

PRESENTED AT

33rd Annual Conference on State and Federal Appeals

June 8-9, 2023

**Indicative Rulings under
Federal Rule of Civil Procedure 62.1 and
Federal Rule of Appellate Procedure 12.1**

Dana Livingston

Author Contact Information:

Dana Livingston

Cokinos | Young, P.C.

Austin, Texas

dlivingston@cokinoslaw.com

512.482.9304

TABLE OF CONTENTS

I.	Introduction.....	1
II.	Overview	2
III.	Understanding Federal Rule of Civil Procedure 62.1 and Federal Rule of Appellate Procedure 12.1.....	3
A.	Background and context leading to the rules' adoption.....	3
B.	Text of Civil Rule 62.1 and Appellate Rule 12.1	5
C.	Mechanics—steps in using Civil Rule 62.1 and Appellate Rule 12.1	6
1.	File a motion.	6
2.	District court evaluates and chooses how to respond to the motion.....	7
3.	Give the court of appeals notice.	9
4.	The court of appeals may respond to the notice by remanding to the district court to enter the order indicated or to address the issue.....	10
6.	Post-remand obligation to notify the court of appeals.....	13
7.	Subsequent appeal—it's not over until it's over	13
IV.	When is the indicative-ruling procedure unnecessary?	15
V.	The elephant in the room: Is an indicative ruling an impermissible advisory opinion?	17
VI.	Examples of cases discussing or using Civil Rule 62.1	19
A.	Examples—Civil Rule 60(b) motions	20
1.	Civil Rule 60(b)(1)—relief from judgment for “mistake, inadvertence, surprise, or excusable neglect”	20

2.	Civil Rule 60(b)(2)—relief from judgment for “newly discovered evidence”	21
3.	Civil Rule 60(b)(3)—relief from judgment for “fraud . . . , misrepresentation, or misconduct by an opposing party”	23
4.	Civil Rule 60(b)(4)—“the judgment is void”	25
5.	Civil Rule 60(b)(5)—“the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable”	26
6.	Civil Rule 60(b)(6)—“any other reason that justifies relief”	27
a.	<i>Recusal of district judge who entered order or judgment on appeal</i>	28
b.	<i>Change in the law</i>	28
c.	<i>Settlement</i>	29
B.	Examples beyond Rule 60(b) motions	32
1.	Grant a motion for leave to amend pleadings	32
2.	Vacate judgment for lack of (diversity-of-citizenship) jurisdiction and remand to state court even though judgment is pending on appeal	33
3.	Certify order for immediate appeal under 28 U.S.C. 1292(b) as an alternate basis to support appellate jurisdiction when a collateral-order appeal from that order is already pending.	34
4.	Modify scope of class certification order while on appeal	35
5.	Vacate preliminary injunction while interlocutory appeal pending	36

6.	Allow intervention in the district court after appeal has been taken.....	37
VII.	Conclusion.....	38

INDICATIVE RULINGS UNDER FRCP 62.1 AND FRAP 12.1

I. Introduction

After an appeal has been docketed and while it remains pending, the district court cannot grant a Civil Rule 60(b) motion for relief from judgment without a remand. FED. R. CIV. P. 62.1 advisory committee's note (2009). But sometimes parties need to seek relief from the district court that the court can no longer grant because of the pending appeal.

Federal Rule of Civil Procedure 62.1—and its counterpart, Federal Rule of Appellate Procedure 12.1—formalized the developed practice that most courts followed to navigate this jurisdictional problem. The problem typically arises between district and appellate courts when a party makes a motion under Federal Rule of Civil Procedure 60(b) for relief from a judgment or order that is pending on appeal. *Lopez Dominguez v. Gulf Coast Marine & Assocs., Inc.*, 607 F.3d 1066, 1074 n.5 (5th Cir. 2010). Although the indicative-ruling procedure codified the practice that had developed for Civil Rule 60(b) motions, the procedure is not limited to that context.

In considering the adoption of these rules, the Rules Advisory Committee noted that the indicative-ruling practice—by then “well established”—“is not explicit in the current rules and is often overlooked by lawyers. Moreover, some district judges are unaware of its existence.”¹ Despite the adoption of indicative-ruling mechanism in Civil Rule 62.1 and Appellate Rule 12.1 in 2009, many practitioners remain unaware of this helpful tool.

¹ U.S. Courts Rules Advisory Standing Committee on Rules of Practice and Procedure, Meeting Minutes at 17 (Jan. 11–12, 2007), *available at* https://www.uscourts.gov/sites/default/files/fr_import/ST01-2007-min.pdf; *see* U.S. Courts Civil Rules Advisory Committee, Meeting Minutes at 30 (May 22–23, 2006) (“Although the practice is well settled under Rule 60(b), . . . expressing it in a rule” would “give clear notice of a practice that remains unfamiliar to many lawyers and to at least a few judges.”), *available at* https://www.uscourts.gov/sites/default/files/fr_import/CV05-2006-min.pdf.

II. Overview

Civil Rule 62.1 was considered by its drafters to be “the most important rule in the package being forwarded to the Judicial Conference for approval.”² Similarly, commentators have said that “Rule 62.1 serves a narrow but sometimes important purpose.”³ District courts typically lose power to grant a motion for relief from judgment once an appeal has been taken. *See Wooten v. Roach*, 964 F.3d 395, 403 (5th Cir. 2020); *Moore v. Tangipahoa Par. Sch. Bd.*, 836 F.3d 503, 504 (5th Cir. 2016).

“On occasion,” though, “district courts are presented with compelling grounds to grant relief but lack the power to do so because jurisdiction over the matter in question has passed to the court of appeals.” GENSLE & MULLIGAN, *supra* note 3. “In some circumstances, the most sensible and efficient path forward is for the court of appeals to be apprised of the situation so it may elect to terminate its proceedings and remand the case to the district court for further action.” *Id.*

Enter Federal Rule of Civil Procedure 62.1, alongside Federal Rule of Appellate Procedure 12.1. Civil Rule 62.1 “introduces a structured dialogue between the trial court and the appellate court,”⁴ setting out what actions a court can take when a party seeks relief in the district court that it cannot grant because it has lost jurisdiction as a result of an appeal. The most obvious use

² U.S. Courts Rules Advisory Standing Committee on Rules of Practice and Procedure, Meeting Minutes at 13-14 (June 9-10, 2008), *available at* https://www.uscourts.gov/sites/default/files/fr_import/ST06-2008-min.pdf.

³ 2 STEVEN S. GENSLE & LUMEN N. MULLIGAN, FEDERAL RULES OF CIVIL PROCEDURE, RULES, AND COMMENTARY: *Rule 62.1—Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal* (Feb. 2023 update).

⁴ U.S. Courts Civil Rules Advisory Committee, Meeting Minutes at 30 (May 22-23, 2006), *available at* https://www.uscourts.gov/sites/default/files/fr_import/CV05-2006-min.pdf.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Indicative Rulings under Federal Rule of Civil Procedure 62.1 and Federal Rule of Appellate Procedure 12.1

Also available as part of the eCourse

[2023 eConference on State and Federal Appeals](#)

First appeared as part of the conference materials for the
33rd Annual Conference on State and Federal Appeals session
"Under-Utilized Procedural Tools"