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OF THE
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To: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Honorable Lee H. Rosenthal, Chair**
Advisory Committee on Federal Rules of Civil Procedure

Date: **December 15, 2005**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee held a hearing at the University of Chicago Law School on November 18 to hear testimony on the Style set of the Civil Rules that was published for comment in February. The Rules published on the "Style-Substance Track" and the Style Forms also were discussed. The Committee met in Santa Rosa, California, on October 27-28. Draft minutes of the October meeting are attached. Summaries of the written comments and testimony on the Style Rules, the Style-Substance Track, and the Style Forms will be provided for the Standing Committee's spring meeting along with recommendations for the next steps in moving toward adoption of the Style Project proposals.

Part I of this report presents one action item, a recommendation to approve for publication a minor amendment of Civil Rule 8(c). The recommendation is for publication when this rule can be included in a package with other proposals.

Part II presents information items, describing the projects that are being developed for further consideration. Some of these projects may lead to recommendations for publication as early as next summer. Others are likely to require study that will extend beyond next spring. Some may be deferred or abandoned after further study.

I Action Item: Rule 8(c) Amendment Recommended for Publication

The Style Project raised two questions about the affirmative defenses listed as examples in Rule 8(c). "Contributory negligence" has become outmoded in most states, having given way to rules that in one way or another compare the role of both plaintiff and defendant in causing the plaintiff's injuries. A determination whether to recommend revision of Rule 8(c) on this point was deferred, however, for two reasons. There is no indication that anyone doubts that, for example, comparative negligence is an affirmative defense, captured either in "contributory negligence" or in the residual provision of Rule 8(c) that includes "any other matter constituting an avoidance of affirmative defense." An amendment, further, would require a choice either to substitute a more modern phrase or to avoid any reference at all. This defense is far more often invoked than many of the other matters used as examples in Rule 8(c), making deletion questionable. Substitution, however, would require a choice among comparative negligence, comparative fault, or — and most accurately — comparative responsibility. In many jurisdictions comparison extends beyond

negligence claims to claims based on "strict" liability, suggesting that "fault" might be more suitable. The comparison, moreover, commonly weighs not only relative degrees of departure from the required standard of care but also relative causal contribution, suggesting that "comparative responsibility" may be the best term. This question remains on the agenda.

"Discharge in bankruptcy," another item in the Rule 8(c) list of examples, is ripe for change. Early in the Style Project a bankruptcy judge advised that discharge in bankruptcy is no longer an "affirmative defense" as a matter of substantive bankruptcy law. For many years, 11 U.S.C. § 524(a)(1) and (2) and the predecessor statute have provided:

> (a) A discharge in a case under this title —
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of a personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
>
> (2) operates as an injunction against the commencement of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived * * *.

Although § 524 runs on for many pages, Judge Walker, liaison from the Bankruptcy Rules Committee, affirmed that it means what it seems to say. A discharge voids any judgment obtained on the discharged debt even if the debtor defaults or appears but fails to plead the discharge. The discharge, indeed, operates as an injunction that makes it a contempt to initiate or pursue an action on the discharged claim, again whether or not the debtor fails to plead the discharge.

Section 524 has superseded the role of discharge as an affirmative defense. Rule 8(c) should be amended by deleting the reference to "discharge in bankruptcy." Publication of the proposed amendment, however, can safely await the next package of published proposals. The existing provision has survived for many years after it became irrelevant without causing any observable problem.

II Information Items

A. Style Project

Two of the three scheduled hearings on the redrafted rules proposed by the Style Project and published in February were cancelled because no one requested to testify. One hearing was held in Chicago on November 18.

The Chicago hearing took on the character of a roundtable discussion more than the traditional testimonial presentations. Professor Stephen B. Burbank of the University of Pennsylvania Law School and Gregory P. Joseph, of the New York Bar, discussed Style Project issues for a full morning. They presented comments provided by a working group of 21 academics and practicing lawyers who divided up the complete set of Style Rules and Style-Substance Rules for intense study by teams that paired an academic with a practicing lawyer. Their work on the individual rules, and the thoughtful presentation of the results, were exactly the sort of painstaking study and analysis that a successful Style Project will depend upon. The Rules Committees owe them a real debt of gratitude for their work and for traveling to Chicago to discuss it. Many improvements will result from it.

Professor Burbank and Mr. Joseph also presented a brief summary of the working group's division of opinion on the wisdom of completing the Style Project. A majority of the fourteen members who participated in the group's final conference call concluded that the transaction costs of implementing a complete set of newly worded rules will outweigh the advantages in clarity, simplicity, and consistency that have been achieved in the styling process. A smaller set of members believe that the transitional costs will be outweighed by the long-term benefits. The fervor of these conflicting views varied among members of both groups. Similar expressions of doubt and enthusiasm have become familiar from the time of the first tentative beginnings of the Style Project revision of the Appellate Rules. They must be confronted again, and finally, when the final and best version of the Style Civil Rules is presented for deliberation at the spring meetings of the Advisory Committee and then the Standing Committee.

B. Discrete Issues

General Docket

Thirty-three items that have lingered on the Civil Rules docket were removed from the docket. Some of them offered worthy concerns. But it is not desirable to continually amend the rules to respond to every possible improvement. Neither is it desirable to respond whenever a single decision — or even a few decisions — seem to have misinterpreted a rule.

Rule 15

Several Rule 15 suggestions have accumulated over the last few years, including some that emerged from the Style Project. Two have stimulated particular interest. The first of these focuses on the distinction drawn among the events that terminate the Rule 15(a) right to amend once as a matter of course. A responsive pleading — most often an answer — terminates the right. But a motion to dismiss for failure to state a claim is not a pleading, and does not terminate the right. Amendments at times are made as a matter of right after a motion to dismiss has been submitted for decision. Some judges have provided written suggestions that this part of Rule 15(a) should be reconsidered. The second suggestion focuses directly on the interpretation of the part of Rule 15(c)(3) that allows relation back of an amendment changing the party against whom a claim is asserted if the party had timely notice that "but for a *mistake* concerning the identity of the proper party, the action would have been brought against the party." Many circuits have ruled that relation back is not permitted if the party asserting the claim knew that it did not know the identity of an intended defendant — that is not a "mistake," but a lack of information. Judge Edward Becker has urged the Committee to propose amendments to reverse this interpretation.

These and other Rule 15 questions were submitted to a Subcommittee a few years ago, along with a Rule 50(b) question that has led to the proposed amendment now pending in the Supreme Court for adoption. The Subcommittee concluded that the Rule 15 questions were sufficiently complicated to demand greater attention than could be afforded in competition with such other topics as discovery of electronically stored information and civil asset forfeiture procedure. A new Subcommittee has been named and will again take up these topics. The open questions are not only whether any change is worthwhile but also whether there is any advantage in exploring the many conceptual difficulties that can be found in Rule 15(c) so long as there is no significant evidence that the abstract gaucheries have caused any real problem in practice.

Rule 26(a)(2)(B): "Regular Employee" Expert Witness Reports

Rule 26(a)(2)(B) requires disclosure of a detailed report by an expert trial witness who falls into either of two categories — a witness "retained or specially employed to provide expert

testimony in the case," and one "whose duties as an employee of the party regularly involve giving expert testimony." The suggestion for revision of this rule came in the form of a law review article submitted by the authors. The article finds many decisions that in effect rely on the great value of the disclosure requirement to conclude that the rule also requires disclosure of a report by an employee whose duties do not regularly involve giving expert testimony. At the same time, other decisions read the rule as it was written, though at times suggesting that it would be better to require a report. Although an employee disclosed as an expert trial witness under Rule 26(a)(2)(A) can be deposed directly under Rule 26(b)(4)(A) if a report is not required by (b)(2)(B), the report is thought useful as preparation for the deposition (the hope that a report may obviate the need for a deposition seems not to be fulfilled very often).

This topic will be developed further. One of the reasons offered to support a report requirement is the desire to win access to privileged information used to prepare an expert trial witness. It may be, however, that the disclosure rule as such is not the source of waiver — the same access should be available whether the trial expert discloses a report, is deposed, or testifies at trial. More importantly, privilege questions may be much more difficult when the trial expert witness also is a regular employee who has not been transformed into the practical equivalent of an outside expert specially retained or employed for the case. The regular employee may be immersed in all aspects of the situation, going back even before the events in suit occurred, and be a necessary participant in many privileged communications and in protected trial preparation efforts. Privilege concerns, moreover, invoke obvious interests of the Evidence Rules Committee. The issues are likely to prove difficult.

Rule 30(b)(6): Organization as Deponent

The Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York Bar Association has suggested that growing misuses are made of the Rule 30(b)(6) procedure for naming an organization as a "deponent." In the end, after suggesting many best-practice guides, their submission proposes a single amendment that would limit the subject of the deposition to "factual" matters. This proposal reflects a specific concern that Rule 30(b)(6) depositions are being used to bind an organization to positions, including legal contentions, taken by its designated witnesses. Occasional suggestions have been made by others that Rule 30(b)(6) practice has evolved in undesirable ways that go far beyond anything originally intended, changing a targeted discovery rule to a broad rule of both discovery and evidence.

David Bernick agreed to attend the October meeting to provide some practical insight into the current uses of Rule 30(b)(6). He observed that significant difficulties arise from the requirement that the organization designate witnesses to depose "as to matters known or reasonably available to the organization." The organization, as a legal construct, "knows" often vast amounts of information that are not within the personal knowledge of any single real person or any manageable number of real persons. The designated witnesses must be educated in the relevant corporate knowledge, even though they would not be individually qualified as witnesses on the same "matters." The risks inherent in this device are magnified by efforts to force the individual witnesses to state the organization's positions on matters as to which the organization has conflicting information, and also to state contentions of a sort properly subject to discovery by interrogatories or by requests to admit but not by deposition. The rule continues to have a proper purpose as a cure to the difficulties an outsider faces in attempting to identify the sources of information available to an organization. But it should be limited to that purpose. It could be amended to authorize a deposition "to ascertain the location of facts discoverable under these rules and within the custody or control of the organization." The designated witnesses would have to be educated to identify the relevant persons and documents, but not to recite all of the matters known to those persons or contained in the documents.

The discussion showed that this is a big and potentially troubling topic. It may overlap with interests of the Evidence Rules Committee. It will be studied further. A subcommittee has been formed to study the practice under Rule 30(b)(6) and whether rule amendments should be pursued.

Rules 33, 36: Attorney Signature on Response

A first semester law student pointed out a puzzle in the relationships among Rules 26(g)(2), 33, and 36. Rule 26(g)(2) says that a discovery response must be signed by an attorney unless the party is unrepresented. The Committee Note says directly that "response" includes answers to interrogatories and requests to admit. Rule 33(b)(2), however, in language adopted before the 1983 adoption of Rule 26(g)(2), says that answers to an interrogatory are to be signed by the person making them, while objections are to be signed by the attorney making them. Rule 36(a) says that an answer or objection addressed to a request to admit is to be "signed by the party or by the party's attorney." Since Rule 26(g)(2) is the most recent of these three rules, it might seem that it should govern. On that view, the only question is whether Rules 33 and 36 should be amended to make clear the rule that an attorney must sign Rule 33 and Rule 36 responses. Discussion, however, reflected real doubt whether an attorney should be required to sign answers to interrogatories or requests to admit. The conclusion was to carry this subject forward, but to hold it in abeyance until there is some sign of real difficulties in practice.

Rule 48: Jury Polling

The Committee discussed favorably a proposal to adopt a rule on jury polling parallel to Criminal Rule 31(d). It is expected that a draft will be prepared for the spring meeting with an eye toward recommending an amendment for publication in 2006.

Rules 54(d)(2), 58(c)(2), Appellate Rule 4

The Appellate Rules Committee, reacting to the opinion in *Wikol v. Birmingham Public Schools Bd. of Educ.*, 360 F.3d 604 (6th Cir.2004), has suggested that Civil Rule 58(c)(2) be amended. Rule 58(c)(2) provides that when a timely motion for attorney fees is made under Rule 54(d)(2), the district court "may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect" under Appellate Rule 4 as a timely Rule 59 motion. This provision was adopted to bring some flexibility to administration of the rule that a decision that disposes of all issues other than attorney fees is a final judgment — if appeal is not taken within the time measured from judgment on the merits, the right to appeal on the merits is lost. The trial judge is put in the role of "dispatcher," vested with discretion to determine whether it is better to wrap up the entire dispute in a single package that will support a single appeal, or whether it is better instead to have the appeal on the merits proceed while the fee question remains pending and perhaps stayed pending the outcome on appeal.

The difficulty arising from this structure is simply another illustration of the problems that arise from two related phenomena. One is the rule, adopted as a matter of interpretation rather than statutory mandate, that the appeal times designated in Appellate Rule 4 are "mandatory and jurisdictional." This rule itself is called into doubt by the decision in *Eberhart v. U.S.*, 2005, 126 S.Ct. 403. The other is the sets of rules that govern the initiation, suspension, and running of appeal time. These rules have been constantly amended in an effort to provide inescapable clarity and sound results. Such clarity as has been achieved, however, is attainable only on close and careful reading. So it is with the effect of a motion for attorney fees. Careful reading through four rules tells the parties and court what to do in almost all situations. But careful reading is required in an area

that is not routinely familiar to most attorneys — not even those who practice regularly in federal court.

In the case of Rule 58(c)(2), careful reading suggests a question that is not directly answered. What happens if there never is a notice of appeal that "has become effective"? The simple testing illustration is this: Judgment on the merits enters. A timely motion for attorney fees is made and resolved. The time to appeal runs out both as to the judgment on the merits and as to the order deciding the fee motion. Then a party moves for an extension of appeal time under Rule 58(c)(2), arguing that the court has authority because it can act before a notice of appeal has become effective. To be sure, a district court is not at all likely to grant such a motion unless there is some other reason to wish to extend appeal time. And it can be argued that the rule contemplates an order that suspends appeal time — the effect of a timely Rule 59 motion — only so long as it remains possible to file a notice of appeal that can become effective. This potential gap in present drafting may not present a real problem in practice. (The court managed to find a workable answer for the different problem actually presented by the *Wikol* case.)

Discussion of possible drafting alternatives pointed up the need for information about the ways Rule 58(c)(2) is used in practice. Do district judges commonly suspend the time to appeal on the merits? Commonly refuse to do so? Make sensitive and case-specific rulings that demonstrate the value of the subtle flexibility established by the present rule? Before proceeding further with this topic, the Federal Judicial Center will be asked whether it is possible to design and carry out a study that will shed more light on present practice. The topic also relates to the Time Project, however, and may in any event return for discussion as the Advisory Committee reviews all of the individual time periods established in the Civil Rules and — where indicated — their relationships to the time periods established in the Appellate Rules.

Rule 60 or "62.1" — "Indicative Rulings"

The Advisory Committee has for some time deferred action on a proposal submitted by the Solicitor General to the Appellate Rules Committee and referred on for consideration in the Civil Rules. The simplest part of the proposal is to adopt a rule that expresses the practice adopted in most circuits for district-court consideration of a Rule 60(b) motion to vacate made while an appeal is pending from the judgment addressed by the motion. Most circuits rule that the district court has jurisdiction to deny the motion, and also to indicate that it would grant the motion if the case were remanded. Adoption of this practice in an express Rule 60 provision could make it uniform across the country, inform many lawyers and some judges who are not aware of it, and provide clear guidance on procedural incidents. A more complex provision could seek to establish this "indicative ruling" procedure for all circumstances in which a pending appeal ousts district-court jurisdiction to amend, modify, or vacate an order that is the subject of a pending appeal. The same procedure may well fit across many different categories of appeal jurisdiction. The potential challenge lies in confining a general rule to the circumstances in which it is needed. District-court authority to act is governed by complex rules developed in the case law for different categories of appeals taken before a truly final judgment that concludes all district-court proceedings. The challenge appears to be more a drafting challenge than anything else, at least if it seems wise to leave the underlying questions of authority for continuing development in the decisions.

At least two draft rules will be considered at the spring meeting for a possible recommendation to publish for comment. One will be a simple Rule 60 approach. The other will be a more general model that addresses any situation in which the district court lacks jurisdiction to take requested action without appellate permission.

C. Long-Range Projects

Two long-range projects are being considered for possible development. One, to evaluate the operation of Civil Rule 56, will begin by opening all questions that might be addressed to the rule. Further study, however, may show that the project should be narrowed to focus on the procedures that govern summary-judgment practice and particularly to consider the time periods that in any event must be considered as part of the Time Project. The other, and more fundamental, will ask whether the time has come to revise the notice-pleading part of the basic pleading-discovery package that transformed contemporary procedure with the adoption of the Civil Rules in 1938.

Summary judgment has a rather recent history in the amendment process. A complete revision of Civil Rule 56 was proposed by the Rules Committees but rejected by the Judicial Conference in September, 1992. There are indications that the rejection rested on one facet of the proposals — a perception that the revised Rule 56 accurately restated the summary-judgment test that emerged from three 1986 Supreme Court decisions. This perception in turn led some participants to believe that there was no need to restate established law, while others thought it undesirable to restate and entrench undesirable established law. However that may have been, the question remains today whether Rule 56 is ripe for further consideration. The examination of the rule in the Style Project provided fresh reminders of problems, ranging from unreasonable deadlines to a disconnect between the rule and the ways in which summary judgment motions are litigated – the rule, for example, does not even refer to "partial summary judgment." The large number of specific local rules on Rule 56 motions further demonstrates the inadequacy of the national rule.

Discussion ranged across a full range of issues identified in the earlier proposal. The prospect of restating the standards for summary judgment or addressing other central issues met some reluctance, but was not ruled out. The possibility of "procedural" changes was recognized. The Time Project will require reconsideration of the time periods set for making and responding to summary-judgment motions. Many districts have adopted local rules that flesh out detailed procedures for supporting a Rule 56 motion and for opposing it. The felt need for added detail may suggest that Rule 56 should be revised both to give greater guidance and also to establish more nearly uniform national practices. But there also was some wariness about spelling out detailed procedural requirements in a national rule.

Summary judgment remains on the active agenda. The Federal Judicial Center will be asked to provide at least such help as can be on the basis of ongoing studies of Rule 56, and perhaps will be asked whether some expanded empirical project might be worthwhile. Local rules and perhaps some standing orders will be collected to provide a full picture of the models that might be drawn upon in expanding Rule 56's procedural details.

Notice pleading has been briefly considered in recent years. The immediate promptings have been Supreme Court decisions that reject "heightened pleading" requirements in any area not specifically addressed by a Civil Rule. Deeper concerns have occasionally emerged in the course of ongoing efforts to revise the discovery rules. The combination of notice pleading with broad discovery forms the center of federal civil practice. Concerns that discovery has come to impose undue burdens in a relatively small but worrisome fraction of cases have not yielded fully satisfactory revisions of discovery practice. The Advisory Committee's responsibility to aid in the Judicial Conference's "continuous study of the operation and effect of the general rules" suggests that it is time to ask whether notice pleading might be reconsidered, at least in some respects.

Initial exploration of these questions recognized that notice pleading is no longer used in many cases. In cases that do use notice pleading, discussion reflected a desire for better tools for early management of cases that survive for longer, and at greater expense, than they should. An

alternative might be to revise Rule 12(e). Rule 12(e) now recognizes the motion for a more definite statement only when a pleading is so confused that a responsive pleading cannot reasonably be prepared. It might be developed into a flexible tool for demanding more specific pleading in individual cases that seem likely candidates for disposition on the pleadings because a party is not willing even to plead elements that must be proved to establish a claim or defense. Or it may be that lower courts generally manage to administer "notice" pleading so as to require more detailed allegations "showing that the pleader is entitled to relief," obviating the need for any rules changes.

These questions connect to the summary-judgment questions, both in theory and in the prospects for the early steps of further research. A survey of local rules and standing orders might well include not only the well-known summary-judgment procedure rules but also rules or orders that address pleading in specific categories of cases. Beyond that, it may be feasible to do an electronic docket search that gives some sense of what kinds of pleading motions are being made and how they are decided. One or more conferences similar to those so helpful during the consideration of the 2000 discovery amendments, the 2003 class-action rule changes, and the proposed electronic discovery proposals, may further illuminate whether there are a significant number of cases that courts should be able to decide on the pleadings but that persist beyond the pleading stage to inflict unnecessary expense and delay, and whether amendments can solve this problem without also dispatching on the pleadings cases that should survive for further development. The topic remains interesting and important.