Supreme Court

In re Proposed Amendments to Rules 4(f)(1) and 4(l); 5(b) and (d); 6(b); 14(a); 15(c); 26(b); 30(b), (c), (d), and (f); 33(c); 45(a) and (b); 58; and 59(a) of the Superior Court Rules of Civil Procedure	:

O R D E R

Pursuant to G. L. 1956 (1997 Reenactment) §8-6-2, the Presiding Justice of the Superior Court has submitted to this Court for its approval proposed amendments to a number of the Superior Court Rules of Civil Procedure, to wit, Rule 4(f)(1) and 4(l); Rule 5(b) and (d); Rule 6(b); Rule 14(a); Rule 15(c); Rule 26(b); Rule 30(b), (c), (d) and (f); Rule 33(c); Rule 45(a) and (b); Rule 58; and Rule 59(a). These proposed amendments have been approved unanimously by the Justices of the Superior Court. The process that produced them, which began with a request to the Presiding Justice from the Superior Court Bench/Bar Committee, was quite extensive and included the exhaustive effort of a committee organized by the Presiding Justice to examine the rules and recommend appropriate modifications, as well as the considerable effort of the Presiding Justice's *ad hoc* bench/bar committee, which reviewed the recommended modifications and, where it deemed appropriate, revised them before presenting them to the Justices of the Superior Court for approval. After carefully examining the proposed amendments, we are of the opinion that in light of their significance, we should solicit comment thereon from interested members of the Bar before taking any action on them.

Accordingly, the proposed amendments to the Superior Court Rules of Civil Procedure which presently await our approval are assigned for hearing and comment to ***Thursday, June 15, 2006, at 9:00 a. m.***, and any member of the Bar interested in offering comment thereon may do so at that time. Members intending to participate in the hearing should submit notice of such intention to the Supreme Court Clerk on or before the close of business on ***Tuesday, June 13, 2006***. Written memoranda may also be filed on or before this latter date. Meanwhile, copies of the proposed amendments will be available for inspection in the Supreme Court Clerk's office.

Entered as an Order of this Court this ***1st*** day of ***June 2006.***

By Order,

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Clerk

Rule 4
Process, Attachment, Trustee Process, Arrest

(f) *Service Outside State Within the United States; Personal Jurisdiction.* When an individual or a foreign corporation is subject to the jurisdiction of the courts of the state, service of process may be made outside the state as follows:

(1) Upon an individual by delivery of a copy of the summons and complaint to the individual personally by any disinterested person, or by mailing a copy of the summons and complaint to the individual by registered or certified mail, return receipt requested, *or by express or overnight carrier with a signed receipt of delivery*, or by any other method ordered by the court to give such individual notice of the action and sufficient time to prepare any defense thereto.

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Committee Note

When service of process outside the state is authorized, this amendment permits service by express or overnight carrier, with a signed receipt in addition to service by registered or certified mail.

Rule 4(l)

If a service of the summons and complaint is not made upon a defendant within 120 days after the commencement of the action ~~and the party on whose behalf such service was required cannot show good cause why such service was not made within that period~~ the *court* ~~action shall be dismissed as to that defendant without prejudice,~~ upon ~~the court's~~ *motion or on its own initiative* ~~with~~ *after* notice to ~~such party or upon motion~~ *the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (g).*

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Committee Note:

This amendment to Rule 4(1) enlarges the power of a judge ruling on a motion to dismiss under this rule. It follows a 1993 amendment to the corresponding Federal Rule (4m). The Advisory Committee note to that amendment reads in part as follows: "The new subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown. . . . Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a default in attempted service. "

Rule 5
Service and Filing of Pleadings and Other Papers

(b) ~~*Same: How Made*. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or the party or by mailing it to the attorney or the party at the attorney's or the party's last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at the person's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.~~

(b) Making Service.

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

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

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

(i) handing it to the person;

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

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

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

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

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

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

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Committee Note

The 2001 amendments to Federal Rule 5(b) restyled the Rule, which had been substantially identical to the Rhode Island Rule. It also added provisions (Federal Rule 5(b)(2)(D) and 5(b)(3)) permitting service of papers by electronic means (fax and E-mail) and by commercial delivery services, with the written consent of the other party. This amendment is designed to conform to the Federal Rule.

(d) *Filing; Certificate of Service*. All papers after the complaint required to be served upon a party, together with a certificate of service shall be filed with the court within a reasonable time after service, but ~~the court may on motion of a party or on its own initiative order that interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding~~. *the following discovery requests and responses shall not be filed with the court until they are used in the proceeding or the court orders their filing: (i) interrogatories; (ii) requests for documents or to permit entry upon land; (iii) requests for admission; (iv) answers and responses to items (i)-(iii) above; (v) notices of deposition; and (vi) transcripts of depositions. The court, on motion generally or in a specific case, or on its own initiative, may order the filing of such discovery materials. Notwithstanding anything in this Rule 5(d), any party pressing or opposing any motion for relief under Rules 26(c) or 37 shall file copies of the relevant portions of discovery materials with the court as exhibits to any such motion or opposition. If any moving party under Rule 56 or any opponent relies on discovery documents, copies of the pertinent parts thereof shall be filed with the motion or opposition.*

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Committee Note

This amendment to Rule 5(d) harmonizes it with Federal Rule 5(d) in eliminating the requirement of filing of discovery materials absent a court order that the papers not be filed. If on a motion or at trial, the enumerated discovery documents are relevant, the amended rule mandates filing.

(b) *Enlargement*. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect or (3) permit the act to be done by stipulation of the parties, but it may not exceed the time for taking any action under Rules *50(b)*, 52(b), 59(b), (d), and (e), and 60(b) except to the extent and under the conditions stated in them.

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Committee Note

Rule 6(b), providing for enlargement of time, forbids extension of time for "action under Rule 52(b), 59(b), (d), and (e), and 60(b) . . . ." This amendment would add Rule 50(b) to that list. Its absence from the original Superior Court Rule stemmed from the fact that Rule 50(b) did not then involve a motion. When the rules were amended in 1995, Rule 50(b) came to provide for renewal of a motion for judgment as a matter of law and for its joinder with a motion for a new trial under Rule 59. The time for a motion for a new trial (10 days after judgment) may not be extended. Neither should extension apply to a renewed motion for judgment as a matter of law, hence this proposed amendment to Rule 6(b).

Rule 14
Third Party Practice

(a) *When Defendant May Bring in Third Party*. At any time after commencement of the action a ~~defendant~~ *defending party*, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the ~~defendant~~ *third party plaintiff* for all or part of the plaintiff's claim against the ~~defendant~~ *third party plaintiff*. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other

third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant.

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Committee Note

The change of "defendant" to "defending party" makes clear that fourth and fifth party practice is permissible. The amendment largely tracks Federal Rule 14(a).

Rule 15
Amended and Supplemental Pleadings

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing ~~the~~ ~~party~~ *or adding a plaintiff or defendant* or the naming of ~~the~~ *a* party ~~against whom a claim is asserted~~ relates back if the foregoing provision is satisfied and within the period provided by Rule 4(1) for service of the summons and complaint, the party ~~to be brought in by amendment~~ *against whom the amendment adds a plaintiff, or the added defendant* (1) has received such notice of the institution of the action that the party would not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that but for a mistake ~~concerning the identify of the proper party~~ the action would have been brought *by or* against the ~~party~~, *plaintiff or defendant to be added*.

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Committee Note

The second sentence of Rule 15(c), relative to changing a party "against whom a claim is asserted" provides that, subject to certain requirements, such amendment relates back. The provision was based on what became a 1966 amendment to Federal Rule 15(c).

In Balletta v. McHale, 823 A.2d 292 (R.I. 2003), the Supreme Court of Rhode Island applied the sentence literally to include only added defendants. The court rejected relation back of an amendment adding a spouse's claim of loss of consortium to a personal injury action. Addition of a party asserting a claim is not within the language of this second sentence. The advisory committee note to the Federal Rule change, however, indicates that this had not been a problem, that such amendments had been allowed to relate back under the first sentence of Rule 15(c). The

reporter's note to Super. R. Civ. P. 15(c) makes the same point. The present proposal is designed to restore that understanding.

Rule 26
General Provisions Governing Discovery; Duty of Disclosure

(b) *Discovery; Scope and Limits*.

(4) Trial Preparations: Experts.

(A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. ~~(ii) Upon motion the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(c) of this rule, concerning fees and expenses as the court may deem appropriate.~~ *A party may depose any person who has been identified as an expert expected to testify when the expert interrogatory has been responded to by the other party. Unless otherwise ordered by the court, the party seeking to depose the expert shall pay the expert the reasonable fee for the time spent attending the deposition and the reasonable expenses incurred in attending the deposition.* In the absence of agreement between the parties as to the timing of disclosures required under this subdivision, any party may apply to the court for an order establishing a schedule of such interrogatories, responses, and depositions. Obligation to respond to interrogatories shall be stayed until the ruling on the application.

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Committee Note

Under the present Rule, when an expert has been identified as an intended witness at trial in response to an interrogatory, further discovery from such expert requires a court order. This amendment authorizes the taking of the deposition of such witness without order of the court and provides for payment of a reasonable fee and expenses to the expert incurred in attending the deposition. This provision does not provide for payment by the deposing party of fees and expenses attendant upon preparation for such deposition unless the court so orders in light of the circumstances.

Rule 30
Depositions Upon Oral Examination

(b) N*otice of Examination:General Requirements; Special Notice; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.*

(6) A party may in the witness' notice or in a subpoena name as the deponent a public, ~~or~~ private ~~corporation or a partnership or association~~ or governmental ~~entity or agency~~ *organization* and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall serve and file, prior to the deposition, a written designation which identifies one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

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Committee Note

The amendment to Rule 30(b)(6) is simply to recognize that there are more types of entities than private or public corporations or partnerships (such as limited liability companies); thus the more expansive term "organizations."

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(c) *Examination and Cross-Examination; Record of Examination; Oath; Objections.*

Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the applicable Rhode Island Rules of Evidence except Rules 103 and 615. Subject to a contrary court order or agreement of the parties, no person whose presence at a deposition has been requested by any counsel of record shall be excluded from attending the deposition. However, attendance at depositions of persons other than the deposition officer (reporter), the witness, counsel, and parties to the action shall not be permitted unless notice of same has been given to all counsel of record at least 48 hours before the deposition. The officer before whom the deposition is to be taken or, in a non-stenographic deposition, the examining attorney, shall put the witness on oath *or affirmation* and shall in person, or by someone acting under such person's direction and in such person's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means in accordance with subdivision (b)(2) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings, shall be noted by the officer upon the record of the deposition, but the examination shall proceed with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and that party shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

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Committee Note

This addition of "or affirmation" to the requirement of a deponent's "oath" is simply stylistic.

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(d) *Schedule and Duration: Motion to Terminate or Limit Examination.*

(1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A ~~party~~ *person* may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

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Committee Note

The present rule permits a "party" (which includes a party's attorney) to instruct a deponent not to answer only to preserve a privilege, to enforce a court directed limit on evidence, or to present a motion for a protective order under Rule 30(d)(3). This amendment applies the same limitation to any "person" present, including a non-party deponent's lawyer.

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(f) *Certification and Filing by Officer; Opening*.

(3) Upon being filed the deposition shall be open to inspection *until such time as it is returned by the court to the examining attorney*, unless otherwise ordered by the court.

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Committee Note

This amendment makes clear that transcripts of depositions are open to public inspection only until returned by the court to the examining attorney unless otherwise ordered by the court.

Rule 33
Interrogatories to Parties

(c) *Continuing Duty to Answer*. If the party furnishing answers to interrogatories subsequently shall obtain information which renders such answers incomplete or incorrect, amended answers shall be served within a reasonable time thereafter but not later than ~~10~~ *30* days prior to the day fixed for trial. Thereafter amendments may be allowed only on motion and upon such terms as the court may direct.

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Committee Note

Receiving amended answers to interrogatories as late as 10 days prior to trial often creates difficulty in preparation for imminent trial. It is too late to react effectively to the new information and impossible to engage in further discovery. The amended rule requires amended answers not later than 30 days prior to a trial date. The remaining second sentence authorizes extension on motion of the time for amended answers.

Rule 45
Subpoena

(a) *Form; Issuance*.

(1) Every subpoena shall*:*

(*A*) be issued by the clerk of court or a notary public or other officer authorized by statute;

(*B*) state the name of the court *from which it is issued*;

(*C*) ~~and~~ *state* the title of the action, *the name of the court in which it is pending and its civil action number*;

(D) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person or to permit inspection of premises at a time and place therein specified; ~~The subpoena shall~~

(E) set forth the text of subdivisions (c) and (d) of this rule,

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

2) *A subpoena must issue as follows:*

(A) *for attendance at a trial or hearing, in the name of the court where the hearing or trial is to be held;*

(B) *for attendance at a deposition, in the name of the court in which the action is pending, stating the method for recording the testimony; and*

(C) *for production or inspection, if separate from a subpoena commanding a person's attendance, in the name of the court in which the action is pending.*

(b) *Service.*

(1) A subpoena may be served by the sheriff, by the sheriff's deputy, by a constable, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the state or any officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b). A subpoena may be served at any place within the state.

(2) *Proof of service when necessary shall be made by filing with the clerk of the court by which the*

subpoena is issued a statement of the date and manner of service and the names of the persons served, certified by the person who made the service.

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Committee Note

There are three (3) areas of change from the old Rule 45. First, Rule 45(a)(1) has been modified to track the Federal Rule 45(a)(1) and to conform to current style conventions and the existing form of subpoena (SR-25 Civil). The changes merely specify in greater detail the items required to be set forth on the subpoena form. Second, proposed Rule 45(a)(2)(B) requires that a deposition subpoena state the method for recording the testimony. Rule 30(b)(2) directs that the party noticing a deposition state in the notice the manner for recording the testimony, but the notice need not be served on a non-party deponent. A non-party deponent learns of the recording method only if served with a copy of the notice or if the subpoena sets forth the recording method. This amendment ensures that a non-party deponent receives notice of the recording method. Third, proposed Rule 45(b)(2) adds a provision specifying how proof of service of a subpoena may be made when necessary. Subsections (c), (d) and (e) remain unchanged.

Rule 58
Entry of Judgment

~~(a) *After Trial or Hearing.*~~

~~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 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 judgement shall be set forth on a separate document. A judgment is effective and shall be deemed entered when so set forth and signed by the Clerk. Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall submit forms of judgment upon direction of the court.~~

~~(b) *By Agreement.*~~

~~Subject to the provisions of Rule 54(b) the clerk, without awaiting any direction by the court, may enter judgment for a sum certain or denying relief upon agreement or submission in writing by the parties or their attorneys of record, except when any party is an infant or incompetent person.~~

~~(c) *Upon Order of Supreme Court*. The clerk shall enter any judgement specifically directed by the Supreme Court.~~

(a) Separate Document

(1) Every judgment and amended judgment must be set forth on a separate document. An order disposing of a motion:

(A) for judgment under Rule 50(b)

(B) to amend or make additional findings of fact under Rule 52(b);

(C) for a new trial, or to alter or amend the judgment, under Rule 59;

shall constitute a separate document for purposes of this rule.

(2) Subject to Rule 54(b):

(A) unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(i) the jury returns a general verdict,

(ii) the court awards only costs or a sum certain, or

(iii) the court denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(i) the jury returns a special verdict or a general verdict accompanied by interrogatories, or

(ii) the court grants other relief not described in Rule 58(a)(2)(A).

(b) Time of Entry. Judgment is entered for purposes of these rules when the earlier of these events occurs:

(1) on the day that the separate document is signed by the clerk; or

(2) when 150 days have run from entry in the civil docket under Rule 79(a).

(c) Cost Awards.

(1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs.

(d) By Agreement. Subject to the provisions of Rule 54(b) the clerk, without awaiting any direction by the court, may enter judgment for a sum certain or denying relief upon agreement or submission in writing by the parties or their attorneys of record, except when any party is an infant or incompetent person.

(e) Upon Order of the Supreme Court. The clerk shall enter any judgment specifically directed by the Supreme Court.

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Committee Note

The present rule requires that a judgment be set forth on a separate document and is effective only when so set forth and signed by the clerk. Only then does the appeal period begin to run. A ten month delay in such entry of judgment has been held to postpone start of the appeal period until that entry. Furtardo v. Laferriere, 839 A.2d 533 (R.I. 2004).

The proposed amendment prescribes that judgment is entered when the earlier of these events occurs: on the day that the separate document is signed by the clerk or when 150 days have run from entry in the civil docket under Rule 79(a).

Rule 59
New Trials - Amendment of Judgments

(a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues~~, (1) in an action in which there has been a trial by jury~~ for error of law occurring at the trial or for any of the reasons for which new trials have heretofore been granted ~~in actions at law~~ in the courts of this state. ~~(2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of this state;~~ On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

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Committee Note

This amendment changes Rhode Island practice by adopting a single standard for granting new trials in both jury and non-jury trials. That standard encompasses all grounds for which new trials or rehearings have hitherto been granted, including errors of law committed at the trial, introduced to Rhode Island practice in 1995.