

AMENDMENTS TO THE FEDERAL RULES OF
CIVIL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT
OF THE UNITED STATES

TRANSMITTING

AMENDMENTS AND AN ADDITION TO THE FEDERAL RULES OF
CIVIL PROCEDURE THAT HAVE BEEN ADOPTED BY THE SU-
PREME COURT, PURSUANT TO 28 U.S.C. 2072



APRIL 25, 2023.—Referred to the Committee on the Judiciary and ordered
to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

39-011

WASHINGTON : 2023

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 24, 2023.

Hon. KEVIN MCCARTHY,
Speaker, House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: I have the honor to submit to the Congress amendments and an addition to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended and additional rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 19, 2022; a blackline version of the rules with committee notes; an excerpt from the September 2022 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and excerpts from the May 2022 reports of the Advisory Committee on Civil Rules.

Sincerely,

JOHN G. ROBERTS, Jr.,
Chief Justice.

April 24, 2023

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. The Federal Rules of Civil Procedure are amended to include amendments to Rules 6, 15, and 72, and to add new Rule 87.

[*See infra* pp. — — .]

2. The foregoing amendments and addition to the Federal Rules of Civil Procedure shall take effect on December 1, 2023, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendments and addition to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

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

**Rule 6. Computing and Extending Time; Time for
Motion Papers**

(a) Computing Time. * * *

* * * * *

(6) “*Legal Holiday*” Defined. “Legal holiday”

means:

- (A)** the day set aside by statute for
observing * * * Memorial Day,
Juneteenth National Independence
Day, Independence Day, * * *;

* * * * *

Rule 15. Amended and Supplemental Pleadings**(a) Amendments Before Trial.**

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course no later than:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

* * * * *

Rule 72. Magistrate Judges: Pretrial Order

* * * * *

(b) Dispositive Motions and Prisoner Petitions.

- (1) *Findings and Recommendations.* * * * The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must immediately serve a copy on each party as provided in Rule 5(b).

* * * * *

Rule 87. Civil Rules Emergency

(a) Conditions for an Emergency. The Judicial Conference of the United States may declare a Civil Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

(b) Declaring an Emergency.

(1) *Content.* The declaration:

- (A)** must designate the court or courts affected;
- (B)** adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them; and
- (C)** must be limited to a stated period of no more than 90 days.

- (2) ***Early Termination.*** The Judicial Conference may terminate a declaration for one or more courts before the termination date.
 - (3) ***Additional Declarations.*** The Judicial Conference may issue additional declarations under this rule.
- (c) **Emergency Rules.**
 - (1) ***Emergency Rules 4(e), (h)(1), (i), and (j)(2), and for serving a minor or incompetent person.*** The court may by order authorize service on a defendant described in Rule 4(e), (h)(1), (i), or (j)(2)—or on a minor or incompetent person in a judicial district of the United States—by a method that is reasonably calculated to give notice. A method of service may be completed under the order after the declaration ends unless the

court, after notice and an opportunity to be heard, modifies or rescinds the order.

(2) *Emergency Rule 6(b)(2).*

(A) *Extension of Time to File Certain Motions.* A court may, by order, apply Rule 6(b)(1)(A) to extend for a period of no more than 30 days after entry of the order the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

(B) *Effect on Time to Appeal.* Unless the time to appeal would otherwise be longer:

(i) if the court denies an extension, the time to file an appeal runs for all parties from the date the order

denying the motion to extend
is entered;

- (ii) if the court grants an extension, a motion authorized by the court and filed within the extended period is, for purposes of Appellate Rule 4(a)(4)(A), filed “within the time allowed by” the Federal Rules of Civil Procedure; and
- (iii) if the court grants an extension and no motion authorized by the court is made within the extended period, the time to file an appeal runs for all parties

from the expiration of the
extended period.

- (C) *Declaration Ends.* An act authorized
by an order under this emergency rule
may be completed under the order
after the emergency declaration ends.



THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

October 19, 2022

MEMORANDUM

To: The Chief Justice of the United States
The Associate Justices of the Supreme Court

From: Judge Roslynn R. Mauskopf *Roslynn R. Mauskopf*

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF
CIVIL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for the Court's consideration proposed amendments to Rules 6, 15, and 72, and new Rule 87 of the Federal Rules of Civil Procedure, which have been approved by the Judicial Conference. The Judicial Conference recommends that the amended rules and new rule be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting (i) clean and blackline copies of the amended rules and new rule along with committee notes; (ii) an excerpt from the September 2022 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) excerpts from the May 2022 reports of the Advisory Committee on Civil Rules.

Attachments

3 **(a) Computing Time. * * ***

5 (6) ***“Legal Holiday” Defined.*** “Legal holiday”

7 (A) the day set aside by statute for

9 Juneteenth National Independence

11 * * * * *

The amendment adds “Juneteenth National Independence Day” to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)).

¹ New material is underlined.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE¹**

1 Rule 15. Amended and Supplemental Pleadings

2 (a) Amendments Before Trial.

3 (1) *Amending as a Matter of Course.* A party
4 may amend its pleading once as a matter of
5 course ~~within~~ no later than:

6 (A) 21 days after serving it, or

7 (B) if the pleading is one to which
8 a responsive pleading is required, 21
9 days after service of a responsive
10 pleading or 21 days after service of a
11 motion under Rule 12(b), (e), or (f),
12 whichever is earlier.

13 * * * * *

Committee Note

Rule 15(a)(1) is amended to substitute “no later than”
for “within” to measure the time allowed to amend once as a

¹ New material is underlined; matter to be omitted is lined
through.

2 FEDERAL RULES OF CIVIL PROCEDURE

matter of course. A literal reading of “within” would lead to an untoward practice if a pleading is one to which a responsive pleading is required and neither a responsive pleading nor one of the Rule 12 motions has been served within 21 days after service of the pleading. Under this reading, the time to amend once as a matter of course lapses 21 days after the pleading is served and is revived only on the later service of a responsive pleading or one of the Rule 12 motions. There is no reason to suspend the right to amend in this way. “No later than” makes it clear that the right to amend continues without interruption until 21 days after the earlier of the events described in Rule 15(a)(1)(B).

* * * * *

magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must ~~promptly mail~~ immediately serve a copy to on each party as provided in Rule 5(b).

* * * * *

Rule 72(b)(1) is amended to permit the clerk to serve a copy of a magistrate judge's recommended disposition by any of the means provided in Rule 5(b).

¹ New material is underlined; matter to be omitted is lined through.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE¹**

1 **Rule 87. Civil Rules Emergency**

2 **(a) Conditions for an Emergency.** The Judicial
3 Conference of the United States may declare a Civil Rules
4 emergency if it determines that extraordinary circumstances
5 relating to public health or safety, or affecting physical or
6 electronic access to a court, substantially impair the court's
7 ability to perform its functions in compliance with these
8 rules.

9 **(b) Declaring an Emergency.**

10 **(1) Content.** The declaration:

11 **(A)** must designate the court or courts
12 affected;

13 **(B)** adopts all the emergency rules in
14 Rule 87(c) unless it excepts one or
15 more of them; and

¹ New material is underlined.

16 (C) must be limited to a stated period of
17 no more than 90 days.

18 (2) *Early Termination.* The Judicial Conference
19 may terminate a declaration for one or more
20 courts before the termination date.

21 (3) *Additional Declarations.* The Judicial
22 Conference may issue additional declarations
23 under this rule.

24 (c) **Emergency Rules.**

25 (1) *Emergency Rules 4(e), (h)(1), (i), and (j)(2),*
26 *and for serving a minor or incompetent*
27 *person.* The court may by order authorize
28 service on a defendant described in Rule 4(e),
29 (h)(1), (i), or (j)(2)—or on a minor or
30 incompetent person in a judicial district of the
31 United States—by a method that is
32 reasonably calculated to give notice. A
33 method of service may be completed under

34 the order after the declaration ends unless the
35 court, after notice and an opportunity to be
36 heard, modifies or rescinds the order.

37 **(2) *Emergency Rule 6(b)(2).***

38 **(A) *Extension of Time to File Certain***
39 *Motions.* A court may, by order, apply
40 Rule 6(b)(1)(A) to extend for a period
41 of no more than 30 days after entry of
42 the order the time to act under
43 Rules 50(b) and (d), 52(b), 59(b), (d),
44 and (e), and 60(b).

45 **(B) *Effect on Time to Appeal.* Unless the**
46 time to appeal would otherwise be
47 longer:

48 **(i) if the court denies an**
49 extension, the time to file an
50 appeal runs for all parties
51 from the date the order

Committee Note

The range of the extraordinary circumstances that might give rise to a rules emergency is wide, in both time and space. An emergency may be local—familiar examples include hurricanes, flooding, explosions, or civil unrest. The circumstance may be more widely regional, or national. The

emergency may be tangible or intangible, including such events as a pandemic or disruption of electronic communications. The concept is pragmatic and functional. The determination of what relates to public health or safety, or what affects physical or electronic access to a court, need not be literal. The ability of the court to perform its functions in compliance with these rules may be affected by the ability of the parties to comply with a rule in a particular emergency. A shutdown of interstate travel in response to an external threat, for example, might constitute a rules emergency even though there is no physical barrier that impedes access to the court or the parties.

Responsibility for declaring a rules emergency is vested exclusively in the Judicial Conference. But a court may, absent a declaration by the Judicial Conference, utilize all measures of discretion and all the flexibility already embedded in the character and structure of the Civil Rules.

A pragmatic and functional determination whether there is a Civil Rules emergency should be carefully limited to problems that cannot be resolved by construing, administering, and employing the flexibility deliberately incorporated in the structure of the Civil Rules. The rules rely extensively on sensible accommodations among the litigants and on wise management by judges when the litigants are unable to resolve particular problems. The effects of an emergency on the ability of the court and the parties to comply with a rule should be determined in light of the flexible responses to particular situations generally available under that rule. And even if a rules emergency is declared, the court and parties should explore the opportunities for flexible use of a rule before turning to rely on an emergency departure. Adoption of this rule, or a declaration of a rules emergency, does not imply any limitation of the courts' ability to respond to emergency

circumstances by wise use of the discretion and opportunities for effective adaptation that inhere in the Civil Rules themselves.

Subdivision (b). A declaration of a rules emergency must designate the court or courts affected by the emergency. An emergency may be so local that only a single court is designated. The declaration adopts all of the emergency rules listed in subdivision (c) unless it excepts one or more of them. An emergency rule supplements the Civil Rule for the period covered by the declaration.

A declaration must be limited to a stated period of no more than 90 days, but the Judicial Conference may terminate a declaration for one or more courts before the end of the stated period. A declaration may be succeeded by a new declaration made under this rule. And additional declarations may be made under this rule before an earlier declaration terminates. An additional declaration may modify an earlier declaration to respond to new emergencies or a better understanding of the original emergency. Changes may be made in the courts affected by the emergency or in the emergency rules adopted by the declaration.

Subdivision (c). Subdivision (c) lists the only Emergency Rules that may be authorized by a declaration of a rules emergency.

Emergency Rules 4. Each of the Emergency Rules 4 authorizes the court to order service by means not otherwise provided in Rule 4 by a method that is appropriate to the circumstances of the emergency declared by the Judicial Conference and that is reasonably calculated to give notice. The nature of some emergencies will make it appropriate to rely on case-specific orders tailored to the particular emergency and the identity of the parties. The court should

explore the opportunities to make effective service under the traditional methods provided by Rule 4, along with the difficulties that may impede effective service under Rule 4. Any means of service authorized by the court must be calculated to fulfill the fundamental role of serving the summons and complaint in providing notice of the action and the opportunity to respond. Other emergencies may make it appropriate for a court to adopt a general practice by entering a standing order that specifies one or possibly more than one means of service appropriate for most cases. Service by a commercial carrier requiring a return receipt might be an example.

The final sentence of Emergency Rule 4 addresses a situation in which a declaration of a civil rules emergency ends after an order for service is entered but before service is completed. Service may be completed under the order unless the court modifies or rescinds the order. A modification that continues to allow a method of service specified by the order but not within Rule 4, or rescission that requires service by a method within Rule 4, may provide for effective service. But it may be better to permit completion of service in compliance with the original order. For example, the summons and complaint may have been delivered to a commercial carrier that has not yet delivered them to the party to be served. Allowing completion and return of confirmation of delivery may be the most efficient course. Allowing completion of a method authorized by the order may be particularly important when a claim is governed by a statute of limitations that requires actual service within a stated period after the action is filed.

Emergency Rule 6(b)(2). Emergency Rule 6(b)(2) supersedes the flat prohibition in Rule 6(b)(2) of any extension of the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The court may extend those

times under Rule 6(b)(1)(A). Rule 6(b)(1)(A) requires the court to find good cause. Some emergencies may justify a standing order that finds good cause in general terms, but the period allowed by the extension ordinarily will depend on case-specific factors as well.

Rule 6(b)(1)(A) authorizes the court to extend the time to act under Rules 50(b), 50(d), 52(b), 59(b), 59(d), 59(e), and 60(b) only if it acts, or if a request is made, before the original time allowed by those rules or an extension granted under Emergency Rule 6(b)(2) expires. For all but Rule 60(b), the time allowed by those rules is 28 days after the entry of judgment. For Rule 60(b), the time allowed is governed by Rule 60(c)(1), which requires that the motion be made within a reasonable time, and, for motions under Rule 60(b)(1), (2), or (3), no more than a year after the entry of judgment. The maximum extension is not more than 30 days after entry of the order granting an extension. If the court acts on its own, extensions for Rule 50, 52, and 59 motions can extend no later than 58 days after the entry of judgment unless the court acts before expiration of an earlier extension. If an extension is sought by motion, an extension can extend no later than 30 days after entry of the order granting the extension.

Appeal time must be reset to support an orderly determination whether to order an extension and, if an extension is ordered, to make and dispose of any motion authorized by the extension. Subparagraph 6(b)(2)(B) integrates the emergency rule with Appellate Rule 4(a)(4)(A) for four separate situations.

The first situation is governed by the initial text: “Unless the time to appeal would otherwise be longer.” One example that illustrates this situation would be a motion by the plaintiff for a new trial within the time allowed by

Rule 59, followed by a timely motion by the defendant for an extension of time to file a renewed motion for judgment as a matter of law under Rule 50(b). The court denies the motion for an extension without yet ruling on the plaintiff's motion. The time to appeal after denial of the plaintiff's motion is longer for all parties than the time after denial of the defendant's motion for an extension.

Item (B)(i) resets appeal time to run for all parties from the date of entry of an order denying a motion to extend.

Items (B)(ii) and (iii) reset appeal time after the court grants an extended period to file a post-judgment motion. Appellate Rule 4(a)(4)(A) is incorporated, giving the authorized motion the effect of a motion filed "within the time allowed by" the Federal Rules of Civil Procedure. If more than one authorized motion is filed, appeal time is reset to run from the order "disposing of the last such remaining motion." If no authorized motion is made, appeal time runs from the expiration of the extended period.

These provisions for resetting appeal time are supported for the special timing provisions for Rule 60(b) motions by a parallel amendment of Appellate Rule 4(a)(4)(A)(vi) that resets appeal time on a timely motion "for relief under Rule 60 if the motion is filed within the time allowed for filing a motion under Rule 59." This Rule 4 provision, as amended, will assure that a Rule 60(b) motion resets appeal time for review of the final judgment only if it is filed within the 28 days ordinarily allowed for post-judgment motions under Rule 59 or any extended period for filing a Rule 59 motion that a court might authorize under Emergency Rule 6(b)(2). A timely Rule 60(b) motion filed after that period, whether it is timely under Rule 60(c)(1) or under an extension ordered under

Emergency Rule 6(b)(2), supports an appeal from disposition of the Rule 60(b) motion, but does not support an appeal from the original final judgment.

Emergency Rule 6(b)(2)(C) addresses a situation in which a declaration of a Civil Rules emergency ends after an order is entered, whether the order grants or denies an extension. This rule preserves the integration of Emergency Rule 6(b)(2) with the appeal time provisions of Appellate Rule 4(a)(4)(A). An act authorized by the order, which may be either a motion or an appeal, may be completed under the order. If the order denies a timely motion for an extension, the time to appeal runs from the order. If an extension is granted, a motion may be filed within the extended period. Appeal time starts to run from the order that disposes of the last remaining authorized motion. If no authorized motion is filed within the extended period, appeal time starts to run on expiration of the extended period. Any other approach would sacrifice opportunities for post-judgment relief or appeal that could have been preserved if no emergency rule motion had been made.

Emergency rules provisions were added to the Appellate, Bankruptcy, Civil, and Criminal Rules in the wake of the COVID-19 pandemic. They were made as uniform as possible. But each set of rules serves distinctive purposes, shaped by different origins, traditions, functions, and needs. Different provisions were compelled by these different purposes.

Excerpt from the September 2022 Report of the Committee on Rules of Practice and Procedure

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REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rules 6, 15, and 72, and new Civil Rule 87.

Rule 6 (Computing and Extending Time; Time for Motion Papers)

In response to the enactment of the Juneteenth Act, the Advisory Committee made a technical amendment to Rule 6(a)(6)(A) to include the Juneteenth National Independence Day in the list of legal public holidays in the rule. The Advisory Committee recommended final approval without publication because this is a technical and conforming amendment.

Rule 15 (Amended and Supplemental Pleadings)

The amendment to Rule 15(a)(1) would substitute “no later than” for “within” to measure the time allowed to amend a pleading once as a matter of course. Paragraph (a)(1) currently provides, in part, that “[a] party may amend its pleading once as a matter of course *within* (A) 21 days after serving it or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier” (emphasis added).

A literal reading of the existing rule could suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion, creating an

<p style="text-align: center;">NOTICE NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p>
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Excerpt from the September 2022 Report of the Committee on Rules of Practice and Procedure

unintended gap period (prior to service of the responsive pleading or pre-answer motion) during which amendment as of right is not permitted. The proposed amendment is intended to remove that possibility by replacing “within” with “no later than.”

After public comment, the Advisory Committee made no changes to the proposed amendment to Rule 15(a)(1) as published. The Advisory Committee made one change to the committee note after publication, deleting an unnecessary sentence that was published in brackets. The Standing Committee unanimously approved the Advisory Committee’s recommendation.

Rule 72 (Magistrate Judges: Pretrial Order)

Rule 72(b)(1) directs that the clerk “mail” a copy of a magistrate judge’s recommended disposition. This requirement is out of step with recent amendments to the rules that recognize service by electronic means. The proposed amendment to Rule 72(b)(1) would replace the requirement that the magistrate judge’s findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).

After public comment, the Advisory Committee made no changes to the proposed amendment to Rule 72(b)(1) as published. The Advisory Committee made one change to the committee note, deleting an unnecessary sentence that was published in brackets. The Standing Committee unanimously approved the Advisory Committee’s recommendation.

Rule 87 (Civil Rules Emergency)

Proposed Civil Rule 87 is part of the package of proposed emergency rules drafted in response to the CARES Act directive. Subdivisions (a) and (b) of Rule 87 contain uniform provisions shared by the Appellate, Bankruptcy, and Criminal Emergency Rules. The uniform provisions address (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations.

Excerpt from the September 2022 Report of the Committee on Rules of Practice and Procedure

In form, Civil Rule 87(b)(1) diverges from the Bankruptcy and Criminal Rules with regard to the Judicial Conference declaration of a rules emergency; but in function, Rule 87(b)(1) takes a similar approach to those other rules. While the Bankruptcy and Criminal Rules provide that the declaration must “state any restrictions on the authority granted in” their emergency provisions, Rule 87(b)(1)(B) provides that the declaration “adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them.” The character of the different emergency rules provisions accounts for the difference. Rule 87 authorizes Emergency Rules 4(e), (h)(1), (i), (j)(2), and for serving a minor or incompetent person (referred to as “Emergency Rules 4”), each of which allows the court to order service of process by a means reasonably calculated to give notice. Rule 87 also authorizes Emergency Rule 6(b)(2), which displaces the prohibition on the extension of the deadlines for making post-judgment motions and instead permits extension of such deadlines. The Advisory Committee determined that, while it makes sense for the Judicial Conference to have the flexibility to decide not to adopt a particular Civil Emergency Rule when declaring a rules emergency, it would not make sense to invite other, undefined, “restrictions” on the Civil Emergency Rules. Accordingly, the Advisory Committee’s proposed language in Civil Rule 87(b)(1)(B) stated that the Judicial Conference’s emergency declaration “must ... adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them.” (The inclusion of the word “must” was the result of a stylistic decision concerning the location of “must” within Rule 87(b)(1).)

At the Standing Committee’s June 2022 meeting, a member suggested that it would be preferable to create a clear default rule that would provide for the adoption of all the Civil Emergency Rules in the event that a Judicial Conference declaration failed to specify whether it was adopting all or some of those rules. Accordingly, the Standing Committee voted to relocate the word “must” to Civil Rules 87(b)(1)(A) and (C), so that Civil Rule 87(b)(1)(B) provides

Excerpt from the September 2022 Report of the Committee on Rules of Practice and Procedure

simply that the declaration “adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them.” The resulting Rule will operate roughly the same way as the Bankruptcy and Criminal Emergency Rules – that is, a Judicial Conference declaration of a rules emergency will put into effect all of the authorities granted in the relevant emergency provisions, unless the Judicial Conference specifies otherwise.

After public comment, the Advisory Committee deleted from the committee note two unnecessary sentences that had been published in brackets, and augmented the committee note’s discussion of considerations that pertain to service by an alternative means under Emergency Rules 4(e), (h)(1), (i), and (j)(2). Based on suggestions by a member of the Standing Committee, the committee note was further revised at the Standing Committee meeting to reflect the possibility of multiple extensions under Emergency Rule 6(b)(2) and to delete one sentence that had suggested that the court ensure that the parties understand the effect of a Rule 6(b)(2) extension on the time to appeal.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 6, 15, and 72, and proposed new Civil Rule 87, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



John D. Bates, Chair

Elizabeth J. Cabraser	Troy A. McKenzie
Jesse M. Furman	Patricia Ann Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank Mays Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
Carolyn B. Kuhl	

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Excerpt from the May 13, 2022 Report of the Advisory Committee on Civil Rules

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

JOHN D. BATES
CHAIR

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

ROBERT M. DOW, JR.
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robert M. Dow, Jr., Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: May 13, 2022

Introduction

* * * * *

Part I of this report presents five items for action at this meeting. Amendments to Rules 15(a)(1) and 72(b)(1), and the addition of a new Rule 87, all published for comment in August 2021, are presented for a recommendation to adopt. An amendment of Rule 6(a)(6)(A) is presented for a recommendation to adopt without publication. * * *

* * * * *

Excerpt from the May 13, 2022 Report of the Advisory Committee on Civil Rules

I. Action Items**A. For Adoption: New Rule 87: Civil Rules Emergencies**

The dedicated hard work to develop emergency rules provisions by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees is well known. Civil Rule 87 was published for comment in August 2021 and is now advanced for a recommendation that it be adopted as published, with minor changes in the Committee Note. This recommendation is elaborated in conjunction with the parallel recommendations of the other advisory committees.

* * * * *

C. Recommended for Adoption: Rule 15(a)(1): Mind the Gap

This proposal to amend Rule 15(a)(1) was published in August 2021. The Committee advances it for a recommendation for adoption as published, for the reasons described in the Committee Note. Public comments offer no reason to reconsider. The Committee voted to delete the sentence enclosed by brackets in the Committee Note as an unnecessary elaboration on the meaning of “within.”

(a) Amendments Before Trial.

- (1) *Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course ~~within no later than:~~
- (A)** 21 days after serving it, or
 - (B)** if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

COMMITTEE NOTE

Rule 15(a)(1) is amended to substitute “no later than” for “within” to measure the time allowed to amend once as a matter of course. A literal reading of “within” would lead to an untoward practice if a pleading is one to which a responsive pleading is required and neither a responsive pleading nor one of the Rule 12 motions has been served within 21 days after service of the pleading. Under this reading, the time to amend once as a matter of course lapses 21 days after the pleading is served and is revived only on the later service of a responsive pleading or one of the Rule 12 motions. ~~{The amendment could not come “within” 21 days after the event until the event had happened.}~~ There is no reason to suspend the right to amend in this way. “No later than” makes it clear that the right to amend continues without interruption until 21 days after the earlier of the events described in Rule 15(a)(1)(B).

Excerpt from the May 13, 2022 Report of the Advisory Committee on Civil Rules

SUMMARY OF COMMENTS

Andrew Straw, Disability Party, CV 2021-0003: “I have no problem with the minor change, but the rule must allow an amendment to the operative complaint when an appeal comes back down under certain conditions.” (The balance of the comment complains, among other things, of mistreatment by two federal courts of appeals, dishonest actions by them, inappropriate use of the “frivolous” characterization, and “the 5 law licenses taken away from me with suspension for 54 months.”)

Federal Magistrate Judges Association, CV 2021-0007: “Based on the explanation of the amendment, we foresee no unintended consequences from this modest change.”

New York State Bar Association Commercial and Federal Litigation Section, 21-CV-0008: The proposal is “salutary and desirable.”

Audrey Lessner, CV-2021-0004: It is not clear what proposed amendment this comment addresses, or whether it is intended as a suggestion for a new amendment of Rule 12(a): “I am strongly encouraging the Federal Courts to have a 90-day limit on time to answer a civil case concerning families.”

Federal Bar Association, 21-CV-0013: The proposal is consistent with strengthening the federal judicial system. No objections.

Aaron Ahern, CV-2021-0015: Again, it is not clear which proposed rule amendment this comment addresses: “This must not e[ffect] victims of major crime including gross negligent domestic violence. Who haven’t collected relief. In good faith.”

Changes Since Publication

No changes are recommended in the text of Rule 15(a)(1) as published. The Committee Note is recommended for adoption with the change described above, deleting an unnecessary sentence that was published in brackets.

D. Recommended for Adoption: Rule 72(b)(1): Notice of Magistrate Judge Recommendations

This proposal to amend Rule 72(b)(1) was published for comment in August 2021. Public comments advance no reason for changing or withdrawing the proposal. The Committee voted to delete the sentence in the Committee Note published in brackets. The sentence offered reassurance to guide the comment process, and has served its purpose. The Committee advances the amendment for a recommendation for adoption as published:

(b) Dispositive Motions and Prisoner Petitions.

- (1) *Findings and Recommendations.* * * * The magistrate judge must enter a recommended disposition, including, if appropriate,

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proposed findings of fact. The clerk must ~~promptly mail~~
immediately serve a copy to on each party as provided in Rule 5(b).

COMMITTEE NOTE

Rule 72(b)(1) is amended to permit the clerk to serve a copy of a magistrate judge's recommended disposition by any of the means provided in Rule 5(b). ~~{Service of notice of entry of an order or judgment under Rule 5(b) is permitted by Rule 77(d)(1) and works well.}~~

SUMMARY OF COMMENTS

Federal Magistrate Judges Association, CV 2021-0007: "We endorse this update, which much more accurately reflects current expectations regarding service, and avoids confusion caused by the outdated mailing requirement."

New York State Bar Association Commercial and Federal Litigation Section, 21-CV-0008: The proposal is "salutary and desirable."

Shane Jeansonne, 21-CV-0010: This is a bad idea. Prisoners have no access to the CM/ECF system. If they do not have access to mailed copies of the recommendations, they will be unable to adequately object or appeal. (This comment seems to overlook the provision of Rule 5(b)(2)(E) that allows sending notice by filing with the court's electronic-filing system only as to a registered user.)

Federal Bar Association, 21-CV-0013: The proposal is consistent with strengthening the federal judicial system. No objections.

Changes Since Publication

No changes are recommended in the text of Rule 72(b)(1) as published. The Committee Note is recommended for adoption with the change described above, deleting an unnecessary sentence that was published in brackets.

**E. Recommended for Adoption Without Publication: Rule 6(a)(6)(A):
 Juneteenth Holiday**

The Committee advances for a recommendation to adopt without publication of an amendment of Rule 6(a)(6)(A) to include Juneteenth National Independence Day in the list of statutory holidays included in the definition of "legal holiday." The amendment reflects the Juneteenth National Independence Day Act, P.L. 117-17 (2021).

Adoption without publication will reduce the hiatus between establishment of this new legal holiday and its recognition in rule text. There is no reason for delay -- indeed Rule 6(a)(6)(B) already recognizes the holiday by including as a legal holiday "any day declared a holiday by the President or Congress." Amending Rule 6(a)(6)(A) serves only to make its enumeration of statutory holidays complete.

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As amended, Rule 6(a)(6)(A) would read:

Rule 6. Computing and Extending Time; Time for Motion Papers

(a) Computing Time. * * *

(6) “Legal Holiday” Defined. “Legal Holiday” means:

- (A) the day set aside by statute for observing * * * Memorial Day, Juneteenth National Independence Day, Independence Day, * * *.

COMMITTEE NOTE

Rule 6(a)(6) is amended to add Juneteenth National Independence Day to the days set aside by statute as legal holidays.

* * * * *

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

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EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robert M. Dow, Jr., Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules (Rule 87)

DATE: May 13, 2022

The dedicated hard work to develop emergency rules provisions by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees is well known. Civil Rule 87 was published for comment in August 2021 and is now advanced for a recommendation that it be adopted as published, with minor changes in the Committee Note.

Much of the work that went into the four published emergency rules was devoted to achieving as much uniformity as possible, accepting disuniformities only to the extent required by differences in the fundamental premises of the separate sets of rules. Rule 87 continues to differ from the other emergency rules in a few ways. The standard for declaration of a Civil Rules Emergency by the Judicial Conference is common to all four sets of rules, but does not include the “no feasible alternative measures” addition that is unique to Criminal Rule 62(a)(2). That difference has been discussed extensively and accepted as a response to the particularly sensitive concerns raised by the emergency criminal rules provisions.

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Another disuniformity arises from Rule 87(b)(1)(B), which directs that the Judicial Conference declaration of a Civil Rules Emergency must “adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them.” The parallel provisions in the Bankruptcy and Criminal Rules direct that the declaration must “state any restrictions on the authority granted in” their emergency provisions. This difference was accepted in careful discussions among the reporters after publication of the proposed rules and approved by the advisory committees. The character of the different emergency rules provisions accounts for the difference. Rule 87 authorizes adoption of five Emergency Rules 4, each of which allows the court to order service of process by a means reasonably calculated to give notice. In addition, it authorizes adoption of Emergency Rule 6(b)(2), which displaces the provision in Rule 6(b)(2) that absolutely prohibits any extension of the times set to make post-judgment motions by Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). It can make sense for the Conference to choose among the separate Emergency Rules 4 in declaring a Civil Rules Emergency. Authority to allow service by alternative means on corporations or other entities may seem appropriate, while it may not be appropriate to authorize alternative means of service on individual defendants. But it is not feasible to ask the Conference to identify categories of acceptable or unacceptable methods of service reasonably calculated to give notice. The circumstances of an emergency may be hard to predict, and appropriate alternative methods of service may depend on the nature of the litigation and of the parties. The provisions of Emergency Rule 6(b)(2) that establish discretion to allow no more than an additional 30 days for post-judgment motions are even less suitable for further refinement or “restrictions.” Whether an extension is justified in the particular circumstances of case and parties, and how long any extension might be, cannot be guessed in advance. Emergency Rule 6(b)(2), moreover, presents intricate and carefully resolved questions of integration with the appeal time provisions of Appellate Rule 4. A parallel amendment of Rule 4 is being recommended to ensure effective integration for Rule 60(b) motions.

The provisions for completing acts authorized under Emergency Rules 4 or 6 after expiration of an emergency declaration also differ from the parallel provisions in other rules. These differences too are mandated by the distinctive function of these emergency rules.

Reporters Capra and Struve, who led the uniformity efforts, agree that -- in Professor Capra’s words -- “We’re in a good place on uniformity.” The differences that remain “can be easily explained.”

There were few public comments on Rule 87 as published. A few raised the “delegation” question, vigorously debated during the early development of the emergency rules by the advisory committees and in this committee. No new reasons were advanced to doubt the propriety of relying on the Judicial Conference to declare a rules emergency and to choose from the menu of specific emergency rules responses set out in each emergency rule. The American Association for Justice lauded Rule 87 as published, but suggested that other of the civil rules should be the subject of additional emergency rules to be specified in Rule 87(c) or should be directly amended to accommodate responses to emergency circumstances. The suggestions are cogent. Each of them, however, was carefully considered before Rule 87 was published, and as to each the CARES Act Subcommittee and the Committee concluded that the corresponding civil rules preserve sufficient flexibility and discretion to meet whatever needs may arise. The Committee Note encourages

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courts to make the best use of these qualities as deliberately built into the rules over the course of many years. As much as has been learned about adaptations to the Covid-19 pandemic seems to confirm this confidence in the rules as they are.

Rule 87 did not stimulate extensive Committee discussion. One member asked whether the definition of an emergency is too narrow because it focuses on the court's ability to perform its functions in compliance with the rules. Should not account be taken of an emergency's impact on the parties? Examination of the way in which this problem is addressed in the second paragraph of the Committee Note was found to satisfy this concern.

The Committee Note was revised to respond to a public comment in one respect, adding additional language to reinforce the need to evaluate all opportunities for serving process under Rule 4 before a court orders service by an alternative means under one of the Emergency Rules 4.

The Committee Note was further revised to resolve questions raised by portions that were published in brackets to invite comments. No comments were made. The final and long sentence in the paragraph on Rule 6(b)(1)(A) was deleted as an accurate but unnecessary and potentially confusing reflection on one aspect of the complicated process of integrating Emergency Rule 6(b)(2) with the appeal time provisions of Appellate Rule 4. The final sentence in the paragraph on Emergency Rule 6(b)(2), item B(i), advising that a court should rule on a motion to extend the time for a post-judgment motion as promptly as possible was deleted as gratuitous advice on a point that all judges will understand without prompting. In the last line of the paragraph on resetting appeal time under Emergency Rule 6(b)(2), brackets around "original" will be removed, retaining "original." It seems useful to remind readers that an order finally resolving all issues raised by a Rule 60(b) motion is appealable as a final judgment that does not of itself support review of the earlier -- "original" -- final judgment challenged by the motion.

The Committee voted to advance Rule 87 for a recommendation to adopt as published, with the amendments of the Committee Note described above.

SUMMARY OF COMMENTS

Anonymous, 21-CV-0005: We have three branches of government. "Your job is to bring importance of a matter of emergency declaration then it should be evaluated between three branches of government with respect to our constitution. We can't respect a party that only has one point of you [sic] * * *."

Anonymous, CV-2021-0006: With an extensive quotation from Locke on delegating legislative powers, urges that "to leave any entity sole power over anything would be opposite of what our Constitution represents." So "changing any rule during a national emergency should be illegal. Emergency powers are clearly being abused and extended by many offenders in order to accommodate their agendas."

Federal Magistrate Judges Association, CV 2021-0007: Several members of the group thought the Committee might forgo any new rule for emergencies because the Civil Rules "already provide district courts with tools to address emergency circumstances." There is a great deal of flexibility.

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But the consensus [apparently looking to Emergency Rule 6(b)(2)] was that the rule allows courts discretion to address unique challenges that might arise from different kinds of emergencies. “We did not identify any other areas of the Civil Rules where we thought emergency extensions would be required and are not already permitted by court Order.”

New York State Bar Association Commercial and Federal Litigation Section, 21-CV-0008: Notes that comments it offered last year on possible Civil Rules amendments to respond to an emergency were based on assuming circumstances like the Covid-19 pandemic, “nationwide in scope, and of a sufficient severity to cause the closure of public access to the federal courts.” Proposed Rule 87 does not require an Executive Branch determination of emergency. “Indeed, there is no expressed criteria by which the Judicial Conference can determine that such an emergency exists. We have concerns about such an approach.” If adopted, Rule 87 “should contain explicit criteria under which the Judicial Conference may determine that an Emergency, either national or local, exists.”

American Association for Justice, 21-CV-0012: This comment is detailed and provides strong support for Rule 87 as published, while suggesting additional provisions for Rule 87 and further rules changes to “facilitate flexibility in emergency situations.” These suggestions cover issues that were considered at length in subcommittee and committee, often by other advisory committees, and at times by the Standing Committee. They are important and will be described in some detail, with brief statements of the reasons why they were not recommended while generating Rule 87. The fact that the issues have been considered in the past does not mean that further consideration is inappropriate. But the reasons that proved persuasive once may remain persuasive.

AAJ conducted a survey at the end of January, 2021 to gather information from its members about experience during the first year of the Covid-19 pandemic. Its proposals rest in part on the 112 responses, and in part on more a more general sense of experience during the pandemic.

AAJ strongly supports the provisions in Rule 87 as published. The definition of a rules emergency properly omits the “no feasible alternative measures” provision that appears in, and is appropriate for, Criminal Rule 62. Confiding authority to declare a rules emergency in the Judicial Conference is wise, although a “backup” provision should be added. The structure that provides that a declaration of a civil rules emergency adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them “helps streamline the process and creates less work for the Judicial Conference.” The provisions for completing proceedings begun under an emergency rule after the declaration terminates also are proper.

AAJ suggests there should be a backup plan to cover a situation in which the Judicial Conference is unable to meet to declare a rules emergency. This subject was discussed and put aside by each of the advisory committees. In January, 2021, the Standing Committee thought it deserved further consideration. The advisory committees deliberated further, and again recommended that any attempt to create such a provision for a “doomsday” scenario would be unwise, for reasons described at pages 80-81 of the June, 2021 Standing Committee agenda materials.

More specific recommendations suggest review of “several specific rules that would clarify what can be done virtually versus in-person during emergencies,” noting that “a hybrid of in-person and virtual proceedings seems to be the direction courts are headed towards.” Indeed, it

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may be time to consider broader rules provisions to facilitate virtual trials. Several clarifications of “in-person court requirements” are suggested. It is not always clear whether the suggestions are for new emergency civil rules to be added to Rule 87(c); perhaps none of them are. Instead, the suggestions at times clearly contemplate adding provisions to the regular rules that are available only in emergency circumstances, without describing what constitutes an emergency or who -- most likely the trial judge -- decides whether there is an emergency. Some of the proposals suggest general amendment of a current rule without being limited to an emergency.

The three rules suggestions in the first set aim at allowing witnesses to appear by video conference in emergency situations. (1) Rule 32(a)(4)(C) allows a deposition to be used at trial if the witness is unable to attend because of age, illness, infirmity, or imprisonment. The suggestion is to permit court and parties to determine the best ways to ensure the safety of witnesses while protecting the rights of the parties “during a public health emergency.” The suggestion seems to extend beyond allowing use of the witness’s deposition at trial, perhaps in part because of other provisions in Rule 32(a) that allow a party’s deposition to be used for any purpose and allow the court to permit use of a deposition in exceptional circumstances. (2) Rule 45(c) limits the geographic reach of a subpoena to command a person to attend a trial, hearing, or deposition. The rule is not qualified by conferring a right not to attend during an emergent event, or when travel is otherwise challenging or burdensome. It should be amended to permit appearance by video conference, or even telephone, for good cause. Rule 43(a) now permits testimony in open court by contemporaneous transmission from a different location, on terms that should be readily met in any circumstances that would qualify as an emergency. And see also the general protective order provisions of Rule 26(c). (3) Rule 77(b) directs that no hearing may be conducted outside the district unless all affected parties consent. This provision was considered by the subcommittee, by all advisory committees -- most especially the Criminal Rules Committee. 28 U.S.C. § 141(b)(1), which provides for special sessions outside the district, also was considered. The conclusion was that remote proceedings satisfy the current rule, at least as long as the judge is participating from a place within the district, and likely more broadly if an emergency forces a court’s judges to leave the district. The question remains under consideration by other Judicial Conference committees.

The second set of three rules described by AAJ is more easily disposed of. (1) and (2): Rules 28 and 30(b)(5)(A) direct that a deposition be conducted “before” an officer. AAJ recognizes that courts have allowed remote connections to count as “before” during the pandemic, but suggests time and resources would be saved by avoiding litigation of the issue. “Before” should be clarified, they urge, to ensure that the reporter need not be in the same physical location as the witness or counsel during an emergency situation. Subcommittee consideration of this issue concluded that the present rule text meets the need. It seems likely that continuing practice during the pandemic will confirm this conclusion. (3): Rule 30(b)(4) allows a deposition “by telephone or other remote means.” AAJ proposes an amendment to expressly include “video conference” as an appropriate remote means, and to make virtual hearings the default means “during certain emergencies.” The present language suffices to authorize video conferencing. Defining “certain emergencies” could prove difficult.

Finally, AAJ suggests that “language should be used” to clarify that local rules adopted during an emergency may not conflict with Rule 87 and must conform to 28 U.S.C. §§ 2072 and 2075. 28 U.S.C. § 2071(a) and Rule 83(a)(2) suffice to ensure this proposition.

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Federal Bar Association, CV-2021-0013: “[T]he FBA believes the judiciary is best suited to declare an emergency concerning court rules of practice and procedure. The proposed amendments * * * provide important flexibility for the U.S. Courts in unforeseen situations, some of which may not rise to the level of a national emergency.” The FBA also “agrees that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency.” This will help prevent a disjointed or balkanized response, particularly in circumstances that affect only particular regions or subsets of federal courts. And the FBA “applauds the Rules Committee’s success in achieving relative uniformity across all four emergency rules.”

Lawyers for Civil Justice, CV-2021-0014: The need for any Emergency Rule 4 provisions should be carefully considered. “Rule 4 has functioned well during the pandemic.” “Reasonably calculated to give notice” is a vague phrase that “could obviate established due process * * * by permitting courts to authorize alternative methods of service that will not necessarily ensure that actual notice occurs.” e-mail or social media service might be authorized. “The potential alternative methods of service are without limit * * *.” The risks of failure of notice are significant, particularly during an emergency situation. And the rule should provide that even if an alternative method of service is authorized, a default can be entered only after requiring service by a traditional method.

Changes Since Publication

No changes are recommended in the text of Rule 87 as published. The Committee Note is recommended for adoption with the changes described above, adding new language reinforcing the importance of considering the methods of service authorized by Rule 4 before ordering an alternative method under one of the Emergency Rules 4, removing two sentences published in brackets, and removing the brackets from a single word.

