THE SEPARATE DOCUMENT RULE OF FED. R. CIV. P. 58: THE HISTORY, THE MYSTERY, AND THE FUTURE

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> *Without explanation, the district court failed to enter a separate declaratory judgment as Plaintiffs had requested. The court's opinion made clear its holding "that Proposition 8 is unconstitutional" . . . But the clerk apparently never issued this declaratory judgment as a separate document, as Fed. R. Civ. P. 58 requires.*[1]

-The Separate Document Rule Claims Another Victim

I. INTRODUCTION

Be honest: you have never thought about Rule 58 of the Federal Rules of Civil Procedure. If you're lucky, you may never have to think about civil procedure at all. You might be a corporate attorney, for all I know, announcing to rooms full of summer associates that you have not used Lexis in a decade and a half. But even on the litigation side, few need to pay any obvious notice to Rule 58, which in its modern form reads (in part) as follows:

> Rule 58. Entering Judgment
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> (a) Separate Document. Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:
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> (1) for judgment under Rule 50(b);
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> (2) to amend or make additional findings under Rule 52(b);
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> (3) for attorney's fees under Rule 54;

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[1] Perry v. Brown, 671 F.3d 1052, 1069 n.5 (9th Cir. 2012), *vacated*, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

> (4) for a new trial, or to alter or amend the judgment, under Rule 59; or
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> (5) for relief under Rule 60.
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> . . .
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> (c) Time of Entry. For purposes of these rules, judgment is entered at the following times:
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> (1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or
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> (2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:
>
> (A) it is set out in a separate document; or
>
> (B) 150 days have run from the entry in the civil docket.
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> (d) Request for Entry. A party may request that judgment be set out in a separate document as required by Rule 58(a) . . . .[2]

It is easy to see why Rule 58 attracts little attention. In a crowd of fiddly and specific rules, Rule 58 is one of the fiddliest. Worse, it is not even directed at litigants. It tells federal district courts what to do, and is in part directed at the *clerk's office* of the court, that unfathomable entity that rejects your brief if you had the temerity to compose it in Garamond.[3] It contains one brief sop to litigant interaction in subsection (d), and that provision says, more or less, "you can ask the court to do what the rest of this rule said it should do."[4]

But Rule 58 is more important than it first appears. In fact, it stands at a crucial crossroads in litigation: when trial-court proceedings end, and the time to appeal (or file post-judgment motions) begins to run. Thus, for years, the rule has been the source of a great amount of litigation. It has starred in several Supreme Court opinions—unsigned *per curiam* opinions, to be sure, but opinions nonetheless—along with numerous federal appellate decisions.[5] And as my chosen epigraph makes clear, Rule 58 also appears in walk-on

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[2] FED. R. CIV. P. 58.

[3] *See* FED. R. CIV. P. 58(b)-(c). Subsection (c) refers, in turn, to Fed. R. Civ. P. 79(a), which instructs the clerk's office on the proper procedures for maintaining the court's civil docket. FED. R. CIV. P. 79(a).

[4] *See* FED. R. CIV. P. 58(d).

[5] *See, e.g.*, Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978) (per curiam); United States v. Indrelunas, 411 U.S. 216 (1973) (per curiam); Freudensprung v. Offshore Tech. Servs. Inc., 379 F.3d 327 (5th Cir. 2004); United States v. Torres, 282 F.3d 1241 (10th Cir. 2002).

roles in cases of both high and low profile, sometimes hiding in footnotes that gently—but firmly—signal that something has gone awry.[6]

The reason for much of this litigation was that actual compliance with Rule 58 means fulfilling several formal requirements. For over a half century, the Rule has required that each "judgment"—defined, essentially, as an appealable order—be set out in a "separate document."[7] This "separate document rule," or SDR,[8] was introduced to Rule 58 in 1963 as a way of better defining the divide between trial and appellate phases of a case.[9] By instructing courts to enter appealable orders and judgments as separate documents,[10] the SDR was supposed to provide a clear landmark to the parties. But in reality, the SDR was and is often ignored or overlooked; and of course, lawyers and judges are uniquely skilled at taking simple concepts and complicating them beyond all recognition (especially when they implicate federal jurisdiction, a topic of some leaden seriousness). The SDR was born of the best of intentions, but not only did it fail to solve the problem it targeted, it arguably created a whole host of others—at least until a 2002 amendment softened its impact, removing some of the more fundamental problems caused by noncompliance.[11]

Because the SDR operates largely on the margins and can seem to be a relic of a bygone age in the era of electronic filing and service, it continues to attract little attention, as does Rule 58 in general. There are more important things in life, after all, like discovery disputes, final pretrial orders, and ERISA.

But even today, attorneys and litigants ignore the SDR at their peril. During my three years working for a federal appellate court, I saw potentially meritorious appeals that would not have been timely pursued if not for the SDR. I read briefs drafted by highly decorated attorneys at expensive litigation boutiques—briefs that probably incurred five-figure charges for the

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[6] *See, e.g.*, Moore v. Warwick Pub. Sch. Dist. No. 29, 794 F.2d 322, 323 n.1 (8th Cir. 1986).

[7] FED. R. CIV. P. 58(a).

[8] Also known as the "separate judgment rule." *See, e.g.,* Casey v. Albertson's Inc., 362 F.3d 1254, 1257 (9th Cir. 2004). While I actually prefer the "separate judgment" phrasing—it flows better and I admire the cut of its jib—the "document" construction is more precise, thanks to the complex definition of the word "judgment" discussed further *infra*.

[9] The SDR also appears elsewhere; parts of it are in Rule 4 of the Federal Rules of Appellate Procedure (Fed. R. App. P), for example. *See* FED. R. APP. P. 4(a)(7)(A). But since Rule 58 is its birthplace and the Rule transcends appeals, this piece will generally employ Rule 58 as shorthand for the host of issues surrounding the SDR. Also, this Article will not reach state equivalents of the SDR. *See, e.g.,* HAW. R. CIV. P. 58, http://www.courts.state.hi.us/docs/court_rules/rules/hrcp.htm; MONT. R. CIV. P. 58, http://leg.mt.gov/bills/mca_toc/25.htm. As I claim no expertise whatsoever in the ins and outs of Hawaii or Montana civil procedure, this paper will leave exploration of corresponding state rules to the next brave/foolhardy adventurer. *But see* Jenkins v. Cades Schutte Fleming & Wright, 869 P.2d 1334, 1337 (Haw. 1994) (discussing "vexing problem" of non-compliance with Hawaii's SDR).

[10] FED. R. CIV. P. 58 (1963).

[11] *See* FED. R. CIV. P. 58 advisory committee's note (2002).

firm's giant corporate clients—that were written in complete ignorance of the SDR. As the Eighth Circuit wrote in 1988:

> [A]ll too often lawyers also ignore the requirements of Rule 58. The winning side needs to inquire whether a separate judgment has been duly entered to assure finality. The losing party also needs to confirm that entry as a basis to file timely post-judgment motions or to protect rights to a timely and proper appeal.[12]

In this article, I hope to give the SDR—and Rule 58 in a broader sense (sans Rule 58(e), its attorney-fees provision)—the spark of publicity it has hitherto lacked. This, after all, is a rule that manages to subvert the orderly operation of the jurisdictional grant by Congress to the federal courts. It is a rule that allows a district judge to extend the time to appeal fivefold by simply adding two unnecessary citations to her order.[13] The Rule is central to congressional policies and preferences against piecemeal appeals, but falls apart in puzzling ways on the margins. The SDR may not become your "new best friend,"[14] but awareness is an oft-undervalued thing. And, once aware, you will start spotting violations left and right.

I also will show why, far from being an anachronism, Rule 58 and its SDR are more important than ever in the twenty-first century, the age of electronic filing. Litigation remains complex, and recent federal jurisprudence on filing deadlines has heightened the penalties for blowing a deadline, even for the best of reasons.[15] Way stations and landmarks, as well as distinct paper trails, are a must, and Rule 58 can ably fill those roles. I argue that, in order for Rule 58 to be truly effective, courts must adopt clearer standards governing its application, taking into account the realities of the current PACER/ECF system. In fact, one court has done so; the United States Court of Appeals for the Third Circuit has comprehensively tackled both the mechanical requirements of the Rule and its connections to the federal electronic filing system, thereby showing a promising way forward.[16] Ideally, a variation on the Third Circuit's mechanical requirements would be added to Rule 58 in a future revision, as there is no need for the Rule itself to remain opaque.

The article is organized as follows. Part II sets forth the purpose and history of the Rule, and will touch upon the problems in its jurisprudence that led to its substantial revision in 2002.[17] Part III explains *how* the SDR works: what violates it, what complies, and how the Circuits have (both before and since 2002) implemented different policies regarding its use and misuse.

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[12] Sanders v. Clemco Indus., 862 F.2d 161, 168 (8th Cir. 1988).

[13] FED. R. CIV. P. 58(c).

[14] Andrew M. Low, *Separate Document*, 39 COLO. LAW. 55, 56 (2010).

[15] *See, e.g.*, Mobley v. C.I.A., 806 F.3d 568, 577 (D.C. Cir. 2015) (discussing the partial overruling of the "unique circumstances" doctrine, which allowed for the relaxation of timeliness rules when a party relied on an erroneous district court ruling).

[16] *See* LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 224 (3d Cir. 2007).

[17] *See* 1-VII MOORE'S FEDERAL RULES PAMPHLET § 58.2 (2015) ("[u]ndoubtedly, the most significant substantive amendments were made in 2002 . . . .").

This Part also explains why the Third Circuit's pioneering approach to the SDR's mechanical requirements makes quite a bit of sense, and should be adopted more broadly. Part IV reaches why the Rule matters; why it is a true anomaly in a world where jurisdiction is never supposed to yield, and why it causes tension in the orderly progression of federal civil procedure. In the conclusion, Part V, the SDR's place in the twenty-first century—the e-filing age—will be briefly examined.

II. THE HISTORY AND THE MYSTERY[18]

In the third episode of the BBC sitcom "Spaced," a performance artist with an anatomically suggestive name stages a bout of performance art involving a vacuum cleaner, a surly assistant, and ungrammatical exclamations.[19] The act is apparently winding to a close by falling silent, and the audience begins, tentatively, to clap.[20] "It's not finished," our artist barks.[21] The clapping stops.[22] Then, grudgingly, moments later: "It's finished."[23]

Federal practice, while generally less colorful, works in much the same way. Beginning with the very first Judiciary Act, the federal system has disfavored piecemeal appeals; finality was and is the order of the day.[24] In the classic articulation, a judicial decision is "final," and thus appealable, when it resolves all claims brought by and against all parties, "end[ing] the litigation on the merits and leav[ing] nothing for the court to do but execute the judgment."[25]

Rule 58 was intended to help litigants and courts identify the "it's finished" moment in federal litigation. While easy to pinpoint in simple litigation, finality becomes all the more elusive in a multi-party, multi-claim action, or one that has simply drawn a less-than-crystal-clear resolution due

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[18] For discussion on the definitive legislative history of Rule 58 (ending right before the 2002 revisions), *see* Daniel Tomson, *Rule 58's Dirty Little Secret: The Problematic Lack of Uniform Enforcement of Federal Rule of Civil Procedure 58 within the Federal Court System*, 36 VAL. U. L. REV. 767 (2002).

[19] *Spaced: Art* (BBC television broadcast Oct. 8, 1999) (a clip of just the performance in question can be found at the unauthorized YouTube link, https://www.youtube.com/watch?v=APjDtBNZiNA).

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *See* Cobbledick v. United States, 309 U.S. 323, 324-25 (1940); *see also* Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962). Of course, Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1292(b)(2), among other rules and doctrines, preserved the possibility of piecemeal appeals in certain situations, but made them the exception, not the rule. For an interesting discussion of the problems posed by Rule 54(b), as encountered by one jurist who was also a member of the Rules committee, *see* Michael E. Smith, *Judge Charles E. Clark and The Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 938-48 (1976).

[25] Catlin v. United States, 324 U.S. 229, 233 (1945). This articulation of finality predates the Federal Rules of Civil Procedure. *See, e.g.*, St. Louis, Iron Mountain & S. R.R. Co. v. S. Express Co., 108 U.S. 24, 28-29 (1883).

to the form and scope of the requested relief. Thus, "Rule 58 [was] intended to promote efficiency and prevent confusion by providing a catch-all judgment when the court becomes aware that no claims are left undecided."[26] Its success at so doing, however, would prove to be somewhat mixed.

A. The Original Rule 58: Clarity of Judgment

Rule 58 debuted in 1938 alongside the rest of the Federal Rules of Civil Procedure (Fed. R. Civ. P.).[27] It was a far simpler rule overall, designed for an age without PACER/ECF and with litigation as an overall-less-complicated undertaking. Like its modern counterpart, it spoke to the district court itself, coordinating the operation of chambers and the clerk. Lacking subdivisions, it read, in full:

> Unless the court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs the entry of a judgment that a party recover only money or costs or that there be no recovery, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry.[28]

The final sentence of that dense block of text, which explicitly defined the "entry of judgment" as its notation in a civil paper docket, marked an important innovation in federal practice.[29] "Entry of judgment" had traditionally been the moment where certain important time limits began to

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[26] Morley v. Peel-Pohto, 309 F. App'x 100, 102 (9th Cir. 2009) (nonprecedential per curiam); *see also* United States v. Indrelunas, 411 U.S. 216, 217-18 (1973). However, "finality" and "Rule 58" are not necessarily coterminous. As will be discussed later, a case can be "final" without ever complying with the SDR, and a separate document can be entered on something that is not final. *See, e.g.*, Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 691 (7th Cir. 2015) (noting that judgment was final despite noncompliance with Rule 58); Casey v. Albertson's Inc., 362 F.3d 1254, 1258 (9th Cir. 2004); Theriot v. ASW Well Serv., Inc., 951 F.2d 84, 87-88 (5th Cir. 1992); *see also* Stevens v. Santander Holdings USA Inc., 799 F.3d 290, 294 (3d Cir. 2015) (holding that a decision was not final and thus not appealable, notwithstanding the district court's entry of separate judgment and its direction to its clerk to close the underlying case).

[27] *See* Tomson, *supra* note 18, at 777.

[28] FED. R. CIV. P. 58 (1938).

[29] *See* Hon. Alexander Holtzoff, *A Judge Looks at the Rules After 15 Years of Use,* 15 F.R.D. 155, 155 (1954) ("The adoption of the new Federal Rules of Civil Procedure in 1938 was an epoch-making event in the history of jurisprudence.").

run[30]—a feature preserved by the new Federal Rules of Civil Procedure[31]—but what constituted that "entry" could be a puzzler in the wooly world of pre-Rules jurisprudence, before the unification of law and equity.[32] Would the relevant event be the entry of a decree, *or* the awarding of costs, *or* the date that both events were apparently recorded?[33]

The intent of the rendering court sometimes had to be divined on a case-by-case basis, surely an annoyance to litigants. In one instance, an earlier entry having "all the essential elements of a final decree" would have been treated as final, if not for the subsequent entry of a document that "was regarded both by the court and the counsel as the final decree in the cause."[34] Further, at common law, the recording of a judgment was not always a prerequisite to the running of the appellate clock.[35] This pre-Rules state of affairs spawned its fair share of "procedural nightmare[s]."[36]

Changing the field, Rule 58 defined, in simple fashion, what was meant by "entry of judgment," bringing some needed clarity to an important subject.[37] Referencing Rule 79, which set forth procedures for the clerk of the court to create and keep dockets and to reflect when various notations were made,[38] Rule 58 envisioned a docketing system with a strong paper trail and ample notice to parties.[39] While parts of the two rules might have seemed overly technical, they served to standardize the process and provide a veneer of uniformity across judicial districts, which had "formerly [been] governed by local practice."[40] Now, however, a jury award reduced to writing, followed by the notation of that event on the docket (pursuant to Rule 79(a)), clearly "made the judgment effective at the date of entry."[41] The two rules,

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[30] *See* Bd. of Comm'rs v. Gorman, 86 U.S. 661, 663-64 (1874); FRANK O. LOVELAND, THE APPELLATE JURISDICTION OF THE FEDERAL COURTS § 40 (1911).

[31] *See* 28 U.S.C. § 230 (1938); FED. R. CIV. P. 59(b) (1938); FED. R. CIV. P. 73(a) (1948).

[32] *See* WILLIAM CLEARY SULLIVAN, A TREATISE ON THE FEDERAL RULES OF CIVIL PROCEDURE § 1181 (1949) (discussing the "complete reversal" of practices under the new Rules); *see also* W.S. SIMKINS, A FEDERAL EQUITY SUIT 581-90, 623, 640 (3d ed. 1916) (discussing, without defining, entry of judgment under the Equity Rules).

[33] *See, e.g.*, Fowler v. Hamill, 139 U.S. 549, 550 (1891) (holding that the earliest date controlled, but that the appeal would have been untimely in any event).

[34] Rubber Co. v. Goodyear, 73 U.S. 153, 155-56 (1868); *see* LOVELAND, *supra* note 30, at § 91.

[35] *See* United States v. Eliopoulos, 158 F.2d 206, 207-08 (2d Cir. 1946) (discussing the rendering of judgment).

[36] The Washington, 16 F.2d 206, 208 (2d Cir. 1926).

[37] FED. R. CIV. P. 58 (1938).

[38] FED. R. CIV. P. 79(a). It is worth noting that Rule 79 is very similar to Rule 3 of the old, 1913 Equity Rules. *See* 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2782 (3d ed. 2015) ("As originally adopted in 1938, Rule 58 combined a number of features of the former Equity Rules and of state laws.").

[39] 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2782 (3d ed. 2015).

[40] 3A GUSTAVUS OHLINGER, JURISDICTION AND PROCEDURE OF THE COURTS OF THE UNITED STATES IN CIVIL ACTIONS 404-05 (1948). Local practice could still play a part, but it would no longer be the only game in town.

[41] Hill v. Hawes, 320 U.S. 520, 521 (1944). How detailed the actual "entry" needed to be was also to be the subject of litigation, although in the absence of additional requirements from

58 and 79, went hand in hand: "Rule 58 tells the parties what types of documents constitute judgment, and Rule 79(a) tells the parties how the clerk must enter those documents on the civil docket. Only when both rules are satisfied is there an 'entry of judgment.'"[42] Thus, a mere six years after the promulgation of the original 1938 Rules, the Supreme Court could bemoan the lack of an analogous Rule in governing criminal appeals.[43]

B. The Context and Apparent Scope of the Original Rule 58

Federal litigation at the dawn of the Rules, and for decades after, was markedly different than the modern system familiar to many attorneys practicing today. This is plain from the text of the original Rule 58 itself. What it mentions first, and at length, is not motions practice, but the *entry of judgment upon a jury verdict*.[44] In effect, it tells the clerk of the court not to tarry in reducing the jury's decision to writing.

In fact, the Rule as written sounds like a trial rule, and a trial rule only. Was something simple won at trial? The clerk should enter a judgment saying that someone won, creating a record and jumpstarting the post-trial process.[45] Conversely, was nothing won at trial? Same result. But if the relief to be parceled out is a little bit more complicated, the judge needs first to take a look at the judgment form, to ensure that all of the dots and crosses are in place.

But—and this is a big caveat that we will return to a bit later—that reading cannot be squared with Rule 54, which debuted alongside Rule 58. In its inaugural revision, Rule 54(a) said that "judgment," as it was used in the new Federal Rules, "include[d] a decree and any order from which an appeal lies."[46] In other words, the "judgment" to which Rule 58 referred was not just the paper saying what happened, when, and who was to get what after a jury did its thing, but the whole universe of things that could end a case.

So, while Rule 58 is most easily read as a trial rule, it also had to function for the whole universe of possible dispositions, making sense for appealable orders of all stripes. It is to this tension that the federal courts were quickly forced to turn.

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the Rule itself, courts found that docket detail—actually mentioning the claims disposed of, for example—was unnecessary. *See* Nichols-Morris Corp. v. Morris, 272 F.2d 586, 588 (2d Cir. 1959) ("To require the clerk's entry specifically to refer to each claim in the complaint would put upon lay personnel in the clerk's office an impracticable burden. Moreover, acceptance of plaintiff's contention that the clerk's notation was ineffective because it did not show plaintiff's failure to obtain all the relief sought would accord to the prayers for relief an importance they are not given under federal procedure.").

[42] Radio Television Espanola S.A. v. New World Entm't, Ltd., 183 F.3d 922, 930 (9th Cir. 1999).

[43] *See* United States v. Hark, 320 U.S. 531, 534 (1944); *see also id.* at 537 (Murphy, J., dissenting) (discussing the particular local practice in the District of Connecticut).

[44] FED. R. CIV. P. 58.

[45] *Id.*

[46] FED. R. CIV. P. 54(a) (1938).

C. So What Is a Judgment, Really? The Supreme Court's Schaefer Decision

While it aimed to foster simplicity, the original Rule 58—and its first revision in 1948, which clarified some of its language[47]—matched its ambition with an equivalent flaw. Although it defined "entry of judgment" with precision, it left open which of many possible orders and documents might be the operative document. The rules themselves promulgated sample forms, but as exemplars, they did not cover the field. When was a "judgment a judgment?"[48]

Compliance with Rule 58 was no mere technical matter, to be disregarded at a whim. Under both the 1938 and 1948 versions of the Rule, judgment was "not effective" until it was properly entered.[49] Thus, a lower court's failure to comply with Rule 58 meant that an appeal taken from what appeared to be a final action of the trial court, disposing of all claims against all parties, could in fact be premature, depriving the appellate court of jurisdiction to reach the merits.[50]

Rule 58 also implicated issues of finality, the "nothing left to do but execute the judgment" standard that provided the traditional measure of

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[47] The 1948 revision of Rule 58 amounted to tinkering, mostly on account of intervening changes to Rule 54(b). *See* FED. R. CIV. P. 58 advisory committee's note (1946). This revision of the rule read:

> Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerks shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

Id.

[48] *See* Cedar Creek Oil & Gas Co. v. Fidelity Gas Co., 238 F.2d 298, 298 (9th Cir. 1956) ("We have here the old, old question of when is a judgment a judgment. As usual, there is a variation in the facts from the last case or any other case on the subject."); *see also* United States v. Higginson, 238 F.2d 439, 442 (1st Cir. 1956) ("The problem of what constitutes a 'final judgment' has been treated by most of the circuit courts, but without a great degree of uniformity.").

[49] *See* FED. R. CIV. P. 58 (1948); FED. R. CIV. P. 58 (1938).

[50] *See* Brown v. United States, 225 F.2d 861, 863 (8th Cir. 1955) (deciding that a notation of jury verdict was not an appealable judgment); *see also In re* Cal. Associated Prods. Co., 183 F.2d 946, 949 (9th Cir. 1950) ("The memorandum opinion, aside from the question whether it constituted a definitive, appealable order at all, was not noted in the clerk's docket . . . ."); McAlister v. C. J. Dick Towing Co., 175 F.2d 652, 654 (3d Cir. 1949) (dismissing an appeal when the district court failed to enter judgment on a jury's verdict).

appellate jurisdiction.[51] Even at this early stage, "finality" and compliance with Rule 58 were two different things, although they were and are often conflated, entangled by language tethering the effectiveness of a judgment to compliance with Rule 58.[52] The Rule did not, strictly speaking, ever really define "finality," because a court's decision could be satisfactorily final without ever being formally entered on the docket. Instead, the Rule acted as an additional gatekeeper to aims like an effective appeal.[53] But these two inquiries—finality and satisfaction of Rule 58's docket entry requirement—were not easy to separate practically or intellectually, especially when the "finality" of what *was* entered was less than clear.

Faced with spare definitions in the relevant rules, courts found themselves having to answer deceptively simple questions as to the breadth of their reach. For example: could a written judicial opinion satisfy Rule 58? The "mere filing" of such an opinion, without a corresponding docket entry under Rule 79(a), was well understood not to do so.[54] In 1949, for example, the First Circuit emphasized that under current law, while a "judgment" had to exist prior to the clerk's entry, there was no "requirement that judgment be pronounced in any particular way, or embodied in written form is a separate formal document entitled 'Judgment.'"[55] Other courts, while noting that an opinion "is not part of the record proper" in federal courts, were concerned with the clarity brought forth by a succinct and unambiguous order.[56]

After two decades of perplexing the lower courts, Rule 58 finally reached the Supreme Court in 1958. *United States v. F. & M. Schaefer Brewing Co.*[57]

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[51] Catlin v. United States, 324 U.S. 229, 233 (1945).

[52] *See, e.g.*, Franklin v. District of Columbia, 163 F.3d 625, 630 (D.C. Cir. 1998) ("While a properly entered separate judgment is an indicium of finality it is not conclusive.") (internal citation omitted). Of course, courts do their fair share of mixing the two terms, thereby confusing everyone. Picking on the Eighth Circuit: *see, e.g.*, Taylor v. United States, 792 F.3d 865, 867 n.1 (8th Cir. 2015) ("The district court did not enter a separate judgment, so its January 30, 2014 order granting Taylor's motion to vacate became final 150 days after the order was entered."); Cardinal Health 110, Inc. v. Cyrus Pharm., LLC, 560 F.3d 894, 902 (8th Cir. 2009) ("Under Fed. R. Civ. P. 58(a), entry of judgment must be 'set out in a separate document' before it is final."); Composite Tech., Inc. v. Underwriters at Lloyd's, London, 762 F.2d 708, 710 n.3 (8th Cir. 1985) ("District judges are reminded, however, that the separate-judgment rule is mandatory, and that it plays an important role in making a judgment 'final' and in determining when the time for filing a notice of appeal starts to run."). *But see* Public Water Supply Dist. No. 8 v. City of Kearney, 401 F.3d 930, 933 (8th Cir. 2005) (recognizing that the absence of SDR compliance does not affect finality).

[53] *See, e.g.*, Smith-Bey v. Hosp. Adm'r, 841 F.2d 751, 756 (7th Cir. 1988) ("Because there is no question about the finality of the district court's decision, the absence of a Rule 58 judgment does not prevent us from hearing this appeal.").

[54] *See* St. Louis Amusement Co. v. Paramount Film Distrib. Corp., 156 F.2d 400, 401-02 (8th Cir. 1946) (per curiam).

[55] *In re* Forstner Chain Corp., 177 F.2d 572, 576 (1st Cir. 1949) (citing United States v. Hark, 320 U.S. 531, 534 (1944)).

[56] *See In re* D'Arcy, 142 F.2d 313, 315 (3d Cir. 1944). For a discussion of the "primacy" of judgments proper, see Edward Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 136-48 (1999).

[57] United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227 (1958).

was the perfect Rule 58 head-scratcher; it could have been drawn from a law school fact pattern.

The facts themselves were straightforward. After the district court granted the plaintiff summary judgment in April, the clerk entered the following in the docket: "April 14, 1955. Rayfiel, J. Decision rendered on motion for summary judgment. Motion granted. See opinion on file."[58] But more than a month later, a formal "judgment" was presented to the district judge, who signed it in May.[59] The clerk then made another docket entry: "May 24, 1955. Rayfiel, J. Judgment filed and docketed against defendant in the sum of $7189.57 with interest of $542.80 together with costs $37 amounting in all to $7769.37. Bill of Costs attached to judgment."[60]

Problems arose when the government attempted to appeal from that May order.[61] The government's adversary argued—and the Second Circuit agreed—that the notice of appeal was filed too late, because the April action (and the clerk's notation of it) constituted the judgment and the entry of judgment pursuant to Fed. R. Civ. P. 58.[62]

The Supreme Court was asked to review whether the Second Circuit had identified the correct moment that the appellate clock began to run.[63] Among the government's chief arguments for timeliness was a bit of foreshadowing: "that practical considerations require that a final judgment be contained in a separate document so labeled."[64]

In ruling the appeal to be timely, thereby reversing the Second Circuit's decision, the Supreme Court created a "totality of the circumstances" test, an objective search for signs of finality.[65] The Court reasoned that, issues of practicality aside, "no present statute or rule so requires" a particular "form of words . . . to evince [the] rendition [of a judgment]."[66] In a simple case for a money judgment, if a district judge's 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," then a final judgment it is, and its entry by the clerk satisfies Rule 58.[67] However, if it is "doubtful whether the judge intended it to be his final act in the case"—for instance, if the opinion left out the amount to be awarded—then it is not a Rule 58 judgment, and its entry cannot fulfill the requirements of the Rule.[68]

Applying the principle to the case before it, the Supreme Court reasoned that since the district court's April opinion and entry failed to "state facts

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[58] *Schaefer*, 356 U.S. at 229.
[59] *Id.*
[60] *Id*.
[61] *See* F. & M. Schaefer Brewing Co. v. United States, 236 F.2d 889, 891 (2d Cir. 1956).
[62] *Id.*
[63] *Schaefer*, 356 U.S. at 229.
[64] *Id.* at 231.
[65] *Id.* at 235-36.
[66] *Id.* at 232 (quoting United States v. Hark, 320 U.S. 531, 534 (1944) (internal quotations omitted).
[67] *Id.* at 232.
[68] *Id.* at 233.

necessary to compute the amount of interest to be included in the judgment," the May order, which did so, was the "final" document.[69] Hence, the appeal was timely.[70]

Schaefer established that the entry of a "final-looking" ruling satisfied Rule 58, even if another "final action"—such as the entry of a formal judgment—was to follow.[71] An opinion or order could therefore have the effect of a judgment if it left nothing else in the case to be resolved.[72] For example, if a district judge granted a motion to dismiss, ending his order with "the Plaintiff's Complaint be and is hereby dismissed" made "with prejudice to the Plaintiff," *that* order, and not the "Final Judgment" entered two weeks later, started the clock.[73] By contrast, an opinion or order that specifically contemplated future action was not final, and its entry did not satisfy Rule 58.[74]

But this rule of finality was more easily explained than followed without deviation. In one post-*Schaefer* case, an announcement from the bench that a motion was "hereby denied," even when accompanied by the clerk's docket entry saying "Court denies motion," was held *not* to be final judgment when the district judge appeared to contemplate the submission of a future order and the statute in question (28 U.S.C. § 2255) required more action.[75] In that instance, even though the order looked "final-ish" under *Schaefer* and was accompanied by a fairly unambiguous docket entry, the clock did not start.[76]

Schaefer did not solve a problem inasmuch as it simply redefined the boundaries of the problem. Appellate courts were now to decode dockets on a case-by-case basis, almost a return to the pre-Rules status quo. In *Schaefer*'s wake, one court of appeals tasked the district courts with ensuring that entries were "unambiguous on [their] face so that counsel or a party consulting the docket will have no reasonable basis for doubt as to the nature and effect of what has been done or as to the timeliness of further proceedings."[77] Another nudged for a slightly different outcome, expressing its belief that "confusion will be avoided and greater certainty will be

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[69] *Schaefer,* 356 U.S. at 234-36.

[70] *Id.* The Court tag-teamed *Schaefer* with a short *per curiam* opinion pertaining to a far-less-pressing Rule 58 inquiry: whether an order sustaining a dismissal of a complaint, but granting leave to amend, could be a final judgment whose Rule 58 entry started the appellate clock. Jung v. K. & D. Mining Co., 356 U.S. 335, 336–37 (1958) (per curiam). The Court held it could not. *Id.* at 337.

[71] *Schaefer*, 356 U.S. at 234-35.

[72] 12-58 MOORE'S FEDERAL PRACTICE - CIVIL § 58.05 (2015).

[73] Erstling v. S. Bell Tel. & Tel. Co., 255 F.2d 93, 94–95 (5th Cir. 1958).

[74] Blanchard v. Commw. Oil Co., 294 F.2d 834, 837 (5th Cir. 1961) (holding that, while memorandum opinion contained the necessary elements of final judgment, procedural irregularities and language in opinion and docket entry contemplated further action; later entry of formal order controlled).

[75] Carnes v. United States, 279 F.2d 378, 379-80 (10th Cir. 1960).

[76] *Id*. at 380.

[77] Danzig v. V.I. Hotel, 278 F.2d 580, 582 (3d Cir. 1960) (per curiam).

obtained if a final judgment is contained in a separate instrument."[78] Both courts were about to get their wish.

D. 1963: The Separate Document Rule Debuts

In a reaction to *Schaefer*, Rule 58 was amended once again in 1963, introducing the separate document requirement:

> 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 for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.[79]

The accompanying advisory committee's note explicitly targeted *Schaefer*:

> Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion [for summary judgment] is granted," see [*Schaefer*]. Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for post-verdict motions and for the purpose of appeal . . . The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment. That judgments shall be on separate documents is also indicated in Rule 79(b) . . . .[80]

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[78] Ram v. Paramount Film Distributing Corp., 278 F.2d 191, 194 (4th Cir. 1960) (per curiam).

[79] FED. R. CIV. P. 58 (1963) (emphasis added).

[80] FED. R. CIV. P. 58 advisory committee's note (1963). *Schaefer*, however, retained its vitality with regard to the altogether separate question of whether a court intended its judgment

As the committee realized, the flexible *Schaefer* concept of "intended finality" was simply not consistently workable, given the many ways cases were handled on their way to disposition.[81] A judge could say "this is it," and the clerk could then write "this is it," only to be followed by a separate "entry of judgment" three months down the line. The parties' reliance might only mean so much, and the judge's intent might have to be divined from an incomplete set of records provided by advocates who were not at all disinterested in the outcome.

This changed with the 1963 Rule 58 revisions, and finality was fully cleaved from compliance with the SDR. From this point forward, "[*a*]*ll* judgments, whether based on a jury verdict or a decision of the court, must be set forth in writing, on separate documents."[82]

The revision had the effect of splitting what was formerly a flexible two steps into a more-distinct three steps. Prior to 1963, and as clarified by *Schaefer*, judgment was "entered" so long as a sufficiently intended-to-be-final decision was rendered and that decision was recorded in the docket in accordance with Rules 58 and 79.[83]

Under the 1963 revisions and the SDR, the final decision itself, whatever its form, was not necessarily enough; nor was its entry. A court also had to prepare a separate "judgment document" (unless the final decision itself sufficed, more on which later), and the entry of *that* document on the docket, pursuant to Fed. R. Civ. P. 79(a), started running the clock.[84] From the practitioner's perspective, the new rule required one to "carefully analyze 1) whether the district court was required to enter the order or judgment on a separate document and 2) if so, whether the court in fact did so."[85] As the Supreme Court later observed, this innovation was "intended to avoid the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely."[86]

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to be "final" and thus appealable under 28 U.S.C. § 1291. *See, e.g.*, Alloyd Gen. Corp. v. Bldg. Leasing Corp., 361 F.2d 359, 362 (1st Cir. 1966).

[81] FED. R. CIV. P. 58 advisory committee's note (1963).

[82] MOORE'S FEDERAL PRACTICE 1019 (1963).

[83] United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 232-33 (1958).

[84] *See* Radio TV Espanola S.A. v. New World Entertainment, Ltd., 183 F.3d 922, 930 (9th Cir. 1999) ("Rule 58 tells the parties what types of documents constitute judgment, and Rule 79(a) tells the parties how the clerk must enter those documents on the civil docket. Only when both rules are satisfied is there an 'entry of judgment.'"). For an interesting discussion of the problems attending the proper "entry" of a document on the electronic docket in high-security cases, *see generally* Fadhel Hussein Saleh Hentif v. Obama, 733 F.3d 1243 (D.C. Cir. 2013).

[85] Michael H. Dore, *Barristers Tips: Calculating The Deadline To File a Notice of Appeal in a Federal Civil Case*, L. A. LAW, MAY 2007, at 10, 10.

[86] Bankers Trust Co. v. Mallis, 435 U.S. 381, 385 (1978) (per curiam).

E. Forty Years in the Wilderness: An Overview of SDR Jurisprudence Through 2002

The advent of the SDR was, as discussed above, intended to increase the precision of the all-important entry of judgment, from which the timely filing of post-judgment motions, notices of appeal, and other important documents was to be measured. Aside from a small revision in 1993,[87] Rule 58 remained more or less unchanged through 2002.

While the Rule itself did not change much, jurisprudence about the rule—and the consequences of failure to comply with the SDR—advanced a great deal, creating a complex body of law dealing with jurisdiction, procedure, and best practices. The proper emphasis here is on "complex," which should not surprise; after all, the SDR stands at a particularly fraught jurisdictional moment, as the gatekeeper of the point when the district court is divested of its power to hear a case. But due to this complexity, "confusion and problems in applying the rule persisted."[88]

Much of the law developed during this long period is still valid. What constitutes a "separate document," for example, was unchanged by the 2002 revisions to the Rule, as was the requirement that the SDR be applied "mechanically."[89] These topics will be addressed below in Part III, although some will be touched upon here.[90]

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[87] FED. R. CIV. P. 58 (1993). This revision read, in part:

> 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).

Id. Its greatest innovation: subsections!

[88] 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2782 (3d ed. 2015).

[89] Warren v. Am. Bankers Ins. of Fla., 507 F.3d 1239, 1242 (10th Cir. 2007).

[90] Several scholars have written comprehensive overviews of the more intricate doctrinal innovations of this period, many of which undermined the great hope for the SDR itself: that an issue so important and distinct should not be endlessly litigated to a party's advantage. *See generally* Tomson, *supra* note 18; Scott Zarin, *The Untimely Death of An Appeal*, FED. LAW, Mar.–Apr. 2003 at 24, 25-28; Michael Zachary, *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, 409 (1996). The relevant treatises, as well as the 2002 notes to the revisions of Fed. R. Civ. P. 58 and Fed. R. App. P. 4, also contain histories, as do several comprehensive appellate cases from this period. *See* FED. R. APP. P. 4 advisory committee's note (2002). This Article will not try to duplicate those efforts, which remain definitive.

1. The Breach

The element of SDR jurisprudence that caused the greatest concern—and which has become largely academic with the 2002 amendments—was the fact that the SDR then gave absolutely no guidance about what happened in the breach.[91] This was, in part, because the 1963 revisions that added the SDR kept the "judgment is not effective" language from the original incarnations of Rule 58,[92] suggesting that a judgment could be a nullity until the SDR was complied with.

This raised a host of questions. What if a district court rendered an indisputably final decision, but a separate document was never entered? Could a party successfully appeal, or file post-judgment motions, or even recover on a judgment, or do any of the other scintillating things a litigant can do when all is well?

The Supreme Court did answer some of these questions in two *per curiam* opinions. First, in *United States v. Indrelunas*,[93] the Court clarified both that the SDR applied to all judgments, not just "complex judgment," and that it should be "mechanically applied" in all cases.[94]

Then, in its 1978 *per curiam* opinion in *Bankers Trust Co. v. Mallis*, the Supreme Court resolved a circuit split by holding that violations of the SDR did not themselves divest an appellate court of jurisdiction.[95] Some courts had held that failure to comply with the SDR rendered an underlying decision essentially unappealable, requiring dismissal (and, inevitably, another appeal after proper entry).[96] The Supreme Court disapproved of this practice, holding that the SDR could be "waived" by the parties.[97] In other words, a decision that looked final and appealable *was* final and appealable, and so long as nobody quibbled about the absence of a separate document, an appellate court should not hold that an appeal was premature simply because the SDR was not satisfied.[98] As the Ninth Circuit would later explain:

> Although a separate judgment is required for the time limit to appeal to begin running, it does not follow that a separate judgment is necessary to create appellate jurisdiction; the parties may waive the requirement, avoiding the pointless exercise of dismissing the

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[91] *See, e.g.*, Zarin, *supra* note 90, at 25; Zachary, *supra* note 90, at 409.

[92] FED. R. CIV. P. 58 (1963).

[93] United States v. Indrelunas, 411 U.S. 216 (1973).

[94] *Id.* at 220, 222.

[95] Bankers Trust Co. v. Mallis, 435 U.S. 381, 383 (1978) (per curiam).

[96] Taylor v. Sterrett, 527 F.2d 856, 858 (5th Cir. 1976) (per curiam). In *Taylor*, the Fifth Circuit dismissed an appeal from a non-SDR-compliant decision, while openly acknowledging that its decision to do so would "creat[e] only delay;" in fact, the court told the parties they would not need to re-brief the case during the inevitable follow-up appeal. *Id.*

[97] *Mallis,* 435 U.S. at 384, 388 (per curiam).

[98] *Id*. at 387-88.

> appeal and waiting for the district court clerk to enter a separate judgment.[99]

A party could hence waive application of the SDR by declining to insist upon entry of a separate document.[100] Naturally, the actual order or opinion appealed from still needed to be appealable.[101] Courts could look to a variety of factors—including the parties' total obliviousness—in determining whether the SDR had been waived.[102]

The Supreme Court's *Mallis* opinion also harkened back to its earlier decisions in *Indrelunas* and *Schaefer*. Recalling both, the Court emphasized that the purpose of the SDR, and Rule 58 in general, was to *prevent* the loss of an opportunity to appeal based on uncertainty, and not to facilitate such a loss by imposing procedural tricks.[103]

Although *Mallis* allowed circumvention of the SDR, the circuits developed markedly different interpretations of how waiver would and should work. Some allowed waiver rarely, whereas others thought that Rule 58 should favor appeals in general.[104] The predominant view, however, was that a clear expression of finality, combined with SDR-noncompliance, should not prevent an appeal from being taken when all parties understood the underlying order to be appealable.[105] In so doing, most courts paid lip service, at least, to the idea that the SDR was supposed to prevent the loss of an appeal.[106]

2. The Clock Never Starts

More to the point, courts split on a far more fundamental problem: if the SDR was not complied with, the time to appeal—or to file post-judgment motions and the like—never actually started to run.[107] As Judge Easterbrook

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[99] McCalden v. Cal. Library Ass'n, 955 F.2d 1214, 1218 n.2 (9th Cir. 1992) (internal quotations omitted) (internal citations omitted).

[100] Tomson, *supra* note 18, at 790; Zachary, *supra* note 90, at 411.

[101] *See, e.g.*, St. Mary's Health Ctr. v. Bowen, 821 F.2d 493, 497-98 (8th Cir. 1987) (holding that, while SDR was substantially complied with, underlying decision was not actually appealable).

[102] *See, e.g.*, Sanders v. Clemco Industries, 862 F.2d 161, 166-67 (8th Cir. 1988) (observing, among other things, that none of the parties to an appeal realized there was even a problem with the district court's decision).

[103] *Id.*

[104] *See* Tomson, *supra* note 18, at 790-15 (discussing, at length, differing approaches among the courts of appeals).

[105] *See* Bonin v. Calderon, 59 F.3d 815, 847 (9th Cir. 1995).

[106] *See, e.g.*, United States v. Nordbrock, 38 F.3d 440, 442 n.1 (9th Cir. 1994); Wright v. Preferred Research, Inc., 937 F.2d 1556, 1559 (11th Cir. 1991); Willhauck v. Halpin, 919 F.2d 788, 792 (1st Cir. 1990); *In re* Ozark Rest. Equip. Co., 761 F.2d 481, 483 (8th Cir. 1985).

[107] *See, e.g.*, Freudensprung v. Offshore Tech. Servs. Inc., 379 F.3d 327, 335 n.4 (5th Cir. 2004); United States v. Torres, 282 F.3d 1241, 1243-44 n.3 (10th Cir. 2002) ("Therefore, if Rule 58 is not complied with, the period for filing an appeal will not begin to run."); FOGADE v. ENB Revocable Trust, 263 F.3d 1274, 1286 (11th Cir. 2001); Hammack v. Baroid Corp., 142 F.3d 266, 269-70 (5th Cir. 1998) ("Under the plain language of Fed. R. App. P. 4(a)(1)

wrote: "A party safely may defer the appeal until Judgment Day if that is how long it takes to enter the document."[108]

What to do, then, when "there is no separate judgment document *and* the notice of appeal is not filed after the final decision within the time period set forth in [Fed. R. App. P. 4(a)(1)]?"[109] Some courts allowed a facially untimely appeal to simply go forward; others required a formal request for entry of judgment before an untimely appeal would be considered.[110] One court used a party's apparent waiver of the SDR to *defeat* its untimely appeal.[111] Unique among the appellate courts, and in another bit of foreshadowing, the First Circuit struck a blow against the resurrection of long-dormant cases by imposing an extra-textual requirement: the SDR is automatically waived, and the time to appeal or file post-judgment motions begins to run, "where a party fails to act within three months of the court's last order in the case."[112]

This breakdown in the keystone of the normal order of things frustrated both the district courts and appellate courts, which were required to issue

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and Fed. R. Civ. P. 58, the thirty-day period for taking an appeal does not begin to run until the court has issued a separate document and records entry of the final judgment in its civil docket."); Gregson & Assocs. Architects v. Gov't of V.I., 675 F.2d 589, 593 (3d Cir. 1982) (per curiam); *see also* Casey v. Long Island R.R. Co., 406 F.3d 142, 148 (2d Cir. 2005) ("Thus, under the Rules as they existed at the time of the verdict in this case, a failure by the district court to enter a judgment in compliance with Rule 58, far from foreclosing a timely Rule 59(b) motion, virtually guaranteed its timeliness."). Since the SDR frequently touched upon jurisdictional concerns, the issue could be raised sua sponte. *See* Domegan v. Ponte, 972 F.2d 401, 405 n.6 (1st Cir. 1992), *vacated on other grounds,* 113 S. Ct. 1378 (1993).

[108] *In re* Kilgus, 811 F.2d 1112, 1117 (7th Cir. 1987). Judge Easterbrook probably wins the prize for consistent grouchiness when district courts fail to comply with the SDR. *See, e.g.*, Specialized Seating, Inc. v. Greenwich Indus., L.P., 616 F.3d 722, 725-26 (7th Cir. 2010) ("The parties, and perhaps the district judge, seem to have assumed that, if the judge's opinion names the winner, no one need bother with the step of producing a concise declaration in a separate document.").

[109] Zachary, *supra* note 90, at 411-12.

[110] *Id.* at 415-20.

[111] *See* Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc., 786 F.2d 1163 (6th Cir. 1986) (nonprecedential per curiam). In *Amoco*, the Sixth Circuit acknowledged that the district court had violated the SDR by affirming a bankruptcy decision via an integrated opinion and order, but held that Amoco clearly knew that the SDR-noncompliant decision was the final decision because it had sought reconsideration. *Id.* at 1163. Although the Supreme Court denied certiorari, Justice Blackmun issued a dissent, joined by Justice O'Connor, in which he wrote that the Sixth Circuit had fundamentally erred by using the SDR to defeat a party's appeal; "[t]he Court of Appeals should have dismissed the purported appeal and directed the District Court to enter a final judgment, from which a proper appeal could lie." Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc., 478 U.S. 966, 969 (1986) (Blackmun, J., dissenting from the denial of certiorari); s*ee also* United States v. Interlink Sys., 984 F.2d 79, 81-82 (2d Cir. 1993) (refusing to penalize appellant when bona fide final judgment was not issued for years due to clerk error).

[112] Fiore v. Wash. Cty. Comm. Mental Health Ctr., 960 F.2d 229, 236 (1st Cir. 1992); *see also* White v. Fair, 289 F.3d 1, 7 (1st Cir. 2002) ("[The SDR's] purpose was not to enable a party to appeal a decision years later, when that party had shown no inclination to do so in a timely fashion.").

lengthy discussions on *Mallis* waivers before even reaching the merits.[113] More to the point, each SDR issue was an admission that someone, somewhere, had screwed up something technical, which courts of all stripes understandably are loath to acknowledge.[114]

F. The 2002 Rule Revisions and the Demise of (Some Small Amount of) Uncertainty

The main SDR struggles—of perpetual appellate timetables, still-living habeas cases from the 1970s, and *Mallis* waivers—more or less came to an end with the 2002 revisions of the Rule.[115] The main innovation of those revisions was the decisive defeat of the clock that never ran, by co-opting the First Circuit's innovation about delayed entry of judgment.[116] But the 2002 revisions (discussed here and excerpted at the beginning of this piece in their 2007 stylistic update[117]) really quite brilliantly solved many of the Rule 58 problems that had plagued the federal courts post-*Indrelunas* and *Mallis*, and (combined with the concurrent revisions to the Federal Rules of Appellate Procedure) provided "an integrated system fostering promptness, accuracy, certainty and finality in the entry of judgments by district courts."[118]

Most prominent was the concept of delayed entry of judgment. Under the new Rule, noncompliance with the SDR would not entail a perpetual post-judgment period, but would instead simply result in a 150-day delay in the entry of judgment.[119] This is a sleek, elegant solution to the problem of pinpointing entry of judgment in the breach, giving a timetable boost—but not an outsized one—when the SDR is an issue.

Less immediately obvious, but just as important, the 2002 revisions finally dispatched the problem of the non-jurisdictional character of the SDR and

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[113] *See, e.g.*, *In re* Kilgus, 811 F.2d at 1117; Casey v. Long Island R.R. Co., 406 F.3d 142, 147-48 (2d Cir. 2005).

[114] *See, e.g.*, Specialized Seating, Inc. v. Greenwich Indus., L.P., 616 F.3d 722, 725-26 (7th Cir. 2010); *In re* Kilgus, 811 F.2d at 1117.

[115] *See generally* FED. R. CIV. P. 58 advisory committee's note (2002).

[116] This did not escape the attention of the First Circuit, as it buried in a footnote the judicial equivalent of "gloating in Circuit-split vindication" in an opinion issued shortly before the 2002 revisions went into effect. *See* White v. Fair, 289 F.3d 1, 8 n.5 (1st Cir. 2002) ("noting," with a cackle, that the proposed amendments "adopt a rule similar to our *Fiore* holding"); *see also* Burnley v. City of San Antonio, 465 F.3d 191, 196-97 (5th Cir. 2006) (discussing revisions and adoption of position similar to that of the First Circuit).

[117] *See* Med. Supp. Chain, Inc. v. Neoforma, Inc., 508 F.3d 572, 573 n.1 (10th Cir. 2007) (discussing stylistic changes to Fed. R. Civ. P. 58).

[118] *Burnley*, 465 F.3d at 195. Note that *Burnley*, somewhat curiously, misstates when a separate document is required. *See id.*

[119] FED. R. CIV. P. 58(c)(2)(B); *see also* FED. R. APP. P. 4(a)(7)(A)(ii) (making a corresponding change); Harmston v. City & Cty. of San Francisco, 627 F.3d 1273, 1279-80 (9th Cir. 2010) (discussing application of SDR before and after the 2002 revisions). The 150-day period is derived (imperfectly, see *infra* Part III) from the 180-day time period for reopening the time for filing an appeal when a party does not receive notice of the entry of judgment contained in Fed. R. App. P. 4(a)(6)(B). *See* FED. R. APP. P. 4(a)(7)(B) advisory committee's note (2002).

the *Mallis* waiver problem. The update deleted earlier language specifying that judgment was only "effective" when the SDR was complied with, because—as the advisory committee conceded—the simple SDR requirement was "ignored in many cases."[120]

Meanwhile, Fed. R. App. P. 4(a)(2) emphasized that notices of appeal filed before the entry of judgment were effective, but simply delayed, and Fed. R. App. P. 4(a)(7)(B) took this one step further by explicitly saying, "[a] failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order."[121] In other words: appeals taken before judgments were technically entered now drew a "who cares?" shrug.[122] And "waiver" would rarely be an issue both due to the text of the revised Rule and because the realities of the appellate timetable meant that most appeals would be decided after judgment had been "entered" automatically by the passage of time.[123]

Another crucial innovation was the specific exemption from the SDR of orders disposing of certain kinds of post-judgment motions.[124] This minor tweak effectively slew a developing circuit split, allowing the division to "recede into the past."[125]

In all, the 2002 revisions marked a phenomenal innovation in Rule 58 practice in general and SDR jurisprudence in particular.[126] Responding to uncertainty in the courts, the Rules committee enacted reforms that, while not defeating all of the oddities created by the SDR, at least cabined the eccentricities to isolated situations away from the vast majority of daily practice.[127] Now, a court could observe an SDR violation in a footnote, in a great many cases without having to worry about jurisdictional concerns or effects on appealability.[128]

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[120] FED. R. CIV. P. 58 advisory committee's note (2002).

[121] *See* FED. R. APP. P. 4(a)(7)(B); *see also* Moreno v. LG Electronics, USA Inc., 800 F.3d 692, 696-97 (5th Cir. 2015) (discussing effect of 2002 appellate rule revisions on unusual post-revision waiver argument).

[122] *See* Ford v. MCI Communs. Corp. Health & Welfare Plan, 399 F.3d 1076, 1081 (9th Cir. 2005) ("The fact that the appeal was filed before entry of judgment under the terms of Rule 58 is not problematic, because Appellate Rule 4(a)(2) provides that the filing of a premature notice of appeal is treated as filed on the date of and after the entry.") (internal quotations omitted).

[123] *Moreno, USA Inc.,* 800 F.3d at 696-97.

[124] *See* FED. R. CIV. P. 58(a)(1)-(5); Med. Supp. Chain, Inc. v. Neoforma, Inc., 508 F.3d 572, 573 (10th Cir. 2007).

[125] Local Union No. 1992 of IBEW v. Okonite Co., 358 F.3d 278, 284 (3d Cir. 2004).

[126] These innovations did not extend to certain other incarnations of the SDR—at least, not immediately. *See* Dynamic Changes Hypnosis Ctr., Inc. v. PCH Holding, LLC, 306 B.R. 800, 807 n.10 (E.D. Va. 2004) (discussing continuing problems under the Bankruptcy Rules).

[127] FED. R. CIV. P. 58 advisory committee's note (2002).

[128] Instances of this are legion. For one unremarkable example, *see* Goldberg & Connolly v. N.Y. Cmty. Bancorp, Inc., 565 F.3d 66, 71 n.3 (2d Cir. 2009).

III. WHAT IT DOES AND WHEN IT'S TRIGGERED

A. What It Does

As discussed above, since 1963, the SDR has required that all judgments be set forth in a separate document.[129] After 2002, the consequences of failing to do so have been strictly limited by important Rule revisions implemented that year.[130] The upshot is that breaching the SDR, a common mistake, is now of greatly reduced importance because the stranger aspects of pre-2002 jurisprudence—has judgment really been entered? Is a separate document a prerequisite to appeal?—have been put to rest. Thus, in most cases where an SDR violation occurs, the parties do not notice that anything is amiss, and courts are in no way obligated to raise the issue themselves.

Under the 2002 revisions, the central consequence of failing to set out a "judgment" in a separate document is a 150-day delay affecting when the judgment in question is considered "entered."[131] As Fed. R. Civ. P. 58(c)(2)(B) sets forth, judgment is entered after "150 days have run from the entry in the civil docket" of the non-SDR-compliant order or decision.[132] The court can correct its error before the 150 days has run, but cannot effectively act afterwards because the Rule specifies that the "earlier" event begins to run the clock.[133]

SDR violations have the potential to affect rules that measure time based on the *entry* of a judgment or order because Rule 58 defines "entry of judgment" for the entirety of the Federal Rules of Civil Procedure.[134] Motions to alter or amend the judgment under Rule 59,[135] certain motions for relief from a judgment,[136] stays of proceedings to enforce a judgment,[137] and motions for fees[138] all measure time from the entry of judgment and all are affected by the SDR.[139] Of course, the rules governing the time to file notices

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[129] FED. R. CIV. P. 58 (1963).

[130] FED. R. CIV. P. 58 (2002).

[131] FED. R. CIV. P. 58 advisory committee's note (2002).

[132] *See, e.g.*, Bey v. City of Tampa Code Enforcement, 607 F. App'x 892, 894 n.1 (11th Cir. 2015) (nonprecedential per curiam) (noting delayed entry of judgment); Meilleur v. Strong, 682 F.3d 56, 60-61 (2d Cir. 2012) (discussing basic failure-to-enter-judgment scenario after the implementation of the 2002 revisions).

[133] FED. R. CIV. P. 58(c)(2); *see* Bolmer v. Oliveira, No. 3:06cv235, 2011 U.S. Dist. LEXIS 49887, at *5-6 (D. Conn. May 10, 2011) (noting that nothing in Fed. R. Civ. P. 58(c)(2) prohibits a court from complying with its SDR obligations after the 150 days have run, despite this delayed compliance having no effect on the time a litigant has to appeal).

[134] FED. R. CIV. P. 58(c).

[135] FED. R. CIV. P. 59(e); *see also* Rainey v. Lipari Foods, Inc., 546 F. App'x 583, 585 (7th Cir. 2013) (nonprecedential) (noting that when SDR was not complied with, all post-dismissal motions filed between day complaint was dismissed and day judgment was automatically entered were "not untimely").

[136] FED. R. CIV. P. 60(c)(1).

[137] FED. R. CIV. P. 62(a).

[138] FED. R. CIV. P. 54(d)(2)(A).

[139] Because the SDR does not explicitly affect rules discussing the entry of judgment that are purely statutory, it appears to be an open question how those rules work in tandem with

of appeal in civil cases, which measure their time limits "from the entry of judgment," are the most important rules affected by the SDR, although they are technically governed by the separate incarnation of the SDR contained in Fed. R. App. P. 4(a)(7).[140]

Three important side issues must be quickly resolved before we move onward. First, note the language that Rule 58(c)(2)(B) uses: "from the entry in the civil docket."[141] This is not necessarily the day the order or decision is dated.[142] Take the PACER mockup below:

05/10/2013	42	MEMORANDUM AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT.(bb.) (Entered: 5/13/2013)

Here, the opinion and order were signed on the tenth, but entry on the docket took place on the thirteenth. The 150-day period starts counting from the latter, not the former.

Second, it is important to remember that appellate and post-judgment timetables are generally measured from the time the *order or judgment* (which will be defined below) is entered on the docket, not when the opinion is entered on the docket.[143] This becomes especially important when the entry of a dispositive, appealable order or judgment precedes the entry of its associated opinion. In these cases, so long as the SDR is not violated, the time to appeal or file post-judgment motions can start before the relevant opinion even hits the docket, because "the entry of the order marks the beginning of the window for appeal even when a memorandum opinion is

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the SDR. For example, 28 U.S.C. § 1292(b) allows for parties to seek permission from the courts of appeals to take interlocutory appeals of important issues of law, so long as they petition within ten days of the entry of the district court order that says "this issue of law is interlocutory-appeal-worthy." 28 U.S.C. § 1292(b) (2012). The entry of these orders is still governed by Rule 58, but since the 150 day entry period only applies to the Civil Rules, it is unclear whether 1292(b) certification orders, if affected by Rule 58 at all, still fall into the pre-2002 entry void. At least one court to consider the issue has suggested that the SDR does apply to § 1292(b) certifications. *See* Rhoades v. Young Women's Christian Ass'n of Greater Pittsburgh, No. 11-8011 (3d Cir. Apr. 18, 2011) (nonprecedential order). These instances are vanishingly small in number, though, so resolving the question is of no great urgency.

[140] *See* FED. R. APP. P. 4(a)(7).

[141] FED. R. CIV. P. 58(c)(2)(B).

[142] *See* Matt Corbin & Casey Tourtillott, *Post-Judgment Day: A Guide to Filing Timely Notices of Appeal in Federal Court*, 78 J. Kan. B.A. 24, 25 (2009) ("Note that litigants must look to the docket entry date of the judgment, not the date the judge signed the underlying order."). As discussed *supra*, most of the Rules measure time from the entry of something on the civil docket. Measuring time from the day something is signed, rather than entered, is a common error even outside of the SDR context. *See, e.g.*, *In re* Chocolate Confectionary Antitrust Litig., 470 F. App'x 67, 69 (3d Cir. 2012) (nonprecedential per curiam).

[143] *See* Cumberland Mut. Fire Ins. Co. v. Express Prods., Inc., 529 F. App'x 245, 250 (3d Cir. 2013) (nonprecedential) (collecting cases).

filed at a later time."[144] Although courts can insert language in their orders to render them non-final and non-appealable pending the filing of an opinion, this approach can understandably create confusion and is generally disfavored.[145]

Third, courts and litigants should be wary of aggregating the extended timetables caused by the SDR. When discussing the SDR's effect on appellate review, for example, it is common to see a mention of "180 days" or "210 days" as the net effect of the 150-day delayed-entry period and the standard 30-day and 60-day Rule 4(a) appellate periods.[146] This shorthand overlooks that the delayed entry requirements of the Rule functionally create two separate and adjacent spans of time. The 150-day period, like any other, is governed by Fed. R. Civ. P. 6(a)(1), which says that if the last day of a period of time falls on "a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday."[147]

In many cases, calculating the two time periods separately, as should be done, will yield an additional day or more—giving a total of 181 days, for example. As a result, litigants and courts alike should assure themselves that neither the entry of judgment nor the end of the secondary span of time falls on any of the days excludable under the Rules.[148]

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[144] Cumberland, 529 F. App'x at 250; *see also* Ludgood v. Apex Marine Corp. Ship Mgmt., 311 F.3d 364, 369 (5th Cir. 2002).

[145] One D.C. Circuit case presents an excellent reason why this approach simply engenders confusion. *See St. Marks Place Hous. Co. v. United States Hous. & Urban Dev.*, 610 F.3d 75 (D.C. Cir. 2010). In *St. Marks,* the district court had decided a pending motion via order shortly before the Civil Justice Reform Act was to require its presence on the much-feared "Six Month List." *Id.* at 80-81; *see also* David F. Levi & Mitu Gulati, *Judging Measures*, 77 UMKC L. REV. 381, 408 (2008); R. Lawrence Dessem, *Judicial Reporting Under The Civil Justice Reform Act: Look, Mom, No Cases!*, 54 U. PITT. L. REV. 687, 688-89 (1993). The judge's order, which facially complied with the SDR, contained a sentence specifying that it was not to become final until the opinion had issued; the opinion that was filed about two months later, meanwhile, appeared to retroactively designate the order as final and appealable. *St. Marks*, 610 F.3d at 79-80. Although the D.C. Circuit held that the district court had successfully kept its original order from being deemed final and appealable—and, thus, held that the appeal that was pegged to the filing of the opinion was timely—it cautioned that this technique should "be avoided" because of the fact that these "orders can confuse parties." *Id.* at 81.

[146] *See, e.g.*, Gillis v. United States, 729 F.3d 641, 642 (6th Cir. 2013) ("[W]hen a district court fails to issue a separate judgment in denying a 28 U.S.C. § 2255 motion, a [movant] effectively has 210 days to submit an appeal."), *reh'g denied*, 550 F. App'x 264 (6th Cir. 2014); Taumoepeau v. Mfrs. & Traders Trust Co., 523 F.3d 1213, 1216 (10th Cir. 2008) ("Accordingly, rather than the normal 30 days, appellants have 180 days from the date the court's decision is entered on the docket to file a timely notice of appeal."); Flowers v. Carville, 161 F. App'x 697, 698 (9th Cir. 2006) (nonprecedential per curiam) ("Flowers had 180 days from entry of the order to file the notice of appeal.").

[147] FED. R. CIV. P. 6(a)(1)(C); *see also* FED. R. APP. P. 26(a)(1)(C).

[148] *See, e.g.*, Gillon v. Bureau of Prisons, 393 F. App'x 550, 552 n.1 (10th Cir. 2010) (nonprecedential) ("Technically, 150 days would have been July 6, 2008, but since July 6 was a Sunday, judgment was deemed entered the next business day."). Lest one think otherwise, this distinction is not merely academic; at least once, it has saved what would otherwise have

B. When It's Triggered

The SDR requires "[e]very judgment and amended judgment [to be] set out in a separate document."[149] Behind that deceptively simple and unadorned instruction lurks a surprising amount of ambiguity, which was *not* salved by the 2002 updates to the Rule. This section will address the structural underpinnings of the SDR, paying particular attention to points of commonality and divergence among the Circuits, and recommending that a modified version of the Third Circuit's approach be followed and (ideally) incorporated into the Rule itself.

1. The Definition of a "Judgment"

a. The Broad Scope of "Judgment"

While opinions like *Schaefer* attempted to define a "judgment" in the context of a case-ending action, the Rules define the term quite broadly. According to Fed. R. Civ. P. 54(a), the term "judgment" includes "a decree and any order from which an appeal lies."[150] Depending on how one reads Rule 54, this means that decrees and appealable orders *are* "judgments," or, in the alternative, that decrees and appealable orders are equivalent to judgments for the purposes of the Rules. I happen to think that the latter makes the most sense—is an order denying qualified immunity really something most practitioners and judges would call a "judgment"?—but reasonable people can disagree on the framing device employed.[151]

Regardless of how Rule 54(a) is read, the result is the same: the SDR applies to, and thereby affects, far more than the "final judgment" for which it was plausibly fashioned. For example, the SDR applies to interlocutory orders that are made appealable by statute,[152] partial merits dispositions that

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been an untimely appeal. *See* Douris v. Upper Makefield Twp., 475 F. App'x 408, 409 n.3 (3d Cir. 2012) (nonprecedential per curiam).

[149] FED. R. CIV. P. 58(a).

[150] FED. R. CIV. P. 54(a).

[151] For the latter approach, *see* Cooper v. Town of E. Hampton, 83 F.3d 31, 35 (2d Cir. 1996) ("Rule 54(a) simply means that all of the provisions in the Civil Rules that apply to judgments also apply to decrees and appealable orders. But it does not exempt those decrees or orders from such provisions."). For the former, arguing that all things appealable should be called "judgments," see Bradley S. Shannon, *Action is an Action is an Action is an Action*, 77 WASH. L. REV. 65, 148 (2002).

[152] *See* Abdulwali v. Wash. Metro. Area Transit Auth., 315 F.3d 302, 304 (D.C. Cir. 2003); Theriot v. ASW Well Serv., Inc., 951 F.2d 84, 87-88 (5th Cir. 1992) ("The rules of civil and appellate procedure applicable to this issue do not exclude from the separate document requirement interlocutory orders or orders appealable by statute."); McCowan v. Sears, Roebuck & Co., 908 F.2d 1099, 1103 (2d Cir. 1990); Salyers v. Sec'y of Health & Human Servs., No. 85-5237, 1986 U.S. App. LEXIS 19289, at *7, n.3 (6th Cir. Apr. 6, 1986) (nonprecedential per curiam).

are certified for appeal under Fed. R. Civ. P. 54(b),[153] and orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions" under 28 U.S.C. § 1292(a)(1).[154] Post-2002, the SDR explicitly excludes certain otherwise appealable orders, such as those disposing of Fed. R. Civ. P. 59 motions, from its breadth.[155]

With regard to injunctions, some tension exists between the formal requirements of the SDR and those of Fed. R. Civ. P. 65(d),[156] which applies to injunctions and restraining orders and requires them to contain a certain amount of detail. As set forth at greater length *infra*, one of the standard judicially created SDR requirements is that the separate document substantially omits both reasoning and the facts of the case.[157] By contrast, Rule 65(d) requires injunctive orders—the orders themselves, and not the accompanying opinions—to contain, among other things, "the reasons why [they] issued."[158] This is "contrary to the touchstone that a separate document is distinct from an opinion."[159]

Because the requirement that the "separate document" omit reasoning and fact is a judge-created requirement,[160] the simplest way to reconcile the two rules—aside from mandating an additional document to supplement the Rule 65(d) order[161]—is to read Rule 65(d) as an override of the omission rationale of the judge-made rule. In this way, a separate document that fulfills the

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[153] *See In re* Cendant Corp. Secs. Litig., 454 F.3d 235, 240 n.2 (3d Cir. 2006); *Cooper*, 83 F.3d at 35. Because the judgment actually becomes appealable once certified in accordance with Fed. R. Civ. P. 54(b), and not before—and because the actual order appealed from is the 54(b) order, if it is not issued contemporaneously with the partial judgment—the definition of "judgment" does not encompass everything that *might* be certified under Rule 54(b). *See* Brown v. Miss. Valley State Univ., 311 F.3d 328, 332 (5th Cir. 2002)

[154] *See* Ingalls v. Thompson (*In re* Bradley), 588 F.3d 254, 262 n.6 (5th Cir. 2009); Beukema's Petroleum Co. v. Admiral Petroleum Co., 613 F.2d 626, 627 (6th Cir. 1979); Chief Freight Lines Co. v Local Union No. 886, 514 F.2d 572, 578 n.6 (10th Cir. 1975).

[155] *See* FED. R. CIV. P. 58(a)(1)–(5). Note, however, that the SDR may still affect orders that *grant* some of the post-judgment motions enumerated in the revised Rule 58(a), at least to the extent that they lead to the entry of an amended judgment. *See* Heck v. Triche, 775 F.3d 265, 277 n.12 (5th Cir. 2014); Emp'rs Ins. of Wausau v. Titan Int'l, 400 F.3d 486, 489 (7th Cir. 2005) (construing "disposing" in Fed. R. Civ. P. 58(a) to mean "denying" and not "granting"); *see also* Med. Supply Chain, Inc. v. Neoforma, Inc., 508 F.3d 572, 575 (10th Cir. 2007) (construing order that "struck" motion to reconsider as one that "disposed" of it); Wright v. Preferred Research, Inc., 937 F.2d 1556, 1559-60 (11th Cir. 1991) (discussing varying approaches to the SDR and amended judgments). Further, while this enumeration does not account for analogous motions under local rules—such as motions for reconsideration, *see* generally D.N.J.L. Civ. R. 7.1(i)—it is generally understood that Rules 59 and 60 govern reconsideration of appealable orders (i.e., orders to which the SDR would apply) while local reconsideration practice applies only to interlocutory orders (i.e., orders to which the SDR generally would not apply). *See, e.g.*, Auto Servs. Co. v. KPMG, LLP, 537 F.3d 853, 857 (8th Cir. 2008); Warner v. Twp. of S. Harrison, 885 F. Supp. 2d 725, 747-48 & n.1 (D.N.J. 2012).

[156] FED. R. CIV. P. 65(d).

[157] 12-58 MOORE'S FEDERAL PRACTICE - CIVIL § 58.05(4)(a) (2015).

[158] FED. R. CIV. P. 65(d)(1)(A).

[159] Dore, *supra* note 85, at 10.

[160] *In re* Cendant Corp. Securities Litigation, 454 F.3d 235, 242-44 (3rd Cir. 2006).

[161] *See* FED. R. CIV. P. 65(d).

"separateness" SDR requirements and meets the content specifications of Rule 65(d) has satisfied both rules. Indeed, several Seventh Circuit opinions seem to take this approach.[162]

b. The (Possible) Collateral-Order Exception

One class of "non-final" orders to which the SDR may no longer practically apply is collateral orders. The collateral order doctrine ordinarily allows for the immediate appeal under 28 U.S.C. § 1291 of a "small category" of interlocutory decisions that are "conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action."[163] Denials of qualified immunity, for example, are classic collateral orders.[164]

The 2002 advisory committee notes to Rule 58 contain an explanation of why the SDR's delayed-entry effect should not affect appealable collateral orders:

> If the 150-day provision in Rule 58(b)(2)(B)—designed to integrate the time for post-judgment motions with appeal time—serves no purpose, or would defeat the purpose of another rule, it should be disregarded. In theory, for example, the separate document requirement continues to apply to an interlocutory order that is appealable as a final decision under collateral-order doctrine. Appealability under collateral-order doctrine should not be complicated by failure to enter the order as a judgment on a separate document—there is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion as the court of appeals. Appeal time should start to run when the collateral order is entered without regard to creation of a separate document and without awaiting expiration of the 150 days provided by Rule 58(b)(2).[165]

The above flips from saying that the 150-day-entry rule should not apply to saying, at the end, that the SDR itself should not apply to collateral orders at all, while acknowledging that this exception is nowhere found in the Rule's text.

This causes some odd problems. For one, the text of the Note should not undermine or contradict the rule in this way.[166] For another, the rationale is

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[162] *See, e.g.*, Advent Elecs. v. Buckman, 112 F.3d 267, 272-73 (7th Cir. 1997); Reich v. ABC/York-Estes Corp., 64 F.3d 316, 319 (7th Cir. 1995).

[163] Swint v. Chambers Cty. Comm'n, 514 U.S. 35, 42 (1995) (citing Cohen v. Benefit Indus. Loan Corp., 337 U.S. 541, 546 (1949)); *see also* 19-202 MOORE'S FEDERAL PRACTICE - CIVIL § 202.07 (2015).

[164] *See* Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

[165] FED. R. CIV. P. 58 advisory committee's note (2002).

[166] Many courts have examined tension between rules and their explanatory notes in the context of the civil and other rules. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 363

not limited to collateral orders; arguably, courts could read the SDR's effects out of the rule whenever a too-perplexing situation presents itself. Because a litigant can always appeal a collateral ruling at the end of the case,[167] implementing this exclusion means that litigants would have two windows to appeal collateral orders: 30 or 60 days after the order is entered, regardless of SDR compliance, and then again within the same span after the final, case-ending order (or Fed. R. Civ. P. 54(b) order, to make things more confusing) is entered. The collateral order doctrine being confusing enough, its intersection with the SDR only serves to complicate an already-complex area. No court appears to have had, as of yet, an occasion to tackle the problem,[168] so we must note it, grimace, and move onward.

c. Applicability in Quasi-Criminal Proceedings

Due to its placement within the civil rules, the SDR does not apply in criminal cases.[169] For instance, motions to correct a sentence under Fed. R. Civ. P. 35 are clearly under the aegis of the criminal rules, and accordingly are outside of the reach of the SDR, as are motions explicitly contemplated by federal criminal statutes.[170] But the SDR does often apply in certain

(2011) ("Of course it is the Rule itself, not the Advisory Committee's description of it, that governs."); Schiavone v. Fortune, 477 U.S. 21, 31 (1986) ("[T]he Advisory Committee's comments do not foreclose judicial consideration of the Rule's validity and meaning . . . ."); *In re* NFL Players Concussion Injury Litig., 775 F.3d 570, 576 n.6 (3d Cir. 2014) (citing *Dukes*); Clark v. Long, 255 F.3d 555, 559 (8th Cir. 2001) ("An advisory committee note, of course, does not have the force of law . . . ."); Jenkins v. Wright & Ferguson Funeral Home, 215 F.R.D. 518, 522 n.4 (S.D. Miss. 2003) ("The Court is reluctant to rely on the quoted Advisory Committee Note to Rule 17(a) because it is in apparent conflict with the Rule itself."); *see also* United States v. Bainbridge, 746 F.3d 943, 947 (9th Cir. 2014) (collecting cases).

[167] 15A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3911 (2d ed. 1992); *see also* Keshner v. Nursing Pers. Home Care, 747 F.3d 159, 163 (2d Cir. 2014). Note that this does not apply to Fed. R. Civ. P. 54(b) judgments. *See, e.g.*, Smith v. Mine Safety Appliances Co., 691 F.2d 724, 725 (5th Cir. 1982).

[168] The Tenth Circuit did identify the oddity of the collateral order exception, but in a context where its resolution of the problem made no difference. *See* Berrey v. Asarco Inc., 439 F.3d 636, 642 n.4 (10th Cir. 2006).

[169] *See, e.g.*, United States v. Lee, 432 F. App'x 232, 234 n.1 (4th Cir. 2011) (nonprecedential per curiam) ("This so-called 'separate document requirement' has no analogue in the criminal rules."); United States v. Fazzini, 414 F.3d 695, 698 (7th Cir. 2005) ("Because this was, at root, a criminal case, it is not governed by the documentation requirements for final judgments found in Fed. R. Civ. P. 58."); *see also* MATTHEW C. BLICKENSDERFER, 1-1 SIXTH CIRCUIT FEDERAL PRACTICE MANUAL § 1.02 ("In criminal cases, there is no similar requirement of a separate judgment."). *But see* United States v. Minor, 457 F. App'x 119, 121 n.2 (3d Cir. 2012) (nonprecedential per curiam) (evaluating SDR in the context of a criminal forfeiture order "[t]o the extent that" it applied); Clymore v. United States, 415 F.3d 1113, 1117 n.4 (10th Cir. 2005) (applying SDR in appeal from motion to return property under Federal Rules of *Criminal* Procedure 41).

[170] *See, e.g.*, United States v. Vives, 546 F. App'x 902, 903 (11th Cir. 2013) (nonprecedential per curiam) (using the criminal rules in connection with a motion that invoked Fed. R. Crim. P. 35; 18 U.S.C. §§ 3231, 3582(c)(2), 3742; and 28 U.S.C. § 1651); United States v. Arrango, 291 F.3d 170, 171 (2d Cir. 2002) (per curiam) (collecting cases for

"quasi-criminal" (or sometimes "quasi-civil") cases, such as federal habeas proceedings brought under 28 U.S.C. § 2254 and § 2241.[171]

A more difficult question arises in the context of post-judgment federal criminal proceedings falling outside an easy civil/criminal divide. For example, a motion to vacate a federal conviction or sentence, brought under 28 U.S.C. § 2255, is neither strictly criminal nor strictly civil, and is filed on the docket of the original criminal case.[172] With a few exceptions, the prevailing sentiment favors treating these borderline proceedings and motions as civil in character.[173]

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the proposition that 18 U.S.C. § 3582(c)(2) motions are plainly criminal and are governed by criminal appellate rules).

[171] *See, e.g.*, Brou v. Abbott, 212 F. App'x 767, 768-69 (10th Cir. 2007) (nonprecedential); United States v. Little, 392 F.3d 671, 680 (4th Cir. 2004); Martinez v. Johnson, No. 98-50684, 1999 U.S. App. LEXIS 39857, at *1 (5th Cir. Tex. Aug. 17, 1999) (nonprecedential per curiam); *see also* RULES GOVERNING § 2254 CASES, RULE 12.

[172] RULES GOVERNING § 2255 PROC., RULE 3(b). In fact, Rule 12 of the Rules Governing § 2255 Cases says that *either* the Civil or Criminal Rules of Procedure might apply. RULES GOVERNING § 2255 PROC., RULE 12. And § 2255's criminal/civil straddling causes other problems, too. *See, e.g.*, Brown v. United States, 748 F.3d 1045, 1058 (11th Cir. 2014) (holding that federal magistrate judges cannot resolve § 2255 motions by consent of the parties because they are not "civil matters" under 28 U.S.C. § 636(c)); Sampson v. United States, 724 F.3d 150, 158–59 (1st Cir. 2013) (addressing application of 28 U.S.C. § 1292(b) to § 2255 motions).

[173] The majority of circuits have applied the SDR in § 2255 cases. *See* Jeffries v. United States, 721 F.3d 1008, 1013 (8th Cir. 2013); United States v. Johnson, 254 F.3d 279, 283-84 n.3 (D.C. Cir. 2001) (explaining decision and collecting cases); *see also* Trenkler v. United States, 536 F.3d 85, 95 n.5 (1st Cir. 2008) (noting the probable application of the SDR in a *coram nobis* case).

Both *Johnson* and *Jeffries* suggest that the Second Circuit has held that Rule 58 does not apply to § 2255 proceedings. *See Johnson*, 254 F.3d at 284 (citing Williams v. United States, 984 F.2d 28, 30 (2d Cir. 1993)); *Jeffries* 721 F.3d at 1013. The Second Circuit's *Williams* decision dealt with the propriety of requiring the entry of formal "judgment" in a § 2255 case; the Circuit concluded that "since a section 2255 motion is a post-judgment remedy 'in the criminal proceeding,' it is not subject to Rule 58 of the civil rules, and there is no justification for entering a judgment upon the denial of such a motion." *Williams*, 984 F.2d at 30; *see also* Cordon v. Greiner, 274 F. Supp. 2d 434, 436 n.1 (S.D.N.Y. 2003) (addressing the departure in *Williams*).

As discussed further *infra*, the Second Circuit's jurisprudence on what constitutes a "judgment" is a bit peculiar, in that it requires a SDR-compliant judgment to be labeled "judgment." *See* Kanematsu-Gosho, Ltd. v. M/T Messiniaki Aigli, 805 F.2d 47, 49 (2d Cir. 1986) (per curiam). Because the Second Circuit views the definition of "judgment" in Fed. R. Civ. P. 54(a) to *equate* "judgments" and "appealable orders," but not to define the latter as a subset of the former, *see* Cooper v. Town of E. Hampton, 83 F.3d 31, 35 (2d Cir. 1996), it is possible that *Williams* simply means that the Second Circuit's extra "judgment" requirement—that an actual honest-to-goodness judgment be entered, labeled "judgment"—does not apply in § 2255 proceedings. *Williams*, 984 F.2d at 30. This would explain the existence of (admittedly unreasoned) post-*Williams* decisions that do appear to apply the SDR to § 2255 motions. *See, e.g.*, Gonzalez v. United States, 433 F. App'x 24, 25 n.1 (2d Cir.) (nonprecedential summary order), *cert. denied*, 132 S. Ct. 858 (2011); Masotto v. United States, No. 97-2894, 2000 U.S. App. LEXIS 298, at *4 (2d Cir. N.Y. Jan. 5, 2000) (nonprecedential summary order).

d. Magistrate and Bankruptcy Proceedings

The discussion so far has focused on the district court *qua* district court, Article III dynamos acting in concert with the clerk's office and slinging dispositive orders left and right. The SDR, though, cares little about life tenure and undiminishable income, and, as a result, it behooves the careful observer to examine how it might affect orders entered by magistrate judges and bankruptcy judges.

With regard to magistrate judges, it is clear that the SDR applies to any appealable orders or judgments entered by magistrate judges sitting by consent under 28 U.S.C. § 636(c)(1).[174] It is equally clear, albeit apparently not much pondered, that the SDR (and Rule 58 in general) does not apply to most other magistrate judge decisions. Although the orders issued by magistrate judges are reviewable by district judges, this process—while often and accurately described as an "appeal" in some decisions and local rules[175]—is called "reconsider[ation]" in § 636(b)(1)(A) and is designated an "objection" process in Fed. R. Civ. P. 72(a).[176] As a result, all such nondispositive orders are outside of the reach of the SDR, because they are not the kind of "appealable" orders contemplated by Fed. R. Civ. P. 54(a).[177]

Bankruptcy proceedings are somewhat hairier, albeit cabined by the language of the revised Federal Rules of Bankruptcy Procedure. Prior to 2009, Bankruptcy Rule 9021 said that Fed. R. Civ. P. 58 "applie[d] in cases under the Code," but appeared to limit application of the SDR to "adversary proceeding[s] or contested matter[s]."[178] Similarly, Bankruptcy Rule 7054 adopted Fed. R. Civ. P. 54—and its definition of "judgment"—in adversary proceedings only, while, in turn, Bankruptcy Rule 9014 adopted Rule 7054 for contested matters.[179] Adversary proceedings, defined by Bankruptcy Rule 7001, are most easily thought of as separate civil suits connected to an ongoing bankruptcy action.[180] "Contested matters" are broader and are

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[174] *See, e.g.*, Kinsey v. MLH Fin. Servs., 509 F. App'x 852, 853 n.3 (11th Cir. 2013) (nonprecedential per curiam); Pramco, LLC v. San Juan Bay Marina, Inc., 435 F.3d 51, 54 n.1 (1st Cir. 2006); *see also* LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 222 (3d Cir. 2007) (applying SDR in appeal from Magistrate Judge sitting by consent).

[175] *See*, *e.g.*, MSC Mediterranean Shipping Co. v. Metal Worldwide, Inc., 884 F. Supp. 2d 1277, 1279 (S.D. Fla. 2012); N.J. Dist. Ct. C.P.R. 72.1(c)(1) (referring to "appeals" of nondispositive orders to the district court).

[176] 28 U.S.C. § 636(b)(1)(A); FED. R. CIV. P. 72(a).

[177] FED. R. CIV. P. 54(a). Needless to say, the opposite outcome would make no sense, requiring a separate document and formal entry thereof of *all* nondispositive magistrate orders. This cannot be what the Rules contemplate.

[178] FED. R. BANKR. P. 9021; *see also* Dynamic Changes Hypnosis Ctr., Inc. v. PCH Holding, LLC, 306 B.R. 800, 807 n.10 (E.D. Va. 2004).

[179] FED. R. BANKR. P. 7054; FED. R. BANKR. P. 9014(c).

[180] *See generally* Douglas G. Baird and Edward R. Morrison, *Adversary Proceedings in Bankruptcy: A Sideshow*, 79 AM. BANKR. L.J. 951, 951 (2005).

frequently part of a main bankruptcy proceeding.[181] Moreover, as anybody who has encountered bankruptcy appeals can attest, the twin concepts of finality and appealability are much more malleable in bankruptcy practice. The upshot is that even with the interlocutory caveat discussed above, many more bankruptcy orders are flat out appealable than would be the case in coordinate civil proceedings. As a result, under the pre-2009 Bankruptcy Rules, the SDR applied quite broadly.[182]

In 2009, the Bankruptcy Rules were substantially revised. The SDR (and Rule 58 in general) now applies *only* to adversary proceedings, through the application of new Bankruptcy Rule 7058 (the corresponding language in Bankruptcy Rule 9021 was stripped out).[183] By limiting the SDR to adversary proceedings, the new Bankruptcy Rules confine the SDR's application to proceedings that follow more of the orderly progress of standard civil litigation, avoiding numerous headaches that would otherwise arise.[184]

2. The Two Formal Components of the SDR: "Separateness" and "Judgment-ness"

Proper application of the SDR can be best thought of as involving two components, which, while analytically separate, are by necessity related to each other.

First, an order or other judgment satisfying the SDR must be *separate*.[185] Deciding whether something is, in fact, "separate" from something that would disqualify it is the more mechanical of the two factors, and one Court of Appeals has promulgated clear rules in that regard.[186]

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[181] *See* Hon. Christopher M. Klein, *Bankruptcy Rules Made Easy: A Guide to the Federal Rules of Civil Procedure that Apply in Bankruptcy*, 70 AM. BANKR. L.J. 301, 305 (1996); *see also* State Bank v. Gledhill, 76 F.3d 1070, 1077 (10th Cir. 1996).

[182] *See, e.g.*, Reid v. White Motor Corp., 886 F.2d 1462, 1464 (6th Cir. 1989).

[183] FED. R. BANKR. P. 7058; *see* Potter v. Barton (*In re* Barton), No. 14-80091, 2014 Bankr. LEXIS 2914, at *2–3 (Bankr. W.D. Mich. June 29, 2014) (discussing application of revised rules).

[184] As one commentator noted:

> The application of this rule to bankruptcy cases has proven awkward, as many bankruptcy courts routinely enter short orders that contain factual recitals . . . The amendments to Bankruptcy Rules 7052 and 9021 and new Bankruptcy Rule 7058 resolve problems that arise when applying the separate-judgment rule to all bankruptcy matters. New Bankruptcy Rule 7058 makes Civil Rule 58, including its separate-document requirement and 150-day default appeal period, applicable only to adversary proceedings. The amendment to Bankruptcy Rule 9021 makes clear that the separate-document requirement does not apply outside of adversary proceedings.

Leslie R. Masterson, *Federal Rules Update: The Times They Are a-Changin'*, AM. BANKR. INST. J., Oct. 2009, at 20, 73.

[185] FED. R. CIV. P. 58(a).

[186] *See* LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 224 (3d Cir. 2007).

Second, the separate document must be an *acceptable judgment*. This is not the same as being a Rule 54(a) judgment, or an equivalent of one. Rather, it is a largely court-promulgated rule—derived in spirit from the textual requirement for the separate document to be "distinct from any opinion or memorandum"[187]—that requires the actual separate document to fit certain specifications. Generally, an SDR-compliant document will substantially omit the facts of the case and contain little to no reasoning.[188] It is easy, if an oversimplification, to think of this as an ersatz "brevity" requirement: the shorter and starker, the better.[189]

Of the two requirements, the first of the two is less talked about than it should be. With all of the agonizing over the other, ephemeral aspects of the rule, it is surprising that so little attention has been paid to its basic mechanics in the modern era. The second of the two is often talked about, but it is "squishy," with courts balancing the requirement that Rule 58 be applied mechanically with the desire to avoid mindless adherence to it—of special concern before the 2002 amendments robbed noncompliance of much of its danger. As one court memorably said, "[I]t is one thing to say that Rule 58 creates a straightjacket, another to define the straightjacket's precise measurements."[190]

a. Separateness

We begin with a twist. Although the SDR contains "separate" in its very name, it nowhere requires the entry of more than one document, so long as the one that is entered meets the substantive criteria discussed further *infra*.[191] If a court entirely eschews an explanation and enters an order saying, "The motion to dismiss is granted and the complaint is dismissed," that suffices.[192]

In the more common scenario, whether an order or judgment is sufficiently separate from the opinion depends on a number of factors, all centered on whether the judgment is sufficiently distinct from any other document, such as an opinion or a memorandum.[193] Courts generally hold that an order 'folded in' with the associated opinion is not 'separate," but while this principle was settled quite early on, a broader definition of separateness was not developed before the dawn of the twenty-first century.

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[187] FED. R. CIV. P. 58 advisory committee's note (1963).

[188] *In re* Cendant Corp. Securities Litigation, 454 F.3d 235, 242-43 (3d Cir. 2006).

[189] *See* Hughes v. Halifax Cnty. School Bd., 823 F.2d 832, 835 (4th Cir. 1987) ("Brevity is an important factor . . . ."). As will be seen, it is brevity of explanation and fact, and not brevity of form, that reigns.

[190] Kidd v. District of Columbia, 206 F.3d 35, 39 (D.C. Cir. 2000).

[191] *See In re* Cendant, 454 F.3d at 242 (collecting cases from the First, Fifth, Ninth, and Tenth Circuits).

[192] *See, e.g.*, United States v. Schimmels, 85 F.3d 416, 421 (9th Cir. 1996); R.R. Vill. Ass'n v. Denver Sewer Corp., 826 F.2d 1197, 1201 (2d Cir. 1987); United States v. Clearfield State Bank, 497 F.2d 356, 358 (10th Cir. 1974) ("Appellant, however, interprets this to mean that two documents are required in all cases. This is unfounded.").

[193] Cloyd v. Richardson, 510 F.2d 485, 486 (6th Cir. 1975) (per curiam) (citing FED. R. CIV. P. 58 advisory committee's note (1963).

But in the modern era, the Third Circuit has led the pack in articulating some easy-to-follow factors, most of which are fairly self-explanatory, make a good deal of sense, and—with one exception—really should characterize the approach of the courts to the issue of "separateness." According to the Third Circuit's opinion in *LeBoon v. Lancaster Jewish Community Center Association*, to be separate, a judgment or order must be:

- separately titled and captioned;
- separately paginated (*i.e.*, page numbers cannot continue from the opinion);
- unattached to the opinion or memorandum (*i.e.*, the opinion cannot be stapled to the order); and
- docketed separately.[194]

The bad news is, despite sounding sensible, these factors are elevated dicta, promoting to a set of formal requirements that earlier cases treated as guideposts. Specifically, in a case called *Local Union No. 1992 of IBEW v. Okonite Co.*, the Third Circuit referred to each of these qualities in order to show that the SDR was satisfied, but did not treat any as a make-or-break factor.[195] Two years after *Okonite*, the Third Circuit's opinion in *In re Cendant Corp*. contained a brief discussion of how the appealed-from order was not "stapled or otherwise attached" to an opinion.[196] Yet according to the Third Circuit's later opinion in *LeBoon*, these earlier opinions suddenly were not saying that these qualities were *evidence* of separateness, but that they *defined* it.[197] Subsequent Third Circuit decisions take these factors as gospel,[198] sometimes going so far as to say that their "mechanical application" (language from *Indrelunas*) is required by the SDR and Supreme Court precedent.[199] That is not to say that the Third Circuit's ruling sprang out of nowhere, though; the general requirement that an order be self-contained in some fashion had a long pedigree,[200] and the D.C. Circuit had feinted in a similar direction in one of its pre-2002 opinions on the SDR.[201]

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[194] LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 224 (3d Cir. 2007) (citing 12-58 MOORE'S FEDERAL PRACTICE - CIVIL § 58.05 (2015)); *Cendant*, 454 F.3d at 241; Local Union No. 1992 of IBEW v. Okonite Co., 358 F.3d 278, 284–85 (3d Cir. 2004); *accord* Titus-Morris v. Banc of Am. Card Servicing Corp., 512 F. App'x 213, 215 n.1 (3d Cir. 2013) (nonprecedential per curiam).

[195] *See Okonite Co.*, 358 F.3d at 285-86.

[196] *In re Cendant*, 454 F.3d at 241–43.

[197] For a good counterexample from an unpublished order, see *In re* K-Dur Antitrust Litig., No. 10-2727, 2010 U.S. App. LEXIS 27699, *1 (3d Cir. Nov. 24, 2010) (citing *Okonite*, 358 F.3d at 280, for the proposition that "generally the District Court is required to set forth a judgment in a separate document, apart from any accompanying opinion").

[198] *See* Washington v. Showalter, 494 F. App'x 268, 271-72 (3d Cir. 2012) (nonprecedential per curiam).

[199] Wallace v. Fegan, 455 F. App'x 137, 138 n.2 (3d Cir. 2011) (nonprecedential per curiam) (quoting United States v. Indrelunas, 411 U.S. 216, 221-22 (1973) (per curiam)).

[200] *See, e.g.*, Pacific Emp'rs Ins. Co. v. Domino's Pizza, 144 F.3d 1270, 1278 (9th Cir. 1998); Otis v. City of Chicago, 29 F.3d 1159, 1163 (7th Cir. 1994) (en banc).

[201] *See* United States v. Johnson, 254 F.3d 279, 286 (D.C. Cir. 2001). *But see id.* at 288-89 (Henderson, J., concurring in the judgment) (suggesting that physical attachment should be

The origin story of the factors, however, should not detract from how reasonable they are. Putting aside for the moment whether these factors are intended to be balanced or if each can separately govern the outcome, three of the four—all except for the pagination, discussed further below—are well considered and should be deemed the guiding lights in thinking about the SDR in the age of electronic filing. (In fact, because the "docketed separately" and "attached" inquiries are more or less the same, there are really only two primary factors.)[202]

Ideally, in order to be deemed "separate," the appealable order or judgment should be a separate PACER/ECF docket entry and should begin with a separate caption and title. Because the SDR is to be mechanically applied,[203] and because these two qualities are so easily achieved, a court that does both has successfully rounded the bases and prevented the great run of litigant confusion.[204]

Outside of the Third Circuit, few cases have reached the aggregation of two of these factors: the separate titling/captioning of an order and its docketing apart from the opinion. After all, nothing in Rule 58 or Rule 79 explicitly requires that the "separate judgment" be separately docketed, meaning in a "docket number" *completely separate from* an opinion.[205] As Judge Henderson of the D.C. Circuit has pointed out, many of the decisions railing against the "tacking on"[206] of an order to an opinion address opinions that contain "so ordered" language or a similar combination of opinions and orders.[207] For instance, under the Third Circuit's factors, one practice stands out as almost a per se SDR violation: "Memorandum and Order" or "Opinion and Order" decisions by district courts,[208] at least those that are not then

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encouraged, not discouraged, and that clerk of court's failure to enter the opinion separately to the order should not have triggered the SDR).

[202] For pro se litigants and non-e-filers, the separate entry of an opinion and order might be followed by a mailing from the court that staples or clips the two separate documents together. Because there is really no practical way to monitor or police this practice, SDR questions must focus on the presentation of the electronic docket and not what might happen when various documents are assembled into mailings to litigants.

[203] United States v. Indrelunas, 411 U.S. 216, 222 (1973).

[204] *See In re* Cendant Corp. Securities Litigation, 454 F.3d 235, 241-42 n.4 (3d Cir. 2006). ("Put simply, Rule 58 is a touch-the-base requirement that lays perception aside.").

[205] *See* FED. R. CIV. P. 58; FED. R. CIV. P. 79.

[206] *See, e.g.*, Nunez-Soto v. Alvarado, 956 F.2d 1, 2 (1st Cir. 1992) (containing "tacked on" language).

[207] *See* United States v. Johnson, 254 F.3d 279, 288-89 (D.C. Cir. 2001) (Henderson, J., concurring). As Judge Henderson noted, several of the opinions discussing the "combination" of opinions and orders were discouraging the use of a "so ordered" coda, or otherwise of the inclusion of a not-separately-captioned order within a larger opinion. *Id.* She stopped short of saying that she would find a combined "Opinion and Order" satisfactory, and I am unaware of any PACER-era case (or even before) endorsing an "Opinion and Order" or "Memorandum and Order" as satisfying the SDR.

[208] Other courts have discussed "opinions and orders," too. *See, e.g.*, Hughes v. Halifax Cnty. School Bd., 823 F.2d 832, 835 (4th Cir. 1987).

followed by an additional separate judgment.[209] But if an order was truly separate from an opinion—separately captioned, separately titled, and all that—it could reasonably be argued that the technical SDR requirements were satisfied, even if the two documents were docketed together in PACER/ECF.[210]

Despite this potential ambiguity, docketing the SDR order in a different PACER/ECF "docket number" from any opinion makes intuitive sense and fulfills the language and the spirit of Rule 58, viewed in tandem with the requirements of Rule 79. This is especially true in light of how PACER/ECF treats and creates "documents." A single PACER/ECF entry that lacks attachments could be the product of countless separate captioned and titled documents, but when retrieved by an end-user will present as a single, combined PDF. While the use of bookmark functions and other PDF features might serve to distinguish component documents in one large PDF, relying on the particular settings of an end-user's terminal is exactly the kind of unknowable factor that would defeat the mechanical application of the rule. An order docketed alongside an opinion as an attachment to that opinion, and which would thereby receive a subsidiary (but technically separate) PACER/ECF entry—42-1, for example, to an opinion's 42—presents a closer call and is more easily justified. But, the ability of the end-user to click on the parent PACER/ECF number and retrieve all documents as a single combined PDF could also conceivably create confusion.

There is another necessary acknowledgment of the realities of electronic filing: the text-only order. Two courts have reached the question; unfortunately, both have done so in what is arguably dicta.[211] The Fifth Circuit has suggested in dicta that a text-only order—an order on the docket without a separate PDF "link"—cannot be a "document" under the SDR.[212] In other words, the Fifth Circuit has said that the docket entry alone—without any document or PDF associated with it—is not sufficient. Moore's has jumped on this,[213] but the outcome seems hard to square with the generation of notices of docket activity, which surely are "documents" that could conceivably contain language satisfying the content requirements of the SDR.[214]

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[209] *See, e.g.*, Alinsky v. United States, 415 F.3d 639, 642-43 (7th Cir. 2005). Of course, these combined entries can still be final for the purposes of 28 U.S.C. § 1291 and appeal. *See* Lupo v. R. Rowland & Co., 857 F.2d 482, 484 (8th Cir. 1988).

[210] "Hybrid opinions," or orders that do not meet the requirements of a valid SDR-compliant order, would be unsatisfactory in any reading. *See, e.g.*, Wynn v. United States, No. 12-6694 (KM), 2014 WL 2711963 at *3 (D.N.J. June 16, 2014).

[211] *See* Barber v. Shinseki, 660 F.3d 877, 879 (5th Cir. 2011) (per curiam); Witasick v. Minn. Mutual Life Ins. Co., 803 F.3d 184, 188 (3d Cir. 2015).

[212] *Barber*, 660 F.3d at 879 ("We nonetheless note that the district court has an obligation to issue an order as a separate, freestanding document, and not just as a docket entry, when it disposes of a case."). This language is dicta because the Fifth Circuit had, a paragraph earlier, conceded that it lacked jurisdiction. *Id.*

[213] 12-58 MOORE'S FEDERAL PRACTICE - CIVIL § 58.05(4)(a) (2015).

[214] For example, in *Beaudry Motor Co. v. Abko Properties, Inc.*, a document labeled "Civil Minutes – General" was held to be an SDR-compliant order when it was treated as such; in

By contrast, in an opinion issued while this piece was going to press, the Third Circuit observed that "electronic entries made by a district court via the federal CM/ECF System can, in certain circumstances, satisfy Rule 58's requirement," a point the court deemed "hardly controversial."[215] Delving into the guts of CM/ECF case-related filing events, the court suggested that text-only orders would encounter "no difficulty satisfying the separate document requirement of Rule 58(a),"[216] while the other two kinds of filing events—utility events or minute entries—cannot suffice because they are "not orders at all" and do not contain a judge's digital signature, as text-only orders do.[217] (The court's reference to judicial signatures was somewhat odd, given as Fed. R. Civ. P. 58(b)(1) specifically contemplates "judgments" that bear only the clerk's signature.) But this discussion was in service of the Third Circuit's refusing to hold that "*every* electronic docket entry satisfies Rule 58's requirements."[218] The court had already held that the "Civil Case Terminated" entry at issue (a utility event, most likely, although the court never directly said so) did not suffice because it did not do what a Rule 58 judgment needs to do: set forth the relief granted, as discussed in the section following this one.[219] Thus, on this broader point about which ECF entries do and do not cut it, the Third Circuit's decision was arguably dicta.[220]

However, by matter of practice, text-only orders are uncommonly used to resolve dispositive motions and, as a result, are uncommonly appealable themselves. While other courts might disagree with the Fifth Circuit and Third Circuit on this point, it is unlikely that they will encounter much opportunity for formal objection—which is probably why the two discussions are dicta in the first place.

In sum, even those circuits that have not explicitly adopted the Third Circuit's "separate docketing" requirement should do so moving forward. The SDR's history, purpose, and text is best followed by requiring that all judgments or orders be separately captioned, named, and docketed under their own independent PACER docket entries. In the modern age of electronic filing, these two requirements best ensure that the document entered by the district court is truly "distinct from any other document entered in the case."[221]

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other words, it was mailed to the parties, and was clearly a decision of the court. Beaudry Motor Co. v. Abko Properties, Inc., 780 F.2d 751, 755 (9th Cir. 1986). It is unclear why similar reasoning would not apply to text-only orders, as long as they were not otherwise procedurally or substantively deficient.

[215] *Witasick*, 803 F.3d at 188.

[216] *Id.* at 189

[217] *Id.*

[218] *Id.* at 188.

[219] *Id.*

[220] *See* Matthew Stiegler, *New Opinions – Rule 58 in the ECF Age, and a Tonnage Clause case*, CA3BLOG (Oct. 1, 2015), http://thirdcircuitblog.com/cases/new-opinions-rule-58-in-the-ecf-age-and-a-tonnage-clause-case.

[221] Cloyd v. Richardson, 510 F.2d 485, 486 (6th Cir. 1975) (per curiam).

The single element of the Third Circuit's approach that appears questionable is the requirement that the "separate document" not be consecutively paginated.[222] Unlike the other factors, such as the requirements of separate captioning and docketing, the pagination issue seems comparatively minor and unlikely to lead to much confusion, if it is even noticed by the litigants. Besides, the only time that an order or judgment would be paginated consecutively is when it was originally part of the same Word/WordPerfect/OpenOffice document as the opinion. If the opinion and order were separately captioned and docketed but were consecutively paginated, then this means that the judge and his or her staff remembered to separate out the opinion and order for filing, but simply forgot to turn off page numbering or otherwise disguise the page number on the order.

Assuming that this has happened and will continue to happen on occasion, giving pagination the power to violate the SDR, all by its lonesome, would jump from "mechanical application" to elevating intricacies of form over substance. If they ever confront a standalone consecutive pagination case, courts would be entirely justified in finding that this nit, standing alone, is not enough to violate the SDR.

Given the paucity of clear circuit law on the "separateness" inquiry, courts are well positioned to follow the modified Third Circuit approach, outlined above, without having to worry about the additional difficulties of overruling panel opinions and the like. Courts will, before long, have to confront the interaction between electronic docketing and the SDR. These factors, while not required by the text of Rule 58, give its requirements real meaning and are easily followed. Of course, the simplest way to incorporate these factors would be to explicitly add them to the Rule itself.

b. An Acceptable Judgment: What Can (and Cannot) Be in a Rule 58 Judgment

The vast quantity of ink spilled on the SDR reaches not the formal quality of separateness, but the primary quality of what makes a proper "judgment" in the first place. From these decisions, several basic rules have developed, and while they are a bit more clearly defined than the "separateness" factors divined by the Third Circuit, they are "squishy" in the sense that courts have blinked on more than one occasion when confronted with a departure from previously set rules. The two main requirements are that the document (1) state all of the relief granted by the court, and (2) omit, or at least substantially

[222] It does not appear that this requirement has ever actually been used on its own to find an SDR violation. Thus, even in the Third Circuit, its power standing alone is unclear, assuming all other factors were satisfied. *Cf.* Wallace v. Fegan, 455 F. App'x 137, 138 n.2 (3d Cir. 2011) (nonprecedential per curiam) (observing that district court violated SDR by docketing order with opinion *and* paginating consecutively).

omit, either a factual recitation or the reasoning of the court.[223] Of course, the decision must also be appealable.[224]

i. Before the Main Event, the Ephemera

(a) "Order" or "Judgment?" Generally, Both are Good (Unless You're In New York, Connecticut, or Vermont)

Most authorities to reach the matter have said that a separate document need not be called anything in particular: both "order" and "judgment" suffice,[225] although the "judgment" label has been held by at least one court of appeals to be a factor suggestive of a district court's intent.[226] Given the expansive definition of "judgment" in Fed. R. Civ. P. 54,[227] this makes sense, and also avoids imposing additional formal requirements that could gum up the works on the way from pen to docket.

Because nothing in life is perfect, there is an outlier, and a conspicuous one at that: the Second Circuit. And the history of the Second Circuit's additional labeling requirements rests, as do all things unholy, in a series of *per curiam* opinions.

In 1979's *Turner v. Air Transport Lodge 1894 Of International Association of Machinists and Aerospace Workers, AFL-CIO*, the district court issued an interesting opinion and order of great social import, which we shall ignore by focusing narrowly instead on its concluding paragraph: "The defendant is directed to reinstate plaintiff immediately, with all benefits to which he was entitled prior to the time of his expulsion. So ordered."[228] On appeal, the Second Circuit found the SDR to be violated by this combined

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[223] *See, e.g.*, 12-58 MOORE'S FEDERAL PRACTICE - CIVIL § 58.05(4)(a) (2015); Local Union No. 1992 of IBEW v. Okonite Co., 358 F.3d 278, 285 (3d Cir. 2004).

[224] Again, despite being separate and distinct from the Rule 58 inquiry, finality and appealability often sneak into the analysis anyway. *See, e.g.*, Trotter v. Regents of the Univ., 219 F.3d 1179, 1183 (10th Cir. 2000) (treating an order as something other than a "final judgment for purposes of Rule 58" when it allowed leave to amend).

[225] *See* 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2785 (3d ed. 2012) ("No particular form of words is required in a judgment."); Creaghe v. Albemarle Corp., 98 F. App'x 972, 974 (5th Cir. 2004) (nonprecedential per curiam) ("Nor does the fact that the order was called a "Ruling" rather than a 'Judgment' affect its status under Rule 58."); *Okonite*, 358 F.3d at 285-86; United States v. Johnson, 254 F.3d 279, 286 n.7 (D.C. Cir. 2001) (collecting cases); Beaudry Motor Co. v. Abko Properties, Inc., 780 F.2d 751, 755 (9th Cir. 1986).

[226] *See* Vaquería Tres Monjitas, Inc. v. Comas-Pagán, 772 F.3d 956, 960 (1st Cir. 2014) ("The document at issue was also entitled 'Order and Judgment,' which may be taken as a further indication that the document is a separate judgment and not a memorandum or an opinion.").

[227] *See* FED. R. CIV. P. 54(a).

[228] Turner v. Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO, No. 77-C-1146, 1978 U.S. Dist. LEXIS 18641, at *12 (E.D.N.Y. Mar. 31, 1978).

opinion and order.[229] The court firmly stated that it would not encourage SDR-waiver situations, noting in passing that, when a district court makes a decision that it thinks is final, "the better procedure is to set forth the decision in a separate document called judgment."[230]

So far, so good. In fact, some other circuits even picked up on the "better procedure" language in their own opinions.[231] But several years later, in *Kanematsu-Gosho, Ltd. v. M/T Messiniaki Aigli*, the Second Circuit rejected the idea that a document captioned "order" could pass muster under the SDR, because "to do so would detract from the evident purposes of the separate document requirement, namely, ensuring that the parties have clear notice of the entry of final judgments."[232] Because one clear way to ensure this certainty would be "to call a judgment a judgment," the court held that "there was no final judgment entered herein until a separate document was filed and entered—this occurred on June 27, 1986—and that document was denominated a 'judgment.'"[233] The court relied, in part, on language contained in the Federal Rules of Appellate Procedure in coming to its conclusion, although it (somewhat curiously) did not reach the Fed. R. Civ. P. 54(a) definition of "judgment."[234]

As a result, since *Kanematsu-Gosho*, the Second Circuit has required SDR-compliant orders to be labeled "judgment," although the cases do not generally reveal a pattern where mislabeling is the only flaw at issue.[235] A

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[229] Turner v. Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO, 585 F.2d 1180, 1182 (2d Cir. 1978) (per curiam).

[230] *Id.*

[231] *See, e.g.*, Hummer v. Dalton, 657 F.2d 621, 624 (4th Cir. 1981) (quoting *Turner*, 585 F.2d at 1182); Beukema's Petroleum Co. v. Admiral Petroleum Co., 613 F.2d 626, 628 (6th Cir. 1979) (per curiam) (quoting the same language from *Turner* as quoted in *Hummer*). The citation evolved, however, to omit the "called a judgment" component. *See* Hanson v. Flower Mound, 679 F.2d 497, 502 (5th Cir. 1982) ("[I]t remains the better practice to have the judgment entered as a separate document.").

[232] Kanematsu-Gosho, Ltd. v. M/T Messiniaki Aigli, 805 F.2d 47, 49 (2d Cir. 1986) (per curiam).

[233] *M/T Messiniaki Aigli*, 805 F.2d at 49 (citing FED. R. CIV. P. appendix of forms, Form 31, Form 32).

[234] *See id.*

[235] *See* Dudley v. Penn-America Ins. Co., 313 F.3d 662, 669 (2d Cir. 2002) (Sotomayor, J., concurring); Cooper v. Town of E. Hampton, 83 F.3d 31, 34 (2d Cir. 1996); Axel Johnson, Inc. v. Arthur Andersen & Co., 6 F.3d 78, 84 (2d Cir. 1993). *But see* Grossman v. Tex. Commerce Bancshares, No. 87 Civ. 6295, 1995 WL 552744, at *22 n.8 (S.D.N.Y. Sept. 15, 1995) (noting the Second Circuit's departure from the general rule while appearing to disparage it).

In a recent precedential opinion, the Second Circuit held that a text order dismissing a prisoner's cases for reasons related to *in forma pauperis* filing requirements did not satisfy the SDR. *See* Arzuaga v. Quiros, 781 F.3d 29, 33 (2d Cir. 2015) (per curiam). Although the Second Circuit's opinion can be read to suggest either that (a) the text-only nature of the order or (b) the failure to label the text-only order a "judgment" was the only flaw at play, *see id.*, an examination of the underlying civil docket sheets reveals that each order also contained reasoning, albeit minimal. *See, e.g.*, Order Dismissing Case at 151, Arzuaga v. Quiros, No. 3:10-CV-01200 (D. Conn. 2013) ("On September 20, 2013 the Court entered an Order, see 147, directing the plaintiff to pay the filing fee by October 20, 2013 or the case would be

random sampling of district court dockets in the circuit reveals a general adherence to the rule.[236]

While the Second Circuit's approach is certainly defensible—and has the collateral effect of requiring district courts to actually acknowledge the form of their judgments rather than simply entering them in ad hoc fashion—it does appear to go against the general tide (although the D.C. Circuit has endorsed using a document labeled "judgment" as the "ideal" practice[237]). It would further be difficult to export to other courts that have not always used these labeling conventions. This is of special concern to those judges who might balk at calling certain appealable orders, such as those dismissing a complaint under Fed. R. Civ. P. 12(b)(6), "judgments."[238] It also creates a secondary danger, exacerbated by the 2002 amendments to Rule 58, of having litigants relying on the judgment/order distinction to determine finality—the "it is finished" moment—as opposed to watching out for an order that is actually final. More bluntly, if the in-Circuit requirement is to have judgments be labeled "judgments," but a court enters what is instead undoubtedly a final (but SDR-noncompliant) order, a litigant who waits for a "judgment" may wait himself out of an appeal.

In all, while the Second Circuit's approach has some merit, it probably should not be considered as part of the pantheon of substantive requirements outside of that Circuit. Absent an actual change to Rule 58 or the adoption of uniform judgment-entry procedures throughout the district courts of a given circuit, other circuits should not, at this late date, adopt such a change without giving significant thought to how it might affect the culture of the affected district courts.

(b) The Uncertainty of Rule 58(b)

Near the beginning of this piece was a discussion of how Rule 58 started out sounding like a trial rule, due in large part to language that now occupies Fed. R. Civ. P. 58(b), assigning prompt entry responsibilities—*without* a judge's oversight in some cases and with it in others—to the Clerk of the

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dismissed. To date the filing fee has not been received, therefore, the Clerk is directed to close this case. IT IS SO ORDERED.").

[236] *See, e.g.*, Judgment in a Civil Case, James v. Bush, 2014 WL 576170 (N.D.N.Y. Feb. 11, 2014) (No. 6.13-cv-1508) ECF No. 9. *But see* Vega v. Rell, 611 F. App'x 22, 24 n.1 (2d Cir. 2015) (nonprecedential summary order) (noting lack of entry of separate document).

[237] Kidd v. District of Columbia, 206 F.3d 35, 41 (D.C. Cir. 2000). *But see id.* at 42-43 (Tatel, J., dissenting) (noting that he, like the majority, would not view the order/judgment distinction itself as dispositive).

[238] *Compare* Macfarlan v. Ivy Hill SNF, LLC, 675 F.3d 266, 269 (3d Cir. 2012) ("When summary judgment is granted to the prevailing party, it is inappropriate and erroneous to dismiss the very complaint that gave rise to the summary judgment order."), *and* Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 121 n.2 (3d Cir. 1999) ("Because the grant of summary judgment and the dismissal of the complaint are inconsistent, we will disregard reference to the 'dismissal' of Cheminor's complaint and treat the record as a summary judgment record."), *with* Blakely v. Wards, 738 F.3d 607, 611-12 (4th Cir. 2013) (equating summary judgment with "dismissal" for the purposes of 28 U.S.C. § 1915(g)).

Court.[239] Fed. R. Civ. P. 58(b) requires the Clerk of the Court to "promptly" prepare, sign, and enter a judgment without awaiting the court's direction upon a general verdict, when the court awards only costs or a sum certain, or when the court denies all relief, and otherwise requires that the court approve the form of judgment.[240]

I suspect, though lack the institutional wherewithal and budget to demonstrate conclusively, that the clerk/court distinction of Rule 58(b) is inconsistently followed.[241] Especially in routine decisions granting motions to dismiss or otherwise "denying all relief,"[242] I have frequently seen the court itself, and not the clerk, enter and sign the case-ending order or judgment—not that anything in the rule prohibits the court from doing what the clerk can do on its own. In some districts, a few cases, especially those disposed of at the beginning of their life and in decisive fashion, are resolved with the official AO 450 form, entitled "JUDGMENT IN A CIVIL CASE."[243] As one authority has observed, "as a practical matter, it is often the court and not the clerk which prepares Rule 58 judgments," in spite of Rule language to the contrary.[244]

In many ways, the language of Rule 58(b), and the presence of AO 450, actually supports the Second Circuit's judgment-labeling approach discussed above. Under that reading, no matter the outcome, the entry of a final order should automatically lead to either the clerk's ministerial preparation and entry[245] of an AO 450 form or its equivalent (if the clerk can act alone) or the court's approval of same (if the court's intervention is required).

Taking Rule 58(b) at face-value on the other hand—requiring the clerk to sign and enter judgment "without awaiting the court's direction" in certain situations[246]—imposes additional formal/substantive requirements on SDR-compliant "judgments" that are, in all likelihood, frequently not met. An excellent example of this uncomfortable reality arose in *Brown v. Fifth Third Bank*, where Judge Posner noted, among other things, that a clerk's order was not actually signed by the clerk.[247]

As is clear, Rule 58(b) is the epitome of an insider rule, in that it purports to coordinate the actions of the clerk's office and chambers. As a result, I have uncovered little research discussing its (or its predecessors') contours;

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[239] *See* FED. R. CIV. P. 58(b).

[240] *Id*.

[241] *Compare* Judgment Pefley v. Gardner, (D. Or. judgment entered Jan. 10, 2013) (No. 3:10-cv-01103) ECF No. 87 (signed by judge), *with* Judgment Jenkins v. McGerr, (E.D. Wash. Judgment July 26, 2013) (No. 2:12-cv-05053) (signed by clerk), ECF No. 41.

[242] FED. R. CIV. P. 58(b).

[243] *See* Hope v. United States, 43 F.3d 1140, 1142 (7th Cir. 1994) (discussing form as "the preferred and sound vehicle for complying with Rule 58"). I note that a search for appellate cases containing "AO 450" or "Form 450" returns primarily cases from the Seventh Circuit.

[244] Scott L. Cagan, *Rule 58 of the Federal Rules of Civil Procedure: An Appealing Alternative*, 21 STETSON L. REV. 311, 325 (1992).

[245] *See* Thompson v. Gibson, 289 F.3d 1218, 1221 (10th Cir. 2002) (describing entry of AO 450 as ministerial task).

[246] FED. R. CIV. P. 58(b).

[247] Brown v. Fifth Third Bank, 730 F.3d 698, 701 (7th Cir. 2013) (Posner, J.).

and in those districts that tend to have judges themselves author and enter even the simplest of case-ending orders, its formal requirements pertaining to clerks may not have any significance. When, by contrast, the clerk follows the literal letter of Rule 58(b) and prepares certain judgments for entry on the docket, additional procedural requirements—signing, service, and proper entry—may apply.[248]

In sum, the operation of and fealty to Rule 58(b) appears to vary by district, and while these regional inconsistencies might be quite illuminating, they are beyond the scope of this piece. Litigants and judges, however, should be wary of the requirements of the Rule and sensitive to how it might apply given the particular practice of the district and circuit in question.

ii. State Relief

This first of the two main substantive requirements is at once both straightforward and easily overcomplicated. Harkening back to *Schaefer*, in order to be SDR-compliant, a Rule 58 judgment must state the complete relief granted by the court—who won what, if someone in fact won something.[249] It is not enough for an opinion or order to state a winner; the Rule 58 judgment must say what was won.[250]

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[248] For a pre-PACER case with this outcome, *see* Ingram v. Acands, Inc., 977 F.2d 1332, 1338-39 (9th Cir. 1992).

[249] United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 232–33 (1958). *See, e.g.*, 12-58 MOORE'S FEDERAL PRACTICE - CIVIL § 58.05(a) (2015); Witasick v. Minn. Mutual Life Ins. Co., 803 F.3d 184, 188 (3d Cir. 2015) (rejecting docket entry that said "nothing of the relief granted"); Local Union No. 1992 of IBEW v. Okonite Co., 358 F.3d 278, 285 (3d Cir. 2004) ("A judgment granting a plaintiff summary judgment, for example, may have to contain any damages or injunctive relief awarded."); Otis v. City of Chicago, 29 F.3d 1159, 1163 (7th Cir. 1994) ("It should be a self-contained document, saying who has won and what relief has been awarded . . . .").

This is, incidentally, why thinking of SDR compliance in terms of "brevity" is not particularly helpful. In a simple case—two parties, for example, or when a motion for summary judgment or to dismiss the complaint has been granted—a lengthy order might be cause for suspicion, especially in light of the general rule against facts and reasoning discussed *infra*. But in a multi-party case, or when the disposition is particularly complex, a proper judgment setting forth the spoils among the parties *might*, if required, be lengthy to fully account for "the relief to which the winner is entitled." Rush Univ. Med. Ctr. v. Leavitt, 535 F.3d 735, 737 (7th Cir. 2008); *see also* Vaquería Tres Monjitas, Inc. v. Comas-Pagán, 772 F.3d 956, 959 (1st Cir. 2014) (deciding that an "Order and Judgment contain[ing] five numbered provisions" that "incorporate[d] the terms of the settlement agreement, explain[ed] that the district court retains jurisdiction for purposes of compliance, and state[d] which parties and successors are bound by the agreement," qualified as a separate document). Particularly woeful attempts at judgment can, of course, cloud a meaningful attempt at appellate review. *See Rush Univ. Med. Ctr.*, 535 F.3d at 737 (describing interstitial remand in search of clarity); Alpine State Bank v. Ohio Cas. Ins. Co., 941 F.2d 554, 559 (7th Cir. 1991) (ominously noting jurisdictional consequences of unclear judgment).

[250] Specialized Seating, Inc. v. Greenwich Indus., L.P., 616 F.3d 722, 725-26 (7th Cir. 2010).

It is important to note that the judgment itself must set forth the relief. In order to be appropriately self-contained, the judgment cannot rely on another document for that purpose or for clarity.[251]

This is different from simply mentioning another document, or referring to the court's opinion in the preamble of an order, without relying on that document to set forth the relief among the parties.[252] A classic example arose in *Stamatakis Indus. v. Thompson*, where an order adopting a report and recommendation—but not otherwise specifying what happened—was not sufficient.[253] By contrast, an order adopting a report and recommendation, but then explaining the outcome and the relief granted, will not be out of compliance simply by dint of reference to the background document. Thus, in *Mason v. Goose*, the Eighth Circuit approved of an order that adopted a report and recommendation and then ordered a habeas corpus petition be denied.[254]

The requirement that the judgment set forth the relief has led to a line of cases suggesting that an order that simply grants a motion, without specifying the aftermath, cannot suffice.[255] That particular line, however, generally involved complex judgments with particular outcomes and not simple judgments—declaratory judgments, for example.[256] It is unclear whether the same thinking would apply to an order with an unambiguous effect, *e.g.*, "The motion to dismiss is GRANTED," although no less a luminary than then-Judge Sotomayor has implied to the contrary.[257]

As shown, the core function of a judgment is to tell the parties (and reviewing courts) what happened. By "setting forth" the relief granted or that relief has been denied, a judgment leaves as little ambiguity as possible at the precise juncture where additional review is contemplated.

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[251] Otis v. City of Chicago, 29 F.3d 1159, 1163 (7th Cir. 1994) (en banc).

[252] Moore's buries this distinction somewhat, originally saying that the judgment should not "refer, for purposes or completeness or explanation, to other proceedings or other documents," but later clarifying that only references that eliminate the "statement of relief" are prohibited. 12-58 MOORE'S FEDERAL PRACTICE - CIVIL § 58.05(4)(a) (2015).

[253] Stamatakis Indus. v. Thompson, 944 F.2d 382, 383 (7th Cir. 1991) (per curiam).

[254] Mason v. Groose, 942 F.2d 515, 516 n.2 (8th Cir. 1991); *see also* United States v. Perez, 736 F.2d 236, 237-38 (5th Cir. 1984) (per curiam) (approving of order that adopted report and recommendation and then denied § 2255 motion). Although some Circuits have suggested that orders adopting reports and recommendations may not comply with the SDR in the wake of Shalala v. Schaefer, 509 U.S. 292 (1993), the D.C. Circuit correctly notes in Kidd v. District of Columbia, 206 F.3d 35, 39-40 (D.C. Cir. 2000), that this is an overreading of *Shalala*.

[255] *See* Am. Interinsurance Exch. v. Occidental Fire & Cas. Co., 835 F.2d 157, 159 (7th Cir. 1987).

[256] *See id.*; *see also* Alpine State Bank v. Ohio Casualty Ins. Co., 941 F.2d 554, 558 (7th Cir. 1991).

[257] Dudley v. Penn-Am. Ins. Co., 313 F.3d 662, 670 (2d Cir. 2002) (Sotomayor, J., concurring) ("As indicated earlier, to satisfy this requirement, a judgment therefore must indicate the disposition of the plaintiff's claims for relief (including, in the appropriate case, a statement that the plaintiff shall take nothing)."); *see also* Paganis v. Blonstein, 3 F.3d 1067, 1069-71 (7th Cir. 1993) (discussing the insufficiency of merely dismissing a "complaint").

iii. Omit Facts and Reasoning

This final substantive factor is the one that truly makes the Rule 58 judgment distinct from any opinion or memorandum. Because the SDR was intended to distinguish the judgment from the document that "provide[d] the basis for the entry of judgment,"[258] *neither a recitation of facts nor the reasoning of the court should appear in the Rule 58 judgment.*

The authorities on this point are copious and in accord.[259] For example, in *In re Cendant Corp. Securities Litigation*, the Third Circuit explained at length that a "six-page Order, five pages of which were devoted to expounding the background of the case" could not be a SDR-compliant document, because both facts and procedural history are generally found within opinions, not judgments, and neither was necessary to set forth the relief granted to the parties.[260]

But *Cendant* itself contains a hedge. The court must *substantially* omit facts and reasoning, as the Circuit had yet to decide (and did not there) whether "an order that includes a modicum of analysis may satisfy the separate-document rule."[261] In fact, courts are willing to accept some slight departures from the no-facts-no-reasoning rule.[262] In a series of decisions, for example, the D.C. Circuit has endorsed a "single-citation, single-sentence standard for Rule 58," allowing some minor (but, admittedly, arbitrary) deviation.[263] Other courts have tolerated similar departures.[264]

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[258] FED. R. CIV. P. 58 advisory committee's note (1963).

[259] *See, e.g.*, Long v. Coast Resorts, Inc., 267 F.3d 918, 922 (9th Cir. 2001) ("Here, the 'order and judgment' entered on December 31, 1998 was not a final judgment because it did not constitute separate entry of judgment, but rather contained facts and legal analysis."); Hughes v. Halifax County School Bd., 823 F.2d 832, 835 (4th Cir. 1987) ("Since the document recites the case's factual and procedural background and reasoning for its disposition, it could be interpreted as an opinion. We conclude that the order did not comply with the Rule 58 separate document requirement."); Reytblatt v. Denton, 812 F.2d 1042, 1044 (7th Cir. 1987) (per curiam) ("It should not . . . contain legal reasoning."); *see also* Cagan, *supra* note 244, at 313 ("A Rule 58 'separate document' is usually no more than a one-page document entitled 'judgment' or 'order' containing a directive or dispositive language, but no legal analysis.").

Courts occasionally try to skirt this requirement by entering a facially sparse order adorned with pages of explanatory footnotes. These courts fool nobody. *See, e.g.*, Bazargani v. Radel, 598 F. App'x 829, 830 (3d Cir. 2015) (nonprecedential per curiam) ("The District Court's opinion is set forth in the footnotes to the dismissal order . . . As such, the order is not a separate document because it is not self-contained and separate from the opinion and it includes the District Court's reasoning.").

[260] *In re* Cendant Corp. Sec. Litig., 454 F.3d 235, 244 (3d Cir. 2006).

[261] *Id.* at 241, 242.

[262] *See* 12-58 MOORE'S FEDERAL PRACTICE - CIVIL § 58.05(4)(a) (2015) ("[S]ome explanation in the order is acceptable, so long as it is sparse.").

[263] Kidd v. District of Columbia, 206 F.3d 35, 39 (D.C. Cir. 2000) (relying on Diamond v. McKenzie, 770 F.2d 225 (D.C. Cir. 1985)).

[264] *See, e.g.*, Vaquería Tres Monjitas, Inc. v. Comas-Pagán, 772 F.3d 956, 959-60 (1st Cir. 2014) (concluding that an "Order and Judgment," consisting of five numbered paragraphs, was an SDR-compliant judgment when it contained only a "single explanatory sentence" and did not otherwise "provide legal analysis," but rather "incorporate[d] the terms of the settlement agreement" while setting forth compliance requirements); Creaghe v. Albemarle

While the exact boundaries of the no-facts-no-reasoning rule have not really been tested, they should not stretch far beyond what the D.C. Circuit has already sanctioned,[265] if at all. Omission of reasoning and fact is simply too straightforward a requirement to tolerate much departure. An SDR document says who won and what, not why that happened. An errant citation—"The complaint is dismissed without prejudice as barred by *Heck v. Humphrey*, 512 U.S. 477 (1994)"—may be acceptable, if unnecessary. But anything more is an invitation to turn the rule into a feast of exceptions.

All in all, the best separate document is one that eschews fact, reasoning, and procedural posture. In some circuits, small departures are acceptable. But anything beyond is just an invitation for uncertainty, or worse, additional litigation.

C. Requesting Entry Under Rule 58(d): Unnecessary in Most Cases

Rule 58(d) allows a party to "request that judgment be set out in a separate document as required by Rule 58(a)."[266] Although the 2002 introduction of Rule 58(d) marked the first formal recognition of a device to enforce the SDR,[267] courts had long entertained such motions even before 2002—a necessity given the pressing issues of waiver and the "effectiveness" of judgments improperly entered.[268]

The few appellate courts to have reached the issue have avoided an unduly narrow reading of Rule 58(d). Instead of interpreting it to authorize only motions that deal with separateness, they have (quite sensibly) viewed it as allowing for motions attacking the broad spectrum of SDR violations, including those—like impermissibly vague relief awards—that could also implicate an appellate court's jurisdiction.[269]

Despite occasional suggestions that formal, rather than functional, SDR defects should be met with Rule 58(d) motions in district court,[270] this is bad advice. Ironically, the promulgation of a formal mechanism for addressing SDR violations occurred simultaneously with the disappearance of a reason to do so (other than, perhaps, to make the litigant look diligent). Unless there

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Corp., 98 F. App'x 972, 974, n.8 (5th Cir. 2004) (nonprecedential per curiam); Hamilton v. Nakai, 453 F.2d 152, 155 (9th Cir. 1971) (holding, in the context of finality, that a one-sentence explanation did not transform an order into an opinion).

[265] *See Kidd*, 206 F.3d at 39.

[266] FED. R. CIV. P. 58(d).

[267] *See id*. Contrary to what one Fifth Circuit opinions asserts, Rule 58(d) has never contained language about "a waiver of th[e separate document] requirement." Bordelon v. Barnhart, 161 F. App'x 348, 351 (5th Cir. 2005) (nonprecedential per curiam).

[268] *See* Am. Disability Ass'n v. Chmielarz, 289 F.3d 1315, 1318 n.1 (11th Cir. 2002); Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683, 689 n.21 (4th Cir. 1978) ("A party may, by motion, request that the district judge enter judgment on a separate document.").

[269] *See, e.g.*, Perry v. Sheet Metal Workers' Local No. 73 Pension Fund, 585 F.3d 358, 362 (7th Cir. 2009).

[270] *See id.*; Warren v. Am. Bankers Ins. of Fla., 507 F.3d 1239, 1244 (10th Cir. 2007) ("Perhaps Plaintiff's best course would have been to ask the district court pursuant to Fed. R. Civ. P. 58(d) to enter a separate judgment.").

is actual uncertainty as to whether a ruling is final or appealable—in which case no one wants to spend a few hundred dollars on a "test" appeal—a party gains no clear benefit from compelling the entry of an SDR-compliant judgment. Moreover, a Rule 58(d) motion is not one of the enumerated motions tolling the time to take an appeal,[271] and (presumably) is treated on the motions calendar like any other filing. Given the understandably high rate of SDR noncompliance among certain district courts, a court has no obvious reason to expedite resolution of a Rule 58(d) motion, and the full appellate time can run while a party waits for the district court to redo what it already assumes it did properly. Instead, parties should do the sensible thing, ignore Rule 58(d), and simply file a notice of appeal or post-judgment motions as they would otherwise.[272] If needed—if the notice of appeal is "facially" untimely, for example—a simultaneous Rule 58(d) motion can be filed in district court, information can be included in the notice of appeal about the Rule 58 issue, or the party can wait until the appellate court's call for clarification on the timeliness of the appeal.

IV. WHY IT MATTERS

By this point, tens of pages in, you know far more about the SDR than you ever wanted to know. You know that it requires that appealable orders and judgments be entered on separate documents,[273] documents that substantially omit recitations unrelated to those of the "everybody gets a car!" variety.[274] You also know what happens when district courts, as is their wont, totally ignore the SDR: the order or judgment is actually entered 150 days *after* it shows up on the docket.[275] While you may know these things, you might not appreciate just how weird the SDR really is, and how out-of-place its primary effect is in the grand scheme of federal procedure in general and federal jurisdiction in particular.

The primary source of strangeness comes from the simple fact that the SDR has the power to vastly extend the time to appeal adverse decisions. Remember that, in most cases, a federal-court loser has 30 days to appeal.[276] A federal-court loser confronting an SDR violation, by contrast, has *at least* 180 days to appeal—a six-factor increase.[277]

This may not seem that spectacular of a power, but for recent Supreme Court decisions on the utter immutability, the *mercilessness*, of "jurisdictional" rules, which normally cannot be modified, delayed, or tolled.

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[271] *See* FED. R. APP. P. 4(a)(4)(A)(i)-(iv).

[272] Other authorities agree with this approach. *See, e.g.*, Zarin, *supra* note 90, at 27-28 (advising a "prudent lawyer" to file an immediate notice of appeal as a primary line of defense, moving to requesting a Rule 58 judgment as a secondary measure).

[273] FED. R. CIV. P. 58(a).

[274] *See* Hughes v. Halifax Cnty. Sch. Bd., 823 F.2d 832, 835 (4th Cir. 1987).

[275] FED. R. CIV. P. 58(c).

[276] FED. R. APP. P. 4(a)(1)(A).

[277] *See In re* Taumoepeau v. Mfrs. & Traders Trust Co., 523 F.3d 1213, 1216 (10th Cir. 2008).

In cases such as *Bowles v. Russell*, the Court has consistently held that appellate time limits derived from statutes (that are not just the rules of court, in other words) cannot be equitably expanded.[278] In *Bowles* itself, a judge reopened the time to appeal for longer than the applicable statute allowed, and the Supreme Court held that the judge himself was without the power to contravene the will of Congress.[279] This is because statutory limits on appellate jurisdiction are, broadly speaking, Congress acting within its power to limit the jurisdiction of the federal courts,[280] a fundamental part of our constitutional fabric that you may remember from half of your Federal Courts class.

Under the reasoning of *Bowles*, a federal judge is powerless, in civil cases, to extend the time for taking an appeal *except* to the extent allowed by statute and the Federal Rules of Appellate Procedure.[281] A judge cannot say, "In this case, I feel like you should get 57 days to appeal," nor can she grant a motion extending the time beyond what the statute says. Nor can a court simply vacate its original order for the purpose of extending the appellate timetable.[282] Even understandable oversights by a party—such as those attributable, in part, to misleading docket entries—do not matter.[283]

The SDR exposes the huge catch in this clear and concise expression of Congress's constitutional will. The congressionally mandated 30-day period is unyielding and jurisdictional, sure, but it runs from the date of *entry*, and the SDR governs the proper entry of judgment.[284] The time limit may be unyielding, but the SDR controls the stopwatch. To put it another way, a court's decision to cite two cases in its judgment order brings the congressional edifice crashing to the ground.

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[278] Bowles v. Russell, 551 U.S. 205, 213 (2007).

[279] *See id.* at 209, 213; *see generally* Colloquy, *Jurisdictionally and Bowles v. Russell*, 102 NW. U. L. REV. 42 (2007).

[280] *See Bowles*, 551 U.S. at 212-13.

[281] 28 U.S.C. § 2107; FED. R. APP. P. 4(a)(1)(A).

[282] *See* McGarr v. United States, 736 F.2d 912, 918 (3d Cir. 1984) ("The United States contends, and we agree, that Fed. R. Civ. P. 60(b) does not authorize the district courts to relax the time periods specified in Fed. R. App. P. 4 merely by vacating and refiling judgments.").

[283] For instance, in Two-Way Media LLC v. AT&T, Inc., 782 F.3d 1311 (Fed. Cir. 2015), the Federal Circuit held that the issuing of an unclear Notice of Electronic Filing, which was "admittedly inaccurate," *id* at 1318, and failed to properly describe the order of the district court, did not require the district court to extend the time to appeal under Fed. R. App. P. 4(a)(5) and (6), in an instance where a party had neglected to actually read the underlying order and had relied on the NEF text. *See generally id.* The Federal Circuit wrote:

> In this era of electronic filing—post-dating by some 60 years the era in which the cases cited by the dissent were issued—we find no abuse of discretion in a district court's decision to impose an obligation to monitor an electronic docket for entry of an order which a party and its counsel already have in their possession and know that the clerk at least attempted to enter.

Id. at 1319-20.

[284] FED. R. APP. P. 4(a)(1)(A).

The SDR is thus a bizarre departure from how we tend to think of grants of jurisdiction. *Bowles*'s strict (and somewhat cruel) outcome comes packaged with a "gotcha."

Far from simply extending the time to appeal, though, the operation of the SDR can create mischief in another way. The rest of the Federal Rules of Civil Procedure (and corresponding local rules) simply are not written from the perspective of a delayed entry of judgment. In a basic example, a litigant can move to alter or amend the judgment under Fed. R. Civ. P. 59(e) before judgment has actually been formally entered.[285]

More complex examples of this can be particularly vexing. Today, the combined operation of Civil Rules 59 and 60, and Appellate Rule 4, allows for a Rule 59 or Rule 60 motion filed within 28 days of judgment to toll the time for filing a notice of appeal by starting the clock upon the order disposing of the last remaining motion.[286] In a standard scenario, if a court grants your adversary's motion for summary judgment, and you file a Rule 59 motion ten days later, and the court rules on *that* two years down the road, your notice of appeal filed 27 days later—two years after summary judgment was granted—is timely.[287]

Now, it is pretty well established that you cannot simply file Rule 59/60 motions into perpetuity to extend the time to take an appeal; they do not "chain" together. In order to gain the benefit of the tolling rule, the post-

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[285] *See* Hilst v. Bowen, 874 F.2d 725, 726 (10th Cir. 1989) (per curiam) (collecting cases and authorities).

[286] *See* FED. R. CIV. P. 59(e) (allowing for a motion to alter or amend to be filed within 28 days of entry of judgment); FED. R. CIV. P. 60(c)(1) (allowing the filing of a Rule 60 motion within a "reasonable time" or within a year of entry of judgment, depending on the subsection used); FED. R. APP. P. 4(a)(4)(A)(v)-(vi) (announcing tolling rule while limiting "timely" Rule 60 motions to 28 days).

A separate question arises when the post-judgment motion in question was *not* timely filed. As of the time of writing, the Courts of Appeals are split over whether an "untimely" post-judgment motion activates the FED. R. APP. P. 4(a)(4)(A) tolling rule. *See* Wallace v. FedEx Corp., 764 F.3d 571, 584 n.7 (6th Cir. 2014) (collecting cases and briefly discussing circuit split); *see also* Obaydullah v. Obama, 688 F.3d 784, 787-91 (D.C. Cir. 2012) (discussing tolling when deadline for filing post-judgment motion had been erroneously extended by the district court, in violation of Fed. R. Civ. P. 6(b)(2)). Of course, failure to comply with the SDR will frequently obviate this distinction. Thus, in Wade v. United States, No. 14-1500, 2015 U.S. App. LEXIS 5840 (4th Cir. Apr. 10, 2015) (per curiam), the Fourth Circuit had jurisdiction over an appeal when (a) the district court entered a combined opinion and order on February 20, 2014; (b) the losing party, in (all-too-common) contravention of Fed. R. Civ. P. 6(b)(2), improperly requested additional time to file a Fed. R. Civ. P. 59(e) motion, and the United States did not object; (c) the district court improperly extended the time to file the motion to April 3, 2014, 42 days after February 20; (d) the motion was "timely" filed on April 2, then denied on April 28; and (e) the notice of appeal was filed on May 26, 95 days after February 20 and 28 days after April 28. Facially, the Fourth Circuit appeared to confront the untimely tolling question. However, since the February 20, 2014 opinion and order violated the SDR, whether the untimely Fed. R. Civ. P. 59(e) motion tolled became irrelevant, because the notice of appeal was timely regardless. *See generally Wade*, 2015 U.S. App. LEXIS at 5840; *see also* S.D. W. Va. Civ. No. 3:12-cv-00608, ECF Nos. 66, 77-78, 81, 84, 88-89.

[287] A premature notice of appeal is fine, too; it's simply held in reserve until the court gets around to ruling on your post-judgment motion. *See* FED. R. APP. P. 4(a)(4)(B)(i).

judgment motion has to be timely filed in relation to the original judgment.[288] Thus, successive tolling motions do not again reset the 30-day appellate period in relation to the original judgment, unless (in certain cases) they manage to be timely filed.[289]

The exception is the hitch. If the SDR is violated, instead of the relatively speedy 28 days contemplated by the Rules, the aggrieved party has at least 178 days to file "timely" post-judgment motions.[290] That's a lot of time, and a litigant can merrily litigate until blue in the face before judgment has even technically been entered. And, after all is said and done, the appellate timetable does not begin to run until the very last of those motions is ruled on.[291]

It is very unlikely that eight serial post-judgment motions filed in the pre-entry 150-day period will actually be meritorious. But especially in the post-*Bowles* era, appellate jurisdiction is a deeply un-fudgeable topic. If a series of post-judgment motions has been filed, and those motions do not "merge" with the underlying judgment (or you're in a Circuit that does not abide by the merger doctrine),[292] untangling what has actually been appealed—what tolled, what did not, what is timely in relation to the notice of appeal—is both deeply annoying and an absolute necessity, because an appellate court cannot affirm the denial of a motion if it lacks jurisdiction over the relevant order.[293] So when a violation of the SDR allows something deeply unusual to happen, a court and counterparty must spend time untangling the whos, whats, whens,

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[288] *See* Aybar v. Crispin-Reyes, 118 F.3d 10, 14 (1st Cir. 1997) ("[A] subsequent motion for reconsideration served within ten days of the order denying the initial motion for reconsideration but more than ten days after the entry of the original judgment does not toll the time for appealing from that judgment.") (internal quotations omitted) (internal citation omitted); Glinka v. Maytag Corp., 90 F.3d 72, 74 (2d Cir. 1996) (collecting cases).

[289] For instance, if a Rule 59 motion is filed on day one, and denied on day ten, a second Rule 59 motion (or a first Rule 60 motion) targeting the original judgment could conceivably gain the benefits of the tolling rule. *See* Robbins v. Saturn Corp., 532 F. App'x 623, 628 (6th Cir. 2013) (nonprecedential) ("Saturn has pointed to no authority, in this circuit or elsewhere, that stands for the proposition that the appeal period is not tolled when a party files a second or successive Rule 59(e) motion within 10 days of the original judgment."). The Seventh Circuit, Judge Posner writing, has suggested that it will only treat the first Rule 59 motion as tolling the time to appeal, although Judge Posner's opinion in the relevant case reveals that the serial motions did not target the original judgment but were instead directed at each other (remember, post-judgment motions cannot "chain"). *See* Borrero v. City of Chicago, 456 F.3d 698, 699-702 (7th Cir. 2006).

[290] *See generally,* Nance v. City of Newark, 501 F. App'x 123, 126 (3d Cir. 2012) (nonprecedential per curiam) (allowing for tolling when multiple post-judgment motions were filed before SDR-noncompliant judgment was entered).

[291] *See* FED. R. APP. P. 4(a)(4)(A).

[292] *See Borrero*, 456 F.3d at 700. In the Third Circuit, for example, an order denying a motion for reconsideration is separately appealable in its own right. *See* Long v. Atl. City Police Dep't, 670 F.3d 436, 446 n.19 (3d Cir. 2012).

[293] *See e.g.,* Espinal-Dominguez v. Puerto Rico, 352 F.3d 490, 495 (1st Cir. 2003) ("Because federal courts are powerless to act in the absence of subject matter jurisdiction, we have an unflagging obligation to notice jurisdictional defects and to pursue them on our own initiative.").

and wheres, even if it is abundantly clear that the underlying merits are somewhat lacking.

It gets even stranger, unfortunately. Recall that Fed. R. App. P. 4(a)(4)(A) starts the time to appeal running "from the entry of the order disposing of the last such remaining motion."[294] So what happens if a Rule 59(e) motion is filed on day 3 of the 150-day SDR period, and is denied on day 64? Do the rules mean that the denial of the "premature" post-judgment motion effectively forces entry of judgment on day 64, thereby allowing 30 days from day 64 to appeal the whole shebang?

Surprisingly, this question has actually been answered: no. In the most recent case, the Tenth Circuit's *Walters v. Wal-Mart Stores, Inc.*,[295] the timeline was as follows: the district court issued its decision on July 15, 2011, but did not abide by the SDR; the plaintiff filed an (uncaptioned) motion to reconsider on August 24, 2011; the district court denied that motion by order entered on August 26;[296] and the notice of appeal was filed on September 28, 33 days after the order denying the reconsideration motion was entered.[297] The court of appeals found itself facing the following question: "when a motion for reconsideration is filed in the absence of a separate judgment, does the denial of that motion start the notice-of-appeal clock, or does the appellant remain entitled to the 150-day period for constructive entry of judgment provided by Fed. R. Civ. P. 58?"[298] It held that the prematurely filed reconsideration motion could not force earlier entry of judgment, in light of the fact that the SDR should not be used to defeat appellate jurisdiction.[299] The appellant therefore got the full benefit of the 150 days, and his notice of appeal, while filed more than 30 days after the entry of the order denying his reconsideration motion, was timely.[300]

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[294] FED. R. APP. P. 4(a)(4)(A).

[295] Walters v. Wal-Mart Stores, Inc., 703 F.3d 1167 (10th Cir. 2013).

[296] The opinion says August 28, *id.* at 1171, but the actual district court docket itself (N.D. Okla. 4:09-cv-00447, ECF No. 50) reflects an August 26 denial and same-day entry.

[297] *Walters*, 703 F.3d at 1171.

[298] *Id.*

[299] *See id.*

[300] *Id.* at 1171. The Ninth Circuit had earlier come to the exact same conclusion: "a premature post-judgment motion may not accelerate the deadline for appeal before a separate judgment has been entered." ABF Capital Corp. v. Osley, 414 F.3d 1061, 1065 (9th Cir. 2005). Another case from the First Circuit feints in the same direction, but as it involved serial motions for reconsideration—one of which followed the entry of judgment and was itself timely appealed from—the opinion can arguably be distinguished as pertaining only to the "last such remaining motion" language of Fed. R. App. P. 4(a)(4)(A). *See* Colon-Santiago v. Rosario, 438 F.3d 101, 107-08 (1st Cir. 2006). And, as this piece was going to press, the Third Circuit implied by omission that it would take this approach. In Witasick v. Minn. Mutual Life Ins. Co., 803 F.3d 184, 188 (3d Cir. 2015), a non-SDR compliant memorandum opinion and order was entered on March 25, 2013; the plaintiff moved for reconsideration on April 8; and the district court denied the motion for reconsideration on May 22. The notice of appeal, however, was filed on September 23, 2013. *See* D.N.J. Civ. No. 1:12-cv-03474, http://ia601701.us.archive.org/24/items/gov.uscourts.njd.275342/gov.uscourts.njd.275342.docket.html. In its discussion of appellate jurisdiction and the SDR, *see Witasick*, 803 F.3d 187-90, the court of appeals never suggested that the denial of the motion for reconsideration forced

Walters also appears to address a related question. Fed. R. Civ. P. 58(a) exempts Rule 52(b)/59/60 motions from the SDR.[301] While Fed. R. App. P. 4(a)(4)(A) allows an appeal of an order denying a post-judgment motion to "sweep up" the underlying order or judgment from which reconsideration was sought,[302] it does not obviously preserve an appeal of a post-judgment motion decided after a decision is rendered but before judgment is entered. Without much discussion, the *Walters* court assumed that it did, reviewing the order denying the motion for reconsideration despite the fact that the notice of appeal was filed more than 30 days after it was entered.[303]

In most cases, whether an independent 30 (or 60)-day clock begins when a post-judgment motion is denied, but an SDR-compliant judgment has not been entered, will not matter much, because an appellate court can reach many of the same arguments that can be raised in a post-judgment motion. But think about the following situation. A district court enters an order granting a summary judgment motion in a complex case. The order violates the SDR. Thirty days later, the losing party files a Fed. R. Civ. P. 60(b)(2) motion based on newly discovered evidence, which, it claims, casts the summary-judgment decision into doubt. The district court disagrees and denies the motion via order, entered 10 days later. Then, 120 days later, the losing party files a notice of appeal.

Suddenly, it matters a great deal whether the notice of appeal—unambiguously timely from the SDR-facilitated delayed entry of the original merits order, less so from the order denying the Rule 60(b)(2) motion—reaches both orders or just the merits order. Appellate courts generally will not consider new evidence presented for the first time on appeal.[304] Relatedly, under Fed. R. App. P. 4(a)(4)(B)(ii), a party seeking review of a post-judgment motion decided after the filing of a notice of appeal must file an amended notice of appeal.[305] If the delayed formal entry of judgment effected by the SDR does not restart the clock for appealing post-judgment orders decided before formal entry, an appellate court might lack jurisdiction to reach the new evidence introduced via a timely filed motion—surely an unintended result.

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the premature entry of the March 25 order, and instead found that the notice of appeal was timely. *Id.* at 189-90.

[301] FED. R. CIV. P. 58(a)(1)-(5).

[302] *See, generally*, "R" Best Produce, Inc. v. DiSapio, 540 F.3d 115, 122 (2d Cir. 2008).

[303] *Walters*, 703 F.3d at 1173. The Tenth Circuit does not appear to follow the "merger" approach to reconsideration motions and generally deals with appeals therefrom under a separate abuse-of-discretion standard. *See* Barber *ex rel.*v. Colorado, 562 F.3d 1222, 1228 (10th Cir. 2009). It also exercises independent appellate jurisdiction over orders denying untimely motions. *See, e.g.*, United States v. McKneely, 398 F. App'x 334, 335-36 (10th Cir. 2010) (nonprecedential).

[304] *See, e.g.*, Crefisa, Inc. v. Wash. Mut. Bank, F.A., 186 F.3d 46, 50 (1st Cir. 1999) ("[N]ew evidence, which could have been offered in the trial court, is not supposed to be proffered for the first time in an appellate setting."); Theriot v. Parish of Jefferson, 185 F.3d 477, 491 n.26 (5th Cir. 1999); *see*, Berwick Grain Co. v. Ill. Dep't of Agric., 116 F.3d 231, 234 (7th Cir. 1997).

[305] *See, e.g.*, United States v. McGlory, 202 F.3d 664, 668 (3d Cir. 2000).

As a result, the approach implicitly taken by *Walters* is by far the most sensible, while also solving the annoying problem discussed above: the delayed entry of judgment effected by the SDR should also be deemed to "restart" the appellate timetable for any post-judgment motion decided before judgment was formally entered.[306] This would have the advantage of establishing a simple, bright-line rule for determining an appellate court's jurisdiction over any post-judgment motion decided before the 150-day period elapses (or before proper judgment is entered). And it would avoid the need for heroic efforts by appellate courts that do not wish to decide an appeal on an artificially restricted record.

As the above should show, the delayed-entry period is an uneasy fit for those other Rules that measure time based on the entry of judgment. While some can be easily adapted, others become more brittle when bent. This reveals, by and large, that the delayed-entry solution of the 2002 revisions, while elegant and fair, is by no means perfect—a reality acknowledged by the drafters, who conceded, albeit in a slightly different context, that "[d]rastic surgery" might be required in order to make the 2002 revisions fit all facts and scenarios.[307]

V. CONCLUSION

One decade into the 21st century, the SDR hides in plain sight. Most of the time, violations go unnoticed, especially in the vast run of simple cases where resolution on motions suggests a straightforward disposition on appeal. In the absence of eagle-eyed clerks, stickler judges, or obsessive-compulsive attorneys for the litigants, nonconforming judgments will not be called out for attention. Most will not matter, and unless the notice of appeal is filed "late"—or a litigant engages in the unorthodox filing discussed above—the SDR will not even register on the radar. Further, in marginal cases, smart attorneys will not rely on the caprice of unsettled appellate jurisprudence by filing notices well after the putative 30 days expire.

When the SDR does arise, it can catch litigants and courts unawares, in large part because of the Rule's low profile. Courts are not eager to create additional work for themselves, and ensuring that proper separate documents are filed in simple cases probably does not rank high on the agenda, especially when there is little real fallout from a failure to do so. The result: appeals that would otherwise be untimely move forward, litigants expend time figuring out odd jurisdictional issues that could be spent on the merits, and tertiary-level headaches abound.

Nevertheless, the SDR clearly retains a lot of relevance in the 21st century. Indeed, its importance might even have increased in the age of complex litigation. Assuming continual disfavoring of piecemeal appeals, recognition of a single "this is it" moment remains paramount. Further, the existence of the SDR forces trial judges to think about the content of their judgments,

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[306] *Walters*, 703 F.3d at 1173.

[307] *See* FED. R. CIV. P. 58 advisory committee's note (2002).

because the proper separate document eschews all but what matters to the parties: who won what. At the same time, the ongoing buzz of electronic dockets amplifies the need for an obvious moment where litigation draws to a close. There are calls to rework discovery, to reestablish old standards for motions to dismiss; yet, no movement exists, to my knowledge, to eliminate the basic SDR requirement from the Federal Rules.

In any event, the SDR should certainly be preserved, yet it is puzzling that the Rules committee has not seen fit to update it—and Rule 58 in general—for the age of electronic filing, or, at the very least, to incorporate the developments of more than 60 years of case law and commentary. It is unnecessarily cryptic, its boundaries unhelpful and vaguely drawn, despite years of litigation and 2002 reforms that clarified the effect but left the cause untouched. While PACER/ECF may not be around forever, the general system for e-filing and retrieving documents likely will not change much for the time being. Thus, instead of delegating to the courts the task of answering the most fundamental questions of SDR jurisprudence—"what is a 'document,' and what makes it 'separate?'"—the Rule could easily be revised to include and incorporate some of the jurisprudence on the topic. It should not be for the courts, whether through local rules or opinions, to discern what "separate" means in a Rule designed to set forth a docket-management procedure and to alert litigants when the time to appeal begins to run. Further, it should not require diligent research and/or access to an annotated version of Fed. R. Civ. P. 58 to realize that there is even a rule to be violated.

A revision to Rule 58 should ideally follow the "revised" Third Circuit separateness requirements—separate title and caption, unattached to the opinion and memorandum, and docketed separately in its own PACER/ECF number—while also emphasizing that the separate document omit reasoning, fact, or procedural background, unless otherwise required by another rule or statute. To do so would allow for a simple, federal-courts-wide awareness of compliance standards, while allowing—but discouraging further expansion of—the one-cite-doesn't-break-the-bank doctrine stewing in the D.C. Circuit and elsewhere. It would better alert both litigants and judges to the fact that the SDR really does exist, while salving ambiguity about its operation in the great number of courts that have not spoken to one or both of the core issues surrounding it.

In the end, so long as the SDR remains enshrined in the Federal Rules of Civil Procedure, issues surrounding it will pop up in the oddest of places, from monumental civil rights decisions to the paltriest of disputes. It may be a hard rule to love or admire, but in a world of ever-constricting federal practice, it is good to know that something so off kilter still lurks in the margins, bending strict jurisdictional deadlines to its will; and all from a Rule that was meant to clarify, not cloud. For now, it pays to simply be aware. And if you have made it this far, you undoubtedly will be on alert the next time a "Memorandum and Order" notice wings your way.