket is required by Rule 79(a). *Id.* at 112. The committee is also recommending a companion amendment to Appellate Rule 4(a)(7), which integrates these changes with the time to appeal. *Id.*

[205] *See* Proposed Rule 58, *supra* note 198, § 58(c).

[206] *Id.* § 58(d). 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. COMMITTEE NOTES, *supra* note 202, at 114; *see also* WRIGHT ET AL., *supra* note 47, § 2786.

[207] *See* Proposed Rule 58, *supra* note 198, § 58(d).

[208] *Id.*

The Committee acknowledged that Rule 58's purpose is to provide that a judgment is effective only when set forth on a separate document and entered as provided in Rule 79(a).[209] However, the Committee found that this simple requirement has been ignored in many cases.[210] When this requirement is ignored, the time for making certain motions and the time for appeal under Appellate Rule 4(a) never begins to run.[211] The amendment proposed by the Committee is designed to work with Appellate Rule 4(a) to ensure that time for appeal does not linger indefinitely. Additionally, the Committee wished to maintain the integration of the time periods set forth in other civil procedure rules.[212]

IV. CONTRIBUTION

Rule 58 currently requires clerks to file a separate document in every case.[213] This signals the parties that the district court has entered judgment on a case and the thirty days for appeal may begin. However, when the clerk fails to do so, appellate courts must attempt to determine the finality of the district court's decision. Circuits disagree over whether appellate courts must immediately accept jurisdiction when there is no separate document, as well as whether cases must be remanded to district courts for a separate document to be entered before appellate courts may accept jurisdiction. Additionally, there is conflict among the circuits as to how many days or months may pass before a claim is considered extinguished when the district court has not filed a separate document.

The Supreme Court decisions regarding Rule 58 have been contradictory. The Supreme Court first ruled that Rule 58 must be "mechanically applied"; five years later, the Court ruled that Rule 58 is not a jurisdictional requirement.[214] The circuits interpret the conflicting Supreme Court decisions in disparate ways, dismissing some appeals outside the thirty-day mark and allowing other appeals that are filed years after the district court's final decision. This lack of uniformity

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[209] *See* COMMITTEE NOTES, *supra* note 202, at 111.

[210] *Id.*

[211] *Id.* Specifically, the Committee mentions that the times for making motions under Federal Rules of Civil Procedure 50, 52, 54(d)(2)(B), and 59, and some motions under Rule 60, never begin to run. *Id.* The Committee mentions that there have been "many and horridly confused problems" with respect to Rule 58 and Appellate Rule 4(a). *Id.* The goal of the Committee was to create a Rule 58 where there was no potential for claims to continue indefinitely. *Id.*

[212] *Id.*

[213] *See* FED. R. CIV. P. 58; *see also supra* note 5 (reproducing Rule 58).

[214] *See supra* Part II.C.

contradicts the very purpose of the Federal Rules of Civil Procedure, which was to bring all the federal courts under one system of procedural rules.

An amendment has been proposed to remedy some of the Rule 58 uncertainties. The proposed amendment reiterates the necessity for a separate document in all final judgments. In addition, the amendment requires that clerks promptly prepare, sign, and enter the judgment. If a separate document is entered by the clerk, the amendment states that judgment is entered, and the time for appeal may begin. However, if a separate document has not been entered by the clerk, the amendment states that the judgment is considered entered after sixty days. The amendment repeats the current Rule 58 language in allowing separate documents to be entered before awards are made for costs or fees, allowing an appeal to go forward on the merits even where the court has not yet ruled on attorney's fees. Finally, the amendment states that either party may request that a separate document be entered to signal that all claims are concluded in the court and the time for appeal is ripe.

The proposed amendment makes great strides in correcting the current Rule 58 controversies. However, the amendment goes too far. It guarantees that all claims will be final judgments from the district court within sixty days.[215] This is a problem because the district court will not be required to enter a Rule 58 separate document judgment order. Therefore, the parties may not realize that the district court's judgment was intended to be a final judgment and that the time for the appeal is running. The amendment extinguishes appeals for the sake of judicial certainty. Instead, judges need some flexibility when a party can prove that the time for appeal ran without any warning.

To prevent prejudice to the appellee or to recognize the presence of exceptional circumstances, this Note proposes the following amendment to Rule 58(b):

> (b) Time of Entry. Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62:
>
> (1) when it is entered in the civil docket under Rule 79(a), and

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[215] *See* Proposed Rule 58, *supra* note 198 and accompanying text (discussing the sixty-day requirement).

> (2) if a separate document is required by Rule 58(a)(1), upon the earlier of these events, *absent exceptional circumstances or prejudice to appellee*:
>
> (A) when it is set forth on a separate document, or
>
> (B) when 60 days have run from entry on the civil docket under Rule79(a).[216]

Adding the phrase "absent exceptional circumstances or prejudice to appellee" grants the courts some discretion to apply when an appellant is unaware that the time to appeal has already run. This is similar to the current systems applied by the Seventh and Ninth Circuits, where waivers are only allowed when there is no prejudice to the appellee.[217] The burden of proof would be on the appellant to show that there was either some prejudice or the presence of exceptional circumstances. The appellant would also be required to prove that allowing an untimely appeal would not prejudice the appellee. This burden would be appropriately high, but possible if the plaintiff had been completely unaware that the district court's action was meant to be a final action, and thus, start the appeal clock running.

Although not yet enacted, the proposed amendment has already been the subject of some controversy, especially Section 58(b)(2)(B) and the new sixty-day rule. The Supreme Court of Texas noted in dicta that the proposed amendment would ensure that every case would be closed within sixty days.[218] Although this is true, the amendment would also make it more likely that a party would be unaware that the time for appeal is running because the party does not know of the clerk's entry on the civil docket.[219] The Texas court was concerned that appellants

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[216] This Note's contribution is the italicized text.

[217] *See supra* notes 142-49, 156-62 and accompanying text (discussing the current Rule 58 jurisprudence of the Seventh and Ninth Circuits).

[218] Lehmann v. Har-Con Corp., 39 S.W.2d 191, 205 (Tex. 2001).

[219] *Id.* The Supreme Court of Texas stated that the easiest way to clear up controversy regarding Rule 58 was to ensure that a separate document judgment order was entered on the civil docket for every judgment. *Id.* However, the court also recognized that the current Rule 58's certainty is accompanied by a lack of a final date for a judgment to be considered to be entered. *Id.* The court stated that the proposed amendments to Rule 58 would ensure that every case would be closed within sixty days, but it also makes it more likely that a party will be unaware that the time for appeal has started to run. *Id.* The court ended its analysis of the proposed amendments by pointing out that the Texas Court's Advisory Committee was presently studying the issues of Texas Rule of Civil Procedure 58 and had yet to decide on a solution which would solve every problem. *Id.*

would be unaware that their thirty days for appeal were running because the district court had not entered a judgment order on the civil docket to let them know that the case was ripe for appeal.[220]

The controversial sixty-day rule is similar in effect to the First Circuit's ninety-day rule pronounced in *Fiore v. Washington County Community Mental Health Center*.[221] In *Fiore*, the First Circuit held that parties would have ninety days to appeal from the final action of the district court where there was no Rule 58 judgment order.[222] Several other circuits have rejected this system for its unfairness to appellants.[223] The circuits have found that it is unnecessarily fatal to appeals.[224] The Committee's proposed amendment reduces the amount of time from ninety to sixty days, thereby extinguishing even more appeals.[225]

The *"Mallis"* waiver system, presently available only in certain federal circuits, has increased the controversy and has resulted in an increased lack of uniformity between the circuits.[226] A *"Mallis"* waiver is established when a party appeals from a judgment and the opposing party does not contest the appeal on the basis of the separate document requirement.[227] However, not all of the circuit appellate courts have accepted jurisdiction through a *"Mallis"* waiver and some circuits accept jurisdiction only when there is no prejudice to the appellee or where neither party objects.[228] Objections based solely on the separate document rule are rare, because the appeal is often either allowed to continue regardless of the lack of a judgment order or is simply remanded to the district court where the appellant gains another thirty

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[220] *Id.* (stating that the amendment "makes it more likely that a party will not be aware that the time for appeal is running . . . because he does not know of the clerk's entry on the civil docket").

[221] *See supra* Part III.A.1 (discussing the First Circuit's approach to Rule 58 in *Fiore*).

[222] Fiore v. Washington County Cmty. Mental Health Ctr., 960 F.2d 229, 239 (1st Cir. 1992) (stating that a judgment becomes final three months after the last action in a case).

[223] *See* New Shows v. Don King Prods., Inc., Nos. 99-9019, 99-9069, 2000 WL 354214, at *5-6 (2d Cir. Apr. 6, 2000); United States v. Haynes, 158 F.2d 1327, 1330-30 (D.C. Cir. 1998); Hammack v. Baroid Corp., 142 F.3d 266, 270 (5th Cir. 1998); Rubin v. Schottenstein, Zox & Dunn, 110 F.3d 1247, 1253 & n.4 (6th Cir. 1997), *vacated in part on other grounds*, 143 F.3d 263 (6th Cir. 1998).

[224] *See New Shows*, 2000 WL 354214, at *5-6; *Haynes*, 158 F.2d at 1330-30; *Hammack*, 142 F.3d at 270; *Rubin*, 110 F.3d at 1253 & n.4, *vacated in part on other grounds*, 143 F.3d 263.

[225] *See* Proposed Rule 58, *supra* note 198, § 58(b)(2)(B) (proposing the sixty-day rule).

[226] *See supra* Part III.A (discussing the state of Rule 58 jurisprudence throughout the federal circuits).

[227] *See supra* notes 78-89 and accompanying text (listing the elements of a *"Mallis"* waiver); *see also* Zachary, *supra* note 50, at 410-11.

[228] *See supra* Part III.A (discussing the current Rule 58 jurisprudence in the federal courts).

days before he must file an amended notice of appeal.[229] The primary advantage to objecting on the grounds of a Rule 58 deficiency is that the appellee gains the amount of time it takes for the case to return to the appellate court after being remanded.[230] However, even this advantage has its dangers because the appellate court judges may see the Rule 58 objection as a delay tactic and rule the separate document requirement to be waived regardless.[231]

The proposed amendment suggested by this Note would allow a Rule 58 waiver only where the appellant can prove exceptional circumstances *and* overcome any claim of unjust prejudice that may be raised by the appellee. The burden of proof would be squarely on the appellant who would need to specifically plead for the waiver. The appellate courts would not possess the power to find that a waiver exists when the appellant has failed to raise it. Also, this would give the appellee an opportunity to plead prejudice and leave the court to balance the pleadings of the appellant and the appellee. This would result in a higher burden of proof for the appellant, which is appropriate because the appellant is attempting to bring an untimely appeal.

The amendment proposed by this Note, if adopted, would impact the hypothetical situations discussed in Part I.[232] In Moss' situation, including the additional language in the proposed amendment would put the burden of proof on Moss to show that there were exceptional circumstances that caused his notice of appeal to be late. Moss would need to specifically plead that he was unaware that the time for appeal had already run. Moss would likely be unable to accomplish this because he did not address the appellate court's questions as to his lateness. In addition, the amendment would allow the appellee in Moss' claim to show that he would be prejudiced in some way if Moss' late appeal were allowed to continue. Moss would need to overcome the pleadings of the appellee and show that the appellee would not be unjustly prejudiced if he was allowed to bring his late appeal. Applying the amendment, the appellate court would have the discretion to balance Moss' claim of exceptional circumstances against the appellee's claim of unfair prejudice. The court would have discretion to allow Moss additional time in which to file his notice of appeal. Thus, Moss could not simply ignore the demands of the court as he did in the hypothetical.

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[229] Zachary, *supra* note 50, at 410-11.
[230] *Id.* at 411.
[231] *Id.*
[232] *See supra* Part I.

If he did, his late notice of appeal would not be allowed because he would not have met his burden of proof.

Lyman, on the other hand, would still have some hope for continuing with her appeal. Because Lyman filed her notice of appeal three days too late under Appellate Rule 4(a), she would need to specifically plead exceptional circumstances. Lyman would need to show that she was unaware that the district court's action was meant to be a final judgment. Additionally, she could claim that she was relying on precedent, albeit from a different circuit. In response, the appellee in Lyman's case would next have the opportunity to plead that unjust prejudice would result should Lyman's appeal be allowed to continue. Because only three days passed since the time the notice of appeal should have been filed, unjust prejudice will be more difficult for the appellee to prove than it was in Moss' case. The appellate court would then need to decide whether Lyman's circumstances were such that her appeal should not be extinguished because she had no notice from the district court that her claim was finalized. In such a case, even if Lyman's appeal was more than three days late, the appellate court would have the discretion to allow Lyman to bring her appeal.

Requiring the appellant to show exceptional circumstances and a lack of prejudice to the appellee will reduce the number of plaintiffs who will use Rule 58 to their tactical advantage. An appellant will be less likely to attempt to bring a late appeal in bad faith realizing that the appellate court has the discretion to dismiss the appeal absent exceptional circumstances. Also, the addition to the proposed amendment will focus the responsibility of proving that the late notice of appeal should be allowed on the appellant. Currently, appellate courts often raise Rule 58 jurisdictional questions *sua sponte* and then remand or waive Rule 58 altogether. The Committee's amendment supplemented by the additional language proposed by this Note requires the appellant to prove exceptional circumstances and overcome any claims of unjust prejudice before the appellate court will have discretion to hear a late appeal.

V. CONCLUSION

Federal Rule of Civil Procedure 58 dictates that a separate document judgment order be entered by the court clerk at the end of every case. When Rule 58 is not followed, appellate courts experience confusion over whether all the claims have been adjudicated in the district court. Currently, the federal circuits are applying a variety of methods to

remedy this problem. There is a proposed amendment that would alter Rule 58 substantially to promote judicial certainty. However, this amendment does not consider situations where the appellant is unaware that the time to appeal has begun. The amendment needs additional wording to allow appellate courts some discretion when an appellant can prove exceptional circumstances and can overcome any claims of unjust prejudice by the appellee.

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