(d)(2), the better the reason to give an instruction. The cogency of the reason for failing to make a timely request also should be considered. To be considered under subdivision (a)(2)(B) a request should be made before final instructions and before final jury arguments. What is a ''final'' instruction and argument depends on the sequence of submitting the case to the jury. If separate portions of the case are submitted to the jury in sequence, the final arguments and final instructions are those made on submitting to the jury the portion of the case addressed by the arguments and instructions.

Instructions. Subdivision (b)(1) requires the court to inform the parties, before instructing the jury and before final jury arguments related to the instruction, of the proposed instructions as well as the proposed action on instruction requests. The time limit is addressed to final jury arguments to reflect the practice that allows interim arguments during trial in complex cases; it may not be feasible to develop final instructions before such interim arguments. It is enough that counsel know of the intended instructions before making final arguments addressed to the issue. If the trial is sequenced or bifurcated, the final arguments addressed to an issue may occur before the close of the entire trial.

Subdivision (b)(2) complements subdivision (b)(1) by carrying forward the opportunity to object established by present Rule 51. It makes explicit the opportunity to object on the record, ensuring a clear memorial of the objection.

Subdivision (b)(3) reflects common practice by authorizing instructions at any time after trial begins and before the jury is discharged.

Objections. Subdivision (c) states the right to object to an instruction or the failure to give an instruction. It carries forward the formula of present Rule 51 requiring that the objection state distinctly the matter objected to and the grounds of the objection, and makes explicit the requirement that the objection be made on the record. The provisions on the time to object make clear that it is timely to object promptly after learning of an instruction or action on a request when the court has not provided advance information as required by subdivision (b)(1). The need to repeat a request by way of objection is continued by new subdivision (d)(1)(B) except where the court made a definitive ruling on the record.

Preserving a claim of error and plain error. Many cases hold that a proper request for a jury instruction is not alone enough to preserve the right to appeal failure to give the instruction. The request must be renewed by objection. This doctrine is appropriate when the court may not have sufficiently focused on the request, or may believe that the request has been granted in substance although in different words. But this doctrine may also prove a trap for the unwary who fail to add an objection after the court has made it clear that the request has been considered and rejected on the merits. Subdivision (d)(1)(B) establishes authority to review the failure to grant a timely request, despite a failure to add an objection, when the court has made a definitive ruling on the record rejecting the request.

Many circuits have recognized that an error not preserved under Rule 51 may be reviewed in exceptional circumstances. The language adopted to capture these decisions in subdivision (d)(2) is borrowed from Criminal Rule 52. Although the language is the same, the context of civil litigation often differs from the context of criminal prosecution; actual application of the plain-error standard takes account of the differences. The Supreme Court has summarized application of Criminal Rule 52 as involving four elements: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Johnson v. U.S.*, 520 U.S. 461, 466–467, 469–470 (1997). (The Johnson case quoted the fourth element from its decision in a civil action, *U.S. v. Atkinson*, 297 U.S. 157, 160 (1936): ''In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise substantially affect the fairness, integrity, or public reputation of judicial proceedings.'')

The court's duty to give correct jury instructions in a civil action is shaped by at least four factors.

The factor most directly implied by a ''plain'' error rule is the obviousness of the mistake. The importance of the error is a second major factor. The costs of correcting an error reflect a third factor that is affected by a variety of circumstances. In a case that seems close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties.

Changes Made After Publication and Comment. The changes made after publication and comment are indicated by double-underlining and overstriking on the texts that were published in August 2001.

Rule 51(d) was revised to conform the plain-error provision to the approach taken in Criminal Rule 52(b). The Note was revised as described in the Recommendation.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 51 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

(a) FINDINGS AND CONCLUSIONS.

(1) *In General.* In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(2) *For an Interlocutory Injunction.* In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) *For a Motion.* The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) *Effect of a Master's Findings.* A master's findings, to the extent adopted by the court, must be considered the court's findings.

(5) *Questioning the Evidentiary Support.* A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) *Setting Aside the Findings.* Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) AMENDED OR ADDITIONAL FINDINGS. On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) JUDGMENT ON PARTIAL FINDINGS. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

See [former] Equity Rule 70½, as amended Nov. 25, 1935 (Findings of Fact and Conclusions of Law), and U.S.C., Title 28, [former] §764 (Opinion, findings, and conclusions in action against United States) which are substantially continued in this rule. The provisions of U.S.C., Title 28, [former] §§773 (Trial of issues of fact; by court) and [former] 875 (Review in cases tried without a jury) are superseded insofar as they provide a different method of finding facts and a different method of appellate review. The rule stated in the third sentence of *Subdivision (a)* accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony. See *Silver King Coalition Mines, Co. v. Silver King Consolidated Mining Co.*, 204 Fed. 166 (C.C.A.8th, 1913), cert. den. 229 U.S. 624 (1913); *Warren v. Keep*, 155 U.S. 265 (1894); *Furrer v. Ferris*, 145 U.S. 132 (1892); *Tilghman v. Proctor*, 125 U.S. 136, 149 (1888); *Kimberly v. Arms*, 129 U.S. 512, 524 (1889). Compare *Kaeser & Blair, Inc., v. Merchants' Ass'n*, 64 F.(2d) 575, 576 (C.C.A.6th, 1933); *Dunn v. Trefry*, 260 Fed. 147, 148 (C.C.A.1st, 1919).

In the following states findings of fact are required in all cases tried without a jury (waiver by the parties being permitted as indicated at the end of the listing): Arkansas, Civ.Code (Crawford, 1934) §364; California, Code Civ.Proc. (Deering, 1937) §§632, 634; Colorado, 1 Stat.Ann. (1935) Code Civ.Proc. §§232, 291 (in actions before referees or for possession of and damages to land); Connecticut, Gen.Stats. §§5660, 5664; Idaho, 1 Code Ann. (1932) §§7–302 through 7–305; Massachusetts (equity cases), 2 Gen.Laws (Ter.Ed., 1932) ch. 214, §23; Minnesota, 2 Stat. (Mason, 1927) §9311; Nevada, 4 Comp.Laws (Hillyer, 1929) §8783–8784; New Jersey, Sup.Ct. Rule 113, 2 N.J.Misc. 1197, 1239 (1924); New Mexico, Stat.Ann. (Courtright, 1929) §105–813; North Carolina, Code (1935) §569; North Dakota, 2 Comp.Laws Ann. (1913) §7641; Oregon, 2 Code Ann. (1930) §2–502; South Carolina, Code (Michie, 1932) §649; South Dakota, 1 Comp.Laws (1929) §§2525–2526; Utah, Rev.Stat.Ann. (1933) §104–26–2, 104–26–3; Vermont (where jury trial waived), Pub. Laws (1933) §2069; Washington, 2 Rev.Stat.Ann. (Remington, 1932) §367; Wisconsin, Stat. (1935) §270.33. The parties may waive this requirement for findings in California, Idaho, North Dakota, Nevada, New Mexico, Utah, and South Dakota.

In the following states the review of findings of fact in all non-jury cases, including jury waived cases, is assimilated to the equity review: Alabama, Code Ann. (Michie, 1928) §§9498, 8599; California, Code Civ.Proc. (Deering, 1937) §956a; but see 20 Calif.Law Rev. 171 (1932); Colorado, *Johnson v. Kountze*, 21 Colo. 486, 43 Pac. 445 (1895), *semble*; Illinois, *Baker v. Hinricks*, 359 Ill. 138, 194 N.E. 284 (1934), *Weininger v. Metropolitan Fire Ins. Co.*, 359 Ill. 584, 195 N.E. 420, 98 A.L.R. 169 (1935); Minnesota, *State Bank of Gibbon v. Walter*, 167 Minn. 37, 38, 208 N.W. 423 (1926), *Waldron v. Page*, 191 Minn. 302, 253 N.W. 894 (1934); New Jersey, N.J.Comp.Stat. (2 Cum.Supp. 1911–1924) Title 163, §303, as interpreted in *Bussy v. Hatch*, 95 N.J.L. 56, 111 A. 546 (1920); New York, *York Mortgage Corporation v. Clotar Const. Corp.*, 254 N.Y. 128, 133, 172 N.E. 265 (1930); North Dakota, Comp.Laws Ann. (1913) §7846, as amended by N.D.Laws 1933, ch. 208, *Milnor Holding Co. v. Holt*, 63 N.D. 362, 370, 248 N.W. 315 (1933); Oklahoma, *Wichita Mining and Improvement Co. v. Hale*, 20 Okla. 159, 167, 94 Pac. 530 (1908); South Dakota, *Randall v. Burk Township*, 4 S.D. 337, 57 N.W. 4 (1893); Texas, *Custard v. Flowers*, 14 S.W.2d 109 (1929); Utah, Rev.Stat.Ann. (1933) §104–41–5; Vermont, *Roberge v. Troy*, 105 Vt. 134, 163 Atl. 770 (1933); Washington, 2 Rev.Stat.Ann. (Remington, 1932) §§309–316; *McCullough v. Puget Sound Realty Associates*, 76 Wash. 700, 136 Pac. 1146 (1913), but see *Cornwall v. Anderson*, 85 Wash. 369, 148 Pac. 1 (1915); West Virginia, *Kinsey v. Carr*, 60 W.Va. 449, 55 S.E. 1004 (1906), semble; Wisconsin, Stat. (1935) §251.09; *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374 (1927), *Gessler v. Erwin Co.*, 182 Wis. 315, 193 N.W. 363 (1924).

For examples of an assimilation of the review of findings of fact in cases tried without a jury to the review at law as made in several states, see Clark and Stone, *Review of Findings of Fact*, 4 U. of Chi.L.Rev. 190, 215 (1937).

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivision (a). The amended rule makes clear that the requirement for findings of fact and conclusions of law thereon applies in a case with an advisory jury. This removes an ambiguity in the rule as originally stated, but carries into effect what has been considered its intent. 3 *Moore's Federal Practice* (1938) 3119; *Hurwitz v. Hurwitz* (App.D.C. 1943) 136 F.(2d) 796.

The two sentences added at the end of Rule 52(a) eliminate certain difficulties which have arisen concerning findings and conclusions. The first of the two sentences permits findings of fact and conclusions of law to appear in an opinion or memorandum of decision. See, *e.g., United States v. One 1941 Ford Sedan* (S.D.Tex. 1946) 65 F.Supp. 84. Under original Rule 52(a) some courts have expressed the view that findings and conclusions could not be incorporated in an opinion. *Detective Comics, Inc. v. Bruns Publications* (S.D.N.Y. 1939) 28 F.Supp. 399; *Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Cincinnati & L. E. R. Co.* (S.D.Ohio 1941) 43 F.Supp. 5; *United States v. Aluminum Co. of America* (S.D.N.Y. 1941) 5 Fed.Rules Serv. 52a.11, Case 3; see also s.c., 44 F.Supp. 97. But, to the contrary, see *Wellman v. United States* (D.Mass. 1938) 25 F.Supp. 868; *Cook v. United States* (D.Mass. 1939) 26 F.Supp. 253; *Proctor v. White* (D.Mass. 1939) 28 F.Supp. 161; *Green Valley Creamery, Inc. v. United States* (C.C.A.1st, 1939) 108 F.(2d) 342. See also *Matton Oil Transfer Corp. v. The Dynamic* (C.C.A.2d, 1941) 123 F.(2d) 999; *Carter Coal Co. v. Litz* (C.C.A.4th, 1944) 140 F.(2d) 934; *Woodruff v. Heiser* (C.C.A.10th, 1945) 150 F.(2d) 869; *Coca-Cola Co. v. Busch* (E.D.Pa. 1943) 7 Fed.Rules Serv. 59b.2, Case 4; Oglebay, *Some Developments in Bankruptcy Law* (1944) 18 J. of Nat'l Ass'n of Ref. 68, 69. Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issues and the determination thereon. Thus they not only aid the appellate court on review (*Hurwitz v. Hurwitz* (App.D.C. 1943) 136 F.(2d) 796) but they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment. Nordbye, *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F.R.D. 25, 26–27; *United States v. Forness* (C.C.A.2d, 1942) 125 F.(2d) 928, cert. den. (1942) 316 U.S. 694. These findings should represent the judge's own determination and not the long, often argumentative statements of successful counsel. *United States v. Forness, supra; United States v. Crescent Amusement Co.* (1944) 323 U.S. 173. Consequently, they should be a part of the judge's opinion and decision, either stated therein or stated separately. *Matton Oil*

Transfer Corp. v. The Dynamic, supra. But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts. *United States v. Forness, supra; United States v. Crescent Amusement Co., supra*. See also *Petterson Lighterage & Towing Corp. v. New York Central R. Co.* (C.C.A.2d, 1942) 126 F.(2d) 992; *Brown Paper Mill Co., Inc. v. Irwin* (C.C.A.8th, 1943) 134 F.(2d) 337; *Allen Bradley Co. v. Local Union No. 3*, I.B.E.W. (C.C.A.2d, 1944) 145 F.(2d) 215, rev'd on other grounds (1945) 325 U.S. 797; *Young v. Murphy* (N.D.Ohio 1946) 9 Fed.Rules Serv. 52a.11, Case 2.

The last sentence of Rule 52(a) as amended will remove any doubt that findings and conclusions are unnecessary upon decision of a motion, particularly one under Rule 12 or Rule 56, except as provided in amended Rule 41(b). As so holding, see *Thomas v. Peyser* (App.D.C. 1941) 118 F.(2d) 369; *Schad v. Twentieth Century-Fox Corp.* (C.C.A.3d, 1943) 136 F.(2d) 991; *Prudential Ins. Co. of America v. Goldstein* (E.D.N.Y. 1942) 43 F.Supp. 767; *Somers Coal Co. v. United States* (N.D.Ohio 1942) 6 Fed.Rules Serv. 52a.1, Case 1; *Pen-Ken Oil & Gas Corp. v. Warfield Natural Gas Co.* (E.D.Ky. 1942) 5 Fed.Rules Serv. 52a.1, Case 3; also Commentary, *Necessity of Findings of Fact* (1941) 4 Fed.Rules Serv. 936.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

This amendment conforms to the amendment of Rule 58. See the Advisory Committee's Note to Rule 58, as amended.

NOTES OF ADVISORY COMMITTEE ON RULES—1983 AMENDMENT

Rule 52(a) has been amended to revise its penultimate sentence to provide explicitly that the district judge may make the findings of fact and conclusions of law required in nonjury cases orally. Nothing in the prior text of the rule forbids this practice, which is widely utilized by district judges. See Christensen, *A Modest Proposal for Immeasurable Improvement*, 64 A.B.A.J. 693 (1978). The objective is to lighten the burden on the trial court in preparing findings in nonjury cases. In addition, the amendment should reduce the number of published district court opinions that embrace written findings.

NOTES OF ADVISORY COMMITTEE ON RULES—1985 AMENDMENT

Rule 52(a) has been amended (1) to avoid continued confusion and conflicts among the circuits as to the standard of appellate review of findings of fact by the court, (2) to eliminate the disparity between the standard of review as literally stated in Rule 52(a) and the practice of some courts of appeals, and (3) to promote nationwide uniformity. See Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 Va. L. Rev. 506, 536 (1963).

Some courts of appeal have stated that when a trial court's findings do not rest on demeanor evidence and evaluation of a witness' credibility, there is no reason to defer to the trial court's findings and the appellate court more readily can find them to be clearly erroneous. See, e.g., *Marcum v. United States*, 621 F.2d 142, 144–45 (5th Cir. 1980). Others go further, holding that appellate review may be had without application of the ''clearly erroneous'' test since the appellate court is in as good a position as the trial court to review a purely documentary record. See, *e.g., Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 614 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Lydle v. United States*, 635 F.2d 763, 765 n. 1 (6th Cir. 1981); *Swanson v. Baker Indus., Inc.*, 615 F.2d 479, 483 (8th Cir. 1980); *Taylor v. Lombard*, 606 F.2d 371, 372 (2d Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *Jack Kahn Music Co. v. Baldwin Piano & Organ Co.*, 604 F.2d 755, 758 (2d Cir. 1979); *John R. Thompson Co. v. United States*, 477 F.2d 164, 167 (7th Cir. 1973).

A third group has adopted the view that the ''clearly erroneous'' rule applies in all nonjury cases even when findings are based solely on documentary evidence or on inferences from undisputed facts. See, *e.g., Maxwell v. Sumner*, 673 F.2d 1031, 1036 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982); *United States v. Texas Education Agency*, 647 F.2d 504, 506–07 (5th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982); *Constructora Maza, Inc. v. Banco de Ponce*, 616 F.2d 573, 576 (1st Cir. 1980); *In re Sierra Trading Corp.*, 482 F.2d 333, 337 (10th Cir. 1973); *Case v. Morrisette*, 475 F.2d 1300, 1306–07 (D.C. Cir. 1973).

The commentators also disagree as to the proper interpretation of the Rule. *Compare* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 769–70 (1957) (language and intent of Rule support view that ''clearly erroneous'' test should apply to all forms of evidence), *and* 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil § 2587*, at 740 (1971) (language of the Rule is clear), *with* 5A J. Moore, *Federal Practice ¶52.04, 2687–88 (2d ed. 1982) (Rule as written supports broader review of findings based on non-demeanor testimony)*.

The Supreme Court has not clearly resolved the issue. See, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S. Ct. 1949, 1958 (1984); *Pullman Standard v. Swint*, 456 U.S. 273, 293 (1982); *United States v. General Motors Corp.*, 384 U.S. 127, 141 n. 16 (1966); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394–96 (1948).

The principal argument advanced in favor of a more searching appellate review of findings by the district court based solely on documentary evidence is that the rationale of Rule 52(a) does not apply when the findings do not rest on the trial court's assessment of credibility of the witnesses but on an evaluation of documentary proof and the drawing of inferences from it, thus eliminating the need for any special deference to the trial court's findings. These considerations are outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

Subdivision (c) is added. It parallels the revised Rule 50(a), but is applicable to non-jury trials. It authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence.

The new subdivision replaces part of Rule 41(b), which formerly authorized a dismissal at the close of the plaintiff's case if the plaintiff had failed to carry an essential burden of proof. Accordingly, the reference to Rule 41 formerly made in subdivision (a) of this rule is deleted.

As under the former Rule 41(b), the court retains discretion to enter no judgment prior to the close of the evidence.

Judgment entered under this rule differs from a summary judgment under Rule 56 in the nature of the evaluation made by the court. A judgment on partial findings is made after the court has heard all the evidence bearing on the crucial issue of fact, and the finding is reversible only if the appellate court finds it to be ''clearly erroneous.'' A summary judgment, in contrast, is made on the basis of facts established on account of the absence of contrary evidence or presumptions; such establishments of fact are rulings on questions of law as provided in Rule 56(a) and are not shielded by the ''clear error'' standard of review.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

This technical amendment corrects an ambiguity in the text of the 1991 revision of the rule, similar to the

revision being made to Rule 50. This amendment makes clear that judgments as a matter of law in nonjury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.

NOTES OF ADVISORY COMMITTEE ON RULES—1995 AMENDMENT

The only change, other than stylistic, intended by this revision is to require that any motion to amend or add findings after a nonjury trial must be filed no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase ''no later than'' is used—rather than ''within''—to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, and that under Rule 5 the motions when filed are to contain a certificate of service on other parties.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 52 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 52(a) said that findings are unnecessary on decisions of motions ''except as provided in subdivision (c) of this rule.'' Amended Rule 52(a)(3) says that findings are unnecessary ''unless these rules provide otherwise.'' This change reflects provisions in other rules that require Rule 52 findings on deciding motions. Rules 23(e), 23(h), and 54(d)(2)(C) are examples.

Amended Rule 52(a)(5) includes provisions that appeared in former Rule 52(a) and 52(b). Rule 52(a) provided that requests for findings are not necessary for purposes of review. It applied both in an action tried on the facts without a jury and also in granting or refusing an interlocutory injunction. Rule 52(b), applicable to findings ''made in actions tried without a jury,'' provided that the sufficiency of the evidence might be ''later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.'' Former Rule 52(b) did not explicitly apply to decisions granting or refusing an interlocutory injunction. Amended Rule 52(a)(5) makes explicit the application of this part of former Rule 52(b) to interlocutory injunction decisions.

Former Rule 52(c) provided for judgment on partial findings, and referred to it as ''judgment as a matter of law.'' Amended Rule 52(c) refers only to ''judgment,'' to avoid any confusion with a Rule 50 judgment as a matter of law in a jury case. The standards that govern judgment as a matter of law in a jury case have no bearing on a decision under Rule 52(c).

COMMITTEE NOTES ON RULES—2009 AMENDMENT

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.

Changes Made after Publication and Comment. The 30-day period proposed in the August 2007 publication is shortened to 28 days.

Rule 53. Masters

(a) APPOINTMENT.

(1) *Scope.* Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

(2) *Disqualification.* A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. §455, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(3) *Possible Expense or Delay.* In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) ORDER APPOINTING A MASTER.

(1) *Notice.* Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

(2) *Contents.* The appointing order must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, if any, in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

(3) *Issuing.* The court may issue the order only after:

(A) the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. §455; and

(B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.