COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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 12, 2006

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Vanderbilt Law School in Nashville, Tennessee, on September 7 and 8, 2006. Draft Minutes of the meeting are attached.

Part I presents a technical amendment to Supplemental Rule C(6)(a) with a recommendation that it be approved without publication for comment, because it is a technical amendment.

Part II of this report presents items recommended for approval for publication next summer. These items are proposed amendments to Rules 13(f) and 15(a) on amending pleadings and to Rule 48 on jury polling, along with a proposed new Rule 62.1 on "indicative rulings"that addresses the authority of a district court to act on certain requests for relief after notice of appeal is filed. These were introduced in summary form as information items at the June 2006 meeting but with the recommendation that in light of other recent and anticipated amendments, publication would be in August 2007.

Part III briefly summarizes the Advisory Committee's discussion of the intercommittee time-computation template rule. This part also summarizes the Advisory Committee's considerable progress in the intracommittee work of reviewing the time periods and deadlines within the Civil Rules and recommending amendments to be consistent with the template and to be sure the periods and deadlines are reasonable. These amendments will be recommended for publication in tandem with the template rule.

Part IV presents several items for information. These include projects being developed by subcommittees, one focusing on discovery and the other focusing on summary judgment and the possibility of developing a court-controlled procedure for requiring more specific pleading on an individual-case basis. Another project that has been less developed arises from a Second Circuit suggestion for amending Rule 68 on offers of judgment. Finally, submission of the Style Project to the Supreme Court is noted.

I. Action Item: Recommendation For Adoption Without Publication

The Advisory Committee recommends approval for adoption without publication of a technical amendment to Supplemental Rule C(6)(a)(I).

Adoption of Supplemental Rule G, which took effect on December 1, 2006, required conforming amendments that withdrew portions of other Supplemental Rules that dealt with civil forfeiture proceedings. An unintended omission failed to capitalize "A" as the first word of subparagraph C(6)(a)(i). The omission might be cured by simply capitalizing "A," but a better parallel with subdivisions C(1), (2), and (5) can be achieved by these changes:

(6) Responsive Pleading; Interrogatories.

(a) ~~Maritime Arrests and Other Proceedings~~

Statement of Interest; Answer. In an action in rem:

(i) a person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

* * * * *

II. Action Items: Recommendations for Publication

A. RULES 13(F) AND 15(A): AMENDING PLEADINGS

Related amendments of Rules 13(f) and 15(a) are recommended for publication with other proposals in August 2007. The changes are shown in the Style Rule.

Rule 13. Counterclaim and Crossclaim

* * * * *

~~**(f) Omitted Counterclaim.** The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.~~

Committee Note

Rule 13(f) is deleted as largely redundant and potentially misleading. An amendment to add a counterclaim is governed by Rule 15. Rule 15(a)(1) permits some amendments to be made as a matter of course or with the opposing party's written consent. When the court's leave is required, the reasons described in Rule 13(f) for permitting amendment of a pleading to add an omitted counterclaim sound different from the general amendment standard in Rule 15(a)(2), but seem to be administered — as they should be — according to the same standard directing that leave should be freely given when justice so requires. The independent existence of Rule 13(f) has, however, created some uncertainty as to the availability of relation back of the amendment under Rule 15(c). See *6 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d, § 1430*. Deletion of Rule 13(f) ensures that relation back is governed by the tests that apply to all other pleading amendments.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) ~~before being served with a responsive pleading;~~ 21 days after serving it, or

(B) ~~within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar~~ if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

* * * * *

Committee Note

Rule 15(a) is amended to make three changes in the time allowed to make one amendment as a matter of course.

Former Rule 15(a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading terminated the right to amend. Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a "pleading" as defined in Rule 7. The right to amend survived throughout the time required to decide the motion and indeed survived beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former Rule 15(a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f). This provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or at least reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Second, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise. Just as amendment was permitted by former Rule 15(a) in response to a motion, so the amended rule permits one amendment as a matter of course in response to a responsive pleading. The right is subject to the same 21-day limit as the right to amend in response to a motion.

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period.

Finally, amended Rule 15(a) extends from 20 to 21 days the period to amend a pleading to which no responsive pleading is allowed and omits the provision that cut off the right if the action is on the trial calendar. Rule 40 no longer refers to a trial calendar,[1] and many courts have abandoned formal trial calendars. It is more effective to rely on scheduling orders or other pretrial directions to establish time limits for amendment in the few situations that otherwise might allow one amendment as a matter of course at a time that would disrupt trial preparations. Leave to amend still can be sought under Rule 15(a)(2), or at and after trial under Rule 15(b).

Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

Discussion

Rule 13(f) now provides that the court may permit a party to "amend a pleading to add a counterclaim." The Style Project considered deleting this rule as redundant with Rule 15, but concluded that the change might be challenged as substantive. Despite the different language, however, there is no apparent reason to believe that courts apply different standards when an amendment seeks to add a counterclaim than when an amendment seeks to add a claim or crossclaim, or to make other changes. Nor is there any apparent reason to apply different standards. The existence of this provision, moreover, generates uncertainty whether a Rule 13(f) amendment is eligible for relation back under Rule 15(c). Abrogation will bring all pleading amendments within Rule 15.

Rule 15 has been on the Committee agenda for several years. Several possible amendments have been considered by two subcommittees. The current recommendations result from careful work by a subcommittee chaired by Judge Michael Baylson. The proposed Committee Notes provide most of the discussion needed to explain the proposed amendments.[2]

---

[1] This statement anticipates adoption of Style-Substance Rule 40 on December 1, 2007.

[2] After years of off-and-on debate over whether to pursue proposals to amend to Rule 15(c), the Committee decided not to do so. Close textual analysis reveals problems with the rule, but there is no indication in the reported cases that these problems have caused significant difficulties in practice. Work on Rule 15(c), further, would reopen serious questions. The first provision allows an amendment to relate back to the date of the pleading being amended when applicable limitations law allows relation back. The following provisions allow relation back despite the fact that applicable limitations law does not allow relation back. Relation back still can be justified to cure errors that are fairly characterized as procedural, but the line between providing ameliorative procedure and creating new limitations rules is thin. After exploring both narrow and broad proposals to amend the provisions that now appear in Rule 15(c)(2) and (3) (Style Rule 15(c)(1)(B) and (C)), the Committee decided to decline further work on Rule 15. The discussion is elaborated in the draft Minutes.

Present Rule 15(a) presents a clear distinction between the events that cut off the right to amend once as a matter of course a pleading to which a responsive pleading is required. Service of a responsive pleading terminates the right to amend. Service of a motion that attacks the pleading does not. Instead the right to amend survives the motion, argument of the motion, deliberation by the court, and — on terms that vary somewhat among the courts — even a decision granting the motion. Only a judgment dismissing the action cuts off the right to amend. Neither the rule nor the cases that apply it identify clear reasons justifying this distinction and the proposed amendment eliminates it.

Two significant changes are made. First, the distinction between a motion and a responsive pleading in present Rule 15(a) is eliminated. Instead of providing a right to amend once as a matter of course if the pleading is challenged by a motion – most commonly a motion to dismiss for failure to state a claim – the proposal to amend Rule 15(a) would cut off the right to amend 21 days after the motion is filed. Second, present Rule 15(a) cuts off the right to amend immediately on service of a responsive pleading. The proposed amendment would carry the right to amend forward for 21 days after the responsive pleading is served.

When this proposal was briefly discussed at the June 2006 Standing Committee meeting, one member noted that it may be important for defendants to have the ability to cut off a plaintiff's ability to amend a complaint without leave. Present Rule 15(a) ensures that a defendant can do that by serving an answer. Since that meeting, the member very helpfully provided further thoughts on the concerns he voiced and the Civil Rules Subcommittee had the opportunity to respond. This exchange was very helpful and we are grateful to the Standing Committee member for taking the time to give us the benefit of his thoughts in advance. The following exchange sets out the Standing Committee member's concerns and the Subcommittee's response. Both are set out below.

1. The Concerns

Here is the email from the Standing Committee member:

. . . my concern is based upon my experience as a practitioner who primarily represents defendants. Obviously, the judicial members of the Committee see far more cases than I do, and thus may have different insights. But I believe that the current rule has two important, inter-related benefits in the commercial litigation context that would be lost under the proposed rule change.

As you note, the proposed change to Rule 15 would allow an answer to be amended once as a matter of course within 21 days after a responsive pleading is filed or within 21 days after service of a motion under Rule 12(b), (e) or (f), whichever is earlier. In essence, the proposal does two things: (1) it sets a 21-day cut-off on the present right to amend after a motion to dismiss is served, and (2) it allows plaintiffs to amend a complaint as a matter of right after an answer has been filed.

The first change should be quite beneficial. The second change, however, would alter the balance between plaintiffs and defendants under the current rule, to the disadvantage of defendants and of the judicial system.

1. Some significant percentage of federal commercial litigation is initiated by badly drafted, badly conceived complaints. Despite the requirements of Rule 11, even sophisticated law firms often file weak, cut-and-paste complaints or complaints that omit elements of the claims asserted, even in matters that purportedly involve significant sums of money. Such weak complaints are an obvious abuse of the system, and should be discouraged.

Under the current rule, such weak complaints are discouraged, at least minimally. A plaintiff relying on a weak complaint faces the risk that the defendant may cut off the ability to amend as of right by filing an answer followed by a motion to dismiss. The plaintiff is thus exposed to the cost and risk of a motion for leave to amend – a motion that, even in a system that permits liberal amendment, may be costly to prepare and may not be granted.

That cost and risk should lead at least some plaintiffs to prepare more thoughtful, better researched initial complaints – a benefit to judges and defendants alike. That is the first benefit under current Rule 15 that would be lost under the proposed change.

2. Much commercial litigation is driven by cost and the advantage to be gained by shifting costs onto the opposing party. A plaintiff wants to threaten the defendant with litigation costs such as discovery to compel settlement, while incurring as few costs as possible – costs such as researching the law. The plaintiff knows that the defendant will most likely file a motion to dismiss, which will educate the plaintiff about the law, and that – after imposing on the defendant the cost of preparing the motion to dismiss – the plaintiff can take that "free" legal learning and craft a better complaint, one which may withstand a motion to dismiss and open the gates to discovery. This is obviously a situation that is very frustrating for defendants.

A defendant, however, *currently* has the ability to deny the plaintiff the benefit of a free ride on the defendant's legal research, by answering and then filing a motion to dismiss. Faced with a compelling motion to dismiss, the plaintiff may decide that the cost of preparing an amended complaint and the now-necessary motion for leave to amend is too great, and the plaintiff may decide not to invest further in the lawsuit. The lawsuit will either be abandoned or the initial, badly drafted complaint will be readily dismissed.

Moreover, some complaints are so flawed that leave to amend – if it must be sought – will be denied, for any of a number of well-settled reasons including futility. If amendment remains automatic, then even the "futile" amendment will impose on the defendant the cost of another motion to dismiss.

The proposed rule change gives a plaintiff the perverse incentive to file a weak complaint, as the plaintiff not only minimizes the up-front costs to prepare the complaint but can then, without any risk, impose on the defendant the cost of preparing a motion to dismiss that will never be heard, as plaintiff will learn from the motion to dismiss and then submit an amended complaint.

If a defendant can never cut off the plaintiff's ability to amend as of right, a defendant can be compelled *in every case* to file two motions to dismiss: one directed at the first complaint, and the second directed at the amended complaint – even if the amended complaint is itself fatally flawed and amendment would not be permitted under the current rule. That result is burdensome to the system and unfair to defendants.

The ability to cut off amendment as of right is the second benefit that the proposed rule change would eliminate. Indeed, to the extent that your comments are predicated in part on the notion that answers are beneficial because they "may point out issues that the [plaintiff] had not considered," it is notable that the proposed rule seems to remove any incentive for a defendant to answer in any case in which a motion to dismiss will be filed.

3. I see three arguments in opposition to this analysis.

First, it can be argued that few defendants avail themselves of the opportunity to combine answers with motions to dismiss. That may be so, but well-advised defendants choose to do so in

the right cases – e.g., where the cost of answering is itself low, and where there is some reason to believe that the motion for leave to amend will not be filed, or if filed will not be granted.

Second, as you note, it can be argued that the proposed change will save judges from having to decide motions to dismiss addressed to "raw" complaints. But under the current rule that is also true in most cases: a plaintiff faced with a compelling motion to dismiss will amend the complaint as of right (if the defendant has not taken the precaution of filing an answer), and the defendant will be forced to file another motion to dismiss the "improved" complaint – the same advantage purportedly carried by the proposed change. As this benefit is already a feature of the current rule, it should not be invoked to justify a change.

Third, it can be argued that because motions for leave to amend should be freely granted, all the current rule does is impose on judges the necessity of ruling on motions for leave to amend, and the proposed change would alleviate that burden. This concern undervalues the benefit to the system of increasing plaintiffs' incentives to craft well-designed complaints from the outset. It also overlooks the unfairness to a defendant of incurring the cost to educate the plaintiff about the governing law and pleading standards. It also undervalues the set of outcomes in which the plaintiff, faced with the necessity of preparing both a motion for leave to amend and a fresh complaint, decides to abandon the suit. These benefits, I believe, outweigh the costs imposed by motions for leave to amend under the current rule; and even under the proposed change, plaintiffs could still file motions for leave to amend.

4. To be sure, if Rule 15 were to be changed, the balance between plaintiffs and defendants could be restored in other ways. One approach would be a more generous fee-shifting regime that punished plaintiffs for obviously flawed first complaints; but presumably the courts do not want to invite more fee litigation.

I understand my concern may strike the Committee as a relatively small or hypertechnical point, predicated on a cynical view of commercial litigation. But because the current rule in practice offers important benefits in at least some cases that would be lost under the proposed rule, I wanted to flag the issue for the Committee.

2. The Subcommittee's Response

The response sent to the Standing Committee member from the Civil Rules Subcommittee stated as follows:

On behalf of the Advisory Committee on Civil Rules, I wish to respond to your very thoughtful critique of the proposed amendment to Rule 15(a), F. R. Civ. P. Your letter has been seriously considered by our Rule 15(a) Subcommittee, which developed the proposed amendment, and recommended it to the full Advisory Committee, which as you know has recommended it, in turn, to the Standing Committee.

The Subcommittee considered amending Rule 15(a) so as to require that <u>all</u> amendments must be made with leave of court. However, the consensus of the Subcommittee, and the full Committee, was to the effect that, because the Supreme Court mandates liberal allowance of amendments, particularly early in the litigation, requiring that every amendment be made with leave of court would put an undue burden on district judges.

Our discussions started with the belief that, as presently drafted, Rule 15(a) has resulted, in the usual context of a plaintiff desiring to amend the complaint, in both an unnecessary burden on district judges, and undue advantage to the plaintiff. We have received complaints from district judges over many years that plaintiffs, faced with a motion to dismiss, would frequently wait until

after briefing was completed, and sometimes even wait until after the district judge had issued an opinion and order, (as long as the complaint was not dismissed with prejudice), to file an amended complaint. Many judges felt that this resulted in their having wasted a great deal of time deciding a motion, only to have the plaintiff amend the complaint as of right – something the plaintiff could have done promptly upon service of the motion to dismiss. A further consequence was to delay progress of the litigation. The amended rule will require the plaintiff to "fish or cut bait" about amending the complaint within twenty-one days after service of the motion to dismiss, rather than waiting. The Subcommittee considered the scenario you described, in which the defendant answers the complaint and also files a motion to dismiss. In the experience of Subcommittee members, a motion to dismiss is most often filed before an answer. Cutting off the right to amend once without leave of court does carry a price that seems high given that leave to amend once is likely to be granted.

As to your point that the defendant who files a motion to dismiss is "educating" the plaintiff about defects in the plaintiff's complaint, our Subcommittee believes that the twin concepts, of notice pleading and liberal allowance of complaints early in the litigation, outweigh requiring the plaintiff to secure leave of court to file an amended complaint once an answer has been filed. We think that such an amendment will almost always be allowed if requested properly and that requiring leave of court for an amendment in that context would unnecessarily burden district judges.

We also think that the court system will benefit from the revised rule for the reasons stated above, by encouraging prompt revision of pleadings early in the case, without the necessity of the judge ruling on a motion to dismiss.

I hope this is responsive to some of your concerns. Because the Committee's recommendation is to publish the amendment for public comment, the opportunity to hear from bench and bar will allow us to continue to explore the problems and test the proposed solution. We look forward to continuing to work with you and other members of the Standing Committee on these issues.

/s/ Judge Michael Baylson

In response, the Standing Committee member emphasizes his agreement with that portion of the proposed rule change that would require a plaintiff to amend within 21 days after service of a motion to dismiss, agreeing with the Subcommittee's observation that this particular proposed change will avoid the situation in which a judge wastes time addressing a motion to dismiss, only to have the plaintiff thereafter come forward with an amended complaint. The member continues to be concerned with the other aspect of the proposed amendment, even recognizing that most defendants file a motion to dismiss before an answer. The member is concerned that in the rare instances in which defendants do file a motion to dismiss after an answer, allowing a plaintiff to amend as of right after the answer is filed removes two benefits of the current rule:

First, the current rule signals to the court in the rare instances in which it is used, and plaintiff thereafter seeks leave to amend, that the motion for leave to amend needs particular scrutiny; and second, in all of the other cases in which this mechanism is not used (and thus no burden is imposed on the judge), the mechanism still operates as a useful deterrent, because a plaintiff cannot know in advance whether a defendant will use this mechanism and thus must devote more time to the preparation of the initial complaint.

3. Further Discussion

The Subcommittee and Committee believed that the proposed Rule 15(a) amendment brings the rule text closer to the desirable reality of contemporary practice. There is a cost to extending the opportunity to inflict real burdens by maintaining, at least for longer than should be, ill-founded litigation that is not filtered out by Rule 11. This cost is eloquently presented by the message from the Standing Committee member.

It is useful to point out that before recommending the proposed amendment for publication for comment, the Subcommittee and full Committee considered several alternatives, including the following: (1) there should not be a right to amend once as a matter of course in any circumstance; (2) the right to amend once as a matter of course should be cut off after a brief interval — perhaps 21 days — whether or not the opposing party has responded; (3) the right to amend once as a matter of course should be cut off once the opposing party has responded, no matter whether the response takes the form of a motion to dismiss or a responsive pleading; and (4) as under the present rule, a responsive pleading should cut off the right to amend once as a matter of course, while a responsive motion does not.

The reasons for the present rule, allowing one amendment as a matter of course after a responsive motion, reflected in part the general spirit of notice pleading. Not only should a short and plain statement suffice; the failure to achieve even a short and plain statement on the first effort should not doom a claim or defense that may yet be capable of sufficient statement. In choosing among the risks, the risk that a pleading misadventure will defeat a viable claim is more to be feared than the risk that an opposing party will be put to too much work, whether the work is only at the pleading stage or extends to all the work of discovery needed to establish that there is nothing to support the adequate pleading made possible only after the education provided by a motion to dismiss or an answer.

Views about common practice reflected the sense that courts have fully absorbed the general spirit of notice pleading. Early Advisory Committee discussions, and later Subcommittee deliberations, concluded that little is gained by cutting off the right to amend once as a matter of course during a brief period after an opposing party has pointed out defects in a pleading. The pleader may recognize the cogency of the challenge and be encouraged to amend promptly. Prompt amendment also might be sought if leave is required, but the temptation to stand on the initial pleading for a while may be harder to resist, particularly if the pleader would rather not have to plead and then prove the matters omitted from the initial pleading. The pleader, moreover, is likely to be careful about framing the amended pleading whether the amendment is made as a matter of right or after winning leave. A motion for leave to file a second amended pleading will not be received with anything like the warm notice-pleading spirit that may greet a motion for leave to file a first amended pleading.

Even if the pleader is forced to seek leave to amend, the Subcommittee and Advisory Committee believed that leave is quite likely to be granted. This belief does not reflect hard empirical research. But experience seems to be that leave will be granted if there is any plausible prospect that a potentially sustainable claim or defense lies under an inept pleading. Indeed it is quite common to grant leave to amend as a routine, almost reflexive, part of an order granting a motion to dismiss for failure to state a claim. And that happens only after the pleader has chosen to persist with the initial and inadequate pleading through to the point of forcing actual decision of the motion.

Finally, it is worth emphasizing that the proposal is to publish for comment. The exchange presented in this report foreshadows the benefits of the public comment period that will result if this proposal is published for comment in August 2007.

B. RULE 48: JURY POLLING

Rule 48(c) is recommended for publication at the same time as the amendments proposed for Rule 13(f) and 15, and as new Rule 62.1.

Rule 48. Number of Jurors; Verdict; Polling

(a) Number of Jurors. A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).

(b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

(c) Polling. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or assent by the number of jurors required by the parties' stipulation, the court may direct the jury to deliberate further or may order a new trial.

Committee Note

Jury polling is added as new subdivision (c), which is drawn from Criminal Rule 31(d) with minor revisions to reflect Civil Rules Style and the parties' opportunity to stipulate to a nonunanimous verdict.

Discussion

Consideration of adding a provision for jury polling was suggested during Standing Committee discussion a few meetings ago. Criminal Rule 31(d) provides a good model that is adopted for this recommendation. One departure is required to account for the parties' opportunity to stipulate to a nonunanimous verdict. And a style departure was made by referring to ordering a new trial rather than declaring a mistrial and discharging the jury. The Civil Rules consistently refer to a new trial; the closest illustration in rules sequence is Rule 49(b), which deals with the similar problem of inconsistencies when a general verdict is supplemented by interrogatories.

Jury polling is occasionally resisted on the ground that it may lead to frequent retrials. The Federal Judicial Center gathered figures on more than 100,000 jury trials over the 25 years from 1980 to 2004. Fewer than 1% of these trials resulted in a hung jury. This figure suggests that the likely risk is not great.

C. RULE 62.1: "INDICATIVE RULINGS"

New Rule 62.1 is recommended for publication for comment.

Rule 62.1 Indicative Rulings

(a) Motion For Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer consideration of the motion;

(2) deny the motion; or

(3) indicate that it [might][would] grant the motion if the appellate court should remand for that purpose.

(b) Notice to Appellate Court. The movant must notify the clerk of the appellate court when the motion is filed and when the district court acts on the motion.

(c) Remand. If the district court indicates that it [might][would] grant the motion, the appellate court may remand the action to the district court.

Committee Note

This new rule adopts and generalizes the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant a Rule 60(b) motion. But it can entertain the motion and either deny it or indicate that it [might] [would] grant the motion if the action is remanded.

This clear procedure is helpful whenever relief is sought from an order that the court cannot revise because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's

authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules, as they are or as they develop, deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the "indicative ruling" procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the clerk of the appellate court when the motion is filed in the district court and again when the district court rules on the motion. If the district court indicates that it might grant the motion, the movant may ask the appellate court to remand the action so that the district court can make its final ruling on the motion. Remand is in the appellate court's discretion. The appellate court may remand all proceedings, or may remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules if any party wishes to proceed. [The district court is not bound to grant the motion after indicating that it might do so; further proceedings on remand may show that the motion ought not be granted.]

Discussion

New Rule 62.1 responds to a suggestion made by the Solicitor General to the Appellate Rules Committee. The Appellate Rules Committee concluded that any new rule provision would be better included in the Civil Rules because the underlying question involves district court authority to act while an appeal is pending.

The basic approach recommended in this proposal is borrowed from the procedure followed when a Rule 60(b) motion is made for relief from a judgment while an appeal from the judgment is pending. The courts of appeals recognize that the appeal defeats district-court "jurisdiction" to grant the motion. But they all rule that the district court can consider the motion. Most agree that the district court retains jurisdiction to deny the motion. But all agree that the district court lacks "jurisdiction" to grant the motion. If the district court concludes that the motion should be granted, it can indicate that it would do so if the case is remanded for that purpose. (At least one circuit also requires a remand to establish authority to deny the motion after the district court indicates that it would deny if the case is remanded. And another court at times chooses to vacate the judgment with leave to reinstate the appeal after the district court acts on remand.)

The common Rule 60(b) procedure is satisfactory. It honors the wisdom of the rule that only one court should have control of a case at one time. It recognizes that the time to move under Rule 60(b) is not suspended by a pending appeal, so that the motion often must be made or lost before the appeal is decided. The refusal to suspend the time to move in turn rests on the importance of prompt inquiry into many of the issues that may be raised by such motions.

Although it is well established, the procedure incident to a Rule 60(b) motion made pending appeal is often overlooked by lawyers. Some district judges have been unaware of its existence. It would be useful to write this procedure into Rule 60(b) to make it well known, to make it consistent across all courts, and to provide some useful procedural incidents such as the movant's duty to

inform the court of appeals both when the motion is made and again when the district court acts on the motion.

The proposal goes beyond Rule 60(b) motions, generalizing the procedure to embrace any order that the district court lacks authority to revise because of a pending appeal. The orders most likely to be caught up in the broader rule will be interlocutory orders with respect to injunctions. Civil Rule 62(c) and Appellate Rule 8(a)(1)(C) seem to establish district-court authority to act despite a pending appeal, and indeed seem to indicate that relief should be sought first in the district court. Several courts of appeals, however, do not read those rules as they seem to be written. See 16 Federal Practice & Procedure: Jurisdiction 2d, § 3921.2, pp. 59-64. Rule 62.1 will provide an alternative path to district-court action in those circuits. And it will provide a clear source of authority for more exotic combinations of appeals taken while the district court continues to proceed with respect to matters not subject to the appeal.

Rule 62.1 does not attempt the difficult task of defining the circumstances in which a pending appeal ousts district-court power to act on a motion. It is drafted to apply only when an independent source of authority establishes the district court's lack of power.

The recommendation contemplates publication in a form that seeks comment on alternative wording. The question is whether the district court should be able to indicate that it believes the case should be remanded without committing itself to revise the order. One rule text version allows the district court to indicate that it "might" grant relief. The other version requires the district court to indicate that it "would" grant relief. The argument for insisting that the district court indicate that it "would" grant relief is that a case should be remanded, interrupting the progress of the appeal, only after the district court has invested the time and energy — and imposed the burden on the parties — required to reach final decision on the motion. The argument for recognizing authority to indicate that the district court "might" grant relief is that this approach better integrates the resources of both courts. Initial consideration may persuade the district court that the motion raises important questions, but that final resolution will require a heavy investment that should not be made without assurance that the court of appeals will not decide the appeal — perhaps mooting or changing the inquiry — before the inquiry is complete, or else refuse to remand after the district court indicates that it would grant the motion. Once the district court indicates that it might grant the motion, and explains the reasons why the issues seem important but too difficult to pursue to completion without a remand, the court of appeals has control. The court of appeals can balance the district court's statement of the reasons that support remand against the progress of the appeal and its own deliberations. These arguments would be summarized in the message transmitting the proposal for publication, with a request for comment on the choice.

Two questions were addressed to this proposal at the June 2006 Standing Committee meeting. One asked why this new rule should be located between Rules 62 and 63. The other asked whether it is possible to find a better caption than "indicative rulings."

Further consideration of location reconfirmed the recommendation that the new rule be designated as Rule 62.1. Title VII, Rules 54 to 63, covers "Judgment." There is a logical progression from Rule 59 to Rule 62. Rule 59 covers new trials and alteration or amendment of a judgment immediately after the judgment is entered. Rule 60 covers relief from a judgment or order after the time for relief under Rule 59 expires. Rule 61 expresses a harmless error rule that governs relief under both Rule 59 and Rule 60. Rule 62 addresses staying execution pending appeal from the judgment, a common problem. Rule 63 addresses the quite different questions that arise when a district-court judge is unable to proceed. The new provisions were originally drafted as an addition to Rule 60, addressing only relief under Rule 60 pending appeal. When the proposal was broadened to include all circumstances in which a pending appeal ousts district-court authority to grant relief, the designation as a new Rule 62.1 became the most attractive choice.

The choice of caption proved more difficult. No firm conclusion was reached on an alternative caption. Instead, the Advisory Committee is willing to adopt the title most satisfactory to the Standing Committee. "Indicative rulings" was adopted initially because it is a term familiar to frequent appellate litigators. Under present practice, reflected in proposed Rule 62.1(a)(3), a district court that lacks authority to grant relief pending appeal may "indicate" that it would grant relief — or at least seriously consider granting relief — if the case is remanded for that purpose. The difficulty is that lawyers whose practice is not centered on appeals may not recognize the new rule by this caption. The choice of caption affects the tag line for subdivision (a).

62.1 Indicative Ruling on Motion for Relief Barred by Pending Appeal

This caption avoids the limitations from the word "judgment," which is not in the body of Rule 62.1. This caption also avoids any implication that Rule 62.1 creates a new motion. Finally, this caption refers to "indicative rulings," the term used by appellate specialists, but also describes the rulings in a way that nonspecialists will recognize. The reference to "indicative rulings" also helps invoke the limited role of Rule 62.1, which does not begin to address all forms of trial-court action pending appeal.

D. Rule 8(c): Discharge in Bankruptcy

In January 2006, the Standing Committee approved publication of a proposal to amend Rule 8(c) to delete the reference to "discharge in bankruptcy" as an affirmative defense. This suggestion emerged from the Style Project but was too substantive to be accomplished within that work. Approval was for publication with the next set of Civil Rules amendments to be published. Rule 8(c) will be added to any of the foregoing proposals that may be approved for publication in August 2007.

III. Information Item: Time-Computation Project

The Advisory Committee discussion of the template rule being developed by the Time-Computation Subcommittee is summarized in the draft Minutes. The Time-Computation Subcommittee has considered this discussion along with the deliberations of the other Advisory Committees that are working on the Time-Computation Project. The results are reflected in the Subcommittee's Report.

The Advisory Committee, aided by the diligent work of two subcommittees over the summer, also considered all of the time periods and deadlines included in the Civil Rules. The results of these deliberations will be presented to the Standing Committee as a recommendation to approve for publication in conjunction with presentation of the template time-computation rule. Barring unexpected difficulties, the proposals should be presented at the June 2007 meeting.

One additional time rule deserves mention. Rule 6(b) generally authorizes a court to enlarge a time period or to permit an act to be done after expiration of a specified time period on showing excusable neglect. But Rule 6(b) prohibits an extension of time to act under Rules 50(b) and (c)(2); 52(b); 59(b), (d), and (e); and 60(b). Rules 50, 52, and 59 set the time for post-judgment motions at 10 days. Rule 60(b) sets an outer limit of one year for motions under paragraphs (1), (2), and (3). The one-year limit does not seem to present a problem. The 10-day limits, however, present at least two problems. One is that often the 10-day period is too brief to prepare a well-crafted motion, particularly after a long or complex trial. Judges react to this difficulty in various ways, indirectly circumventing the 10-day limit. The other problem is that motions continue to be filed too late. The consequences are loss of the opportunity for post-judgment relief and, often enough, loss of any opportunity to appeal because of a mistaken belief that the untimely motion has suspended appeal time. The Advisory Committee concluded that these problems should be addressed by replacing the 10-day period in Rules 50, 52, and 59 with a 30-day period. Rule 6(b) then would remain unchanged, prohibiting any extension of the more generous period. The 30-day proposal will be among those submitted for approval for publication with the time-computation package.

The Civil Rules Committee is also reviewing statutes that affect civil cases to identify time periods and deadlines that the template might shorten. Professor Struve has already done considerable work to identify these statutes. This work will enable the Committee to recommend rule changes that would supersede inconsistent statutory provisions or changes to the statutes. Professor Cooper will be reporting on likely candidates for such changes shortly. The results of the Committee's review of Professor Struve's and Cooper's work will also be presented to the Standing Committee in June 2007.

IV. Other Information Items

A. DISCOVERY: RULE 30(b)(6)

The Discovery Subcommittee has made a careful study of a number of questions surrounding deposition of an organization under Rule 30(b)(6). The Advisory Committee determined at its May 2006 meeting that only three of these questions deserved further study. At the September meeting it concluded that two more of these questions can be put aside without further present action. One set of questions is presented by conflicting assertions that the deposition testimony of a person designated by an organization to testify for the organization is given too much effect in "binding" the organization, or instead is not given enough binding effect. The Subcommittee recommended, and the Advisory Committee agreed, that the courts generally are approaching these issues in the right way. Ordinarily the designated witness's testimony is treated the same way as any other deposition testimony of a party. Greater "binding" effect seems to be given only as a sanction for

failure to properly prepare the witness as required by Rule 30(b)(6). The second set of questions is whether express provision should be made for "supplementing" the deposition testimony when the organization uncovers information that was not provided to the designated witness. These questions seem to be incidents of the "binding effect" questions, and were put aside for that reason.

The remaining Rule 30(b)(6) question arises from the role of the organization's lawyers in preparing a designated witness to testify to matters known or reasonably available to the organization. It may be the lawyer who tracks down the organization's information and who educates the witness in this information. The process may threaten to impinge on work-product protection. The Advisory Committee accepted the Subcommittee recommendation that this work-product question deserves further study in conjunction with the similar questions being studied with the disclosure of expert trial-witness reports and discovery of expert trial witnesses.

B. DISCOVERY: EXPERT TRIAL WITNESSES

The Discovery Subcommittee continues to study several questions that relate to disclosure and discovery of expert trial witnesses. Three sets of questions deserve mention now.

The first set of questions relates to identifying the expert trial witnesses that should fall within the disclosure report provisions of Rule 26(a)(2)(B). Two categories of these witnesses are being studied. The first involves interpretation of the express text of Rule 26(a)(2)(B). The Rule requires a disclosure report by an expert trial witness "retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." A majority of reported opinions have effectively read out of the rule the limit that excuses a disclosure report if the witness is an employee whose duties do not regularly involve giving expert testimony. The question is whether the Rule is wrong because a disclosure report is important in this setting, or whether the Rule is right because there may be distinctive reasons for excusing the report requirement. The other category of witness causing concern is the witness who is not retained or specially employed. The Committee Note to the amendments adding Rule 26(a)(2)(B) offers treating physicians as an example of such witnesses. Experience, however, shows that it can be difficult to determine whether a treating physician has crossed over the line to become a witness retained or specially employed. The questions are whether treating physicians or other expert trial witnesses properly should be exempt from the disclosure requirement, and whether any desirable exemption can be expressed more clearly in Rule text.

The second set of questions arises from the "maximum disclosure" effects of the disclosure report requirement in Rule 26(a)(2)(B) and the discovery provisions of 26(b)(4). Prompted in part by the 1993 Committee Note, most courts rule that an expert must disclose communications with counsel that otherwise would be protected by privilege or work-product protection. A 2000 recommendation by the New York State Bar Association Committee on Federal Procedure of the Commercial and Federal Litigation Section urged that this approach be embedded in the rules. A 2006 resolution of the American Bar Association recommends that this approach be retrenched substantially. Other organized bar groups are also examining this issue. The questions raised by these competing recommendations go to the heart of expert witness testimony as it has developed in our adversary system. The bearing on attorney-client privilege and waiver rules is manifest and troubling. The relationship to Rule 26(b)(3) work-product protection also is manifest, and may prove troubling as well. The Subcommittee continues to study these problems, and plans to meet with a small group of experienced litigators for further discussions.

The third set of questions arises from the common practice of allowing discovery of draft expert-witness reports. The American Bar Association Resolution says that discovery of draft reports has encouraged many expert witnesses to take steps to ensure that there are no drafts to discover. These measures can interfere with the effective and orderly development of expert

testimony. At least three states, Massachusetts, New Jersey, and Texas bar such discovery; the result is better expert testimony. Denying discovery of draft reports can even mean that the best qualified experts may be more willing to serve as trial witnesses because they are free to explore competing ideas before forming an opinion. The Subcommittee continues to explore these questions in addition to those described above.

C. PLEADING: RULE 12(e)

The Supreme Court has ruled that the "notice pleading" practice instituted by Civil Rule 8 forecloses any exaction of heightened pleading in circumstances not covered by a specific provision such as Rule 9(b). For more than a decade, the Advisory Committee agenda has included the question whether some provision should be made for more particularized pleading standards, at least for some cases. The general concern ties directly to summary judgment, the topic described next. It may be that some actions persist longer, at greater cost, than should be. Some combination of increased pleading standards and invigorated summary-judgment practice might reduce cost and delay in such actions.

Pleading has been the subject of active study at several recent meetings. Several possible approaches have been deferred, at least for the time being. The possibility that some form of fact pleading might replace notice pleading for all purposes has not commended itself for present action. Adopting specific pleading standards for specific substantive theories would require detailed knowledge of the real workings of present practice, and might raise questions whether substance-specific pleading requirements somehow abridge or modify the underlying substantive rights.

Attention has turned to the Rule 12(e) motion for a more definite statement. Rule 12(e) originally provided for a bill of particulars as well as for a more definite statement, but the bill of particulars was abolished in 1948. There is no thought of restoring bill-of-particulars practice. The standard for a more definite statement is that a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading. But the rule might be expanded to provide a new case management tool that allows a court to order a more definite statement when that would better enable the parties and court to conduct and manage discovery and to present and resolve dispositive motions. The possible advantages must be weighed against the risks of misuse and overuse. Concerns have been expressed that an amended rule would be used to throw up "roadblocks." Rule 12(e) motions might be used — as they may be now — as a shortcut discovery device or as disguised motions for summary judgment. These concerns may not be fatal. One thought has been that the new tool could be designed for initiation by the court, perhaps tied to Rule 16. Other thoughts may emerge.

These topics continue to command attention. The goal continues to be some development of notice-pleading practice that will support early identification of some cases that can properly be resolved on the pleadings or by summary judgment without all-encompassing discovery.

D. SUMMARY JUDGMENT

An attempt to revise Rule 56 in the wake of the 1986 Supreme Court decisions restating summary-judgment burdens ultimately failed in 1992. Practice, however, continues to move beyond the procedures described in Rule 56. Local rules have proliferated and expanded. Some of the local rules seem flatly inconsistent with Rule 56, but have been bypassed in the Local Rules Projects because they seem better than Rule 56. Enough time has gone by to take up Rule 56 again. A subcommittee has begun work, and has added Rule 12(e) to its charge in order to support integrated consideration of both pleading and summary judgment.

The purpose of the present project is to restate and revise the procedures that surround summary judgment. There is no purpose to change the standard for summary judgment. The tie to the standard for judgment as a matter of law is direct and important. The familiar words — "no genuine issue as to any material fact" — were considered sacred in the Style Project and almost certainly will be carried forward unchanged.

It is a closer choice whether to attempt to express in Rule 56 the distinction between the moving burden of a party who does not have the trial burdens on an issue and the moving burden of a party who does have the trial burdens. First rough drafts have been considered and rejected, in part because it is difficult to express the distinction clearly. But a clear provision might give useful direction to lawyers who do not quite grasp the distinction.

Apart from these basic issues, the draft addresses a number of Rule 56 procedures.

The provisions governing the time for Rule 56 motions are completely revised. A motion may be made at any time, subject to a cutoff tied to the conclusion of discovery or the time set for trial.

Many local rules provide, in differing terms, that a motion and response must identify the issues claimed to warrant summary judgment and must refer specifically to the record materials that support or defeat the motion. Those provisions can be amalgamated into a uniform national practice.

The court's duty when a motion is not opposed — or is opposed in a way that does not comply with local rule requirements — is a central question. Different local rules address this question in different ways. It would be possible to grant the motion without further consideration as if on default. But that may be inappropriate when a party has not defaulted on the pleadings. The current draft, subject to further consideration, directs the court to determine whether the movant has carried the burden of justifying summary judgment.

It is settled that a court can initiate summary judgment on its own, so long as the parties are given notice and an opportunity to show why summary judgment should not be granted. This practice could be included in Rule 56, and perhaps tied to related issues such as granting a summary judgment motion on grounds not advanced in the motion.

Rule 56 does not require that a court explain a decision granting summary judgment. Rule 52(a), indeed, expressly directs that findings of fact and conclusions of law are not required. But an explanation identifying the facts not genuinely at issue can be valuable to both the parties and a reviewing court. The current draft includes an optional provision that encourages explanation.

The practice when summary judgment is not granted on all the claims in an action is commonly referred to by a label not found in Rule 56, "partial summary judgment." The present provisions on this topic may deserve some further attention, in part because they may seem to direct more extensive efforts than make sense. A fact that seems to be established beyond genuine issue, for example, may turn on evidence that must in any event be introduced to prove other facts. Carrying the issue forward for trial may be desirable. It also may be desirable to provide for a statement of facts that are in genuine issue — courts entertaining interlocutory immunity appeals frequently bewail the lack of any identification of the fact disputes found to defeat summary judgment on an official-immunity defense.

Still other Rule 56 procedures may deserve attention. The subcommittee will hold an informal meeting later in January to learn the experience of a number of lawyers with current practice across a variety of substantive fields that generate frequent summary-judgment motions.

E. OTHER PROJECTS

1. Rule 68

The Second Circuit has presented a specific question about the offer-of-judgment provisions in Rule 68. It confronted a case in which the defendant had offered $20,001 without any injunctive relief. The ultimate judgment awarded $10,000 and an injunction. The court concluded that the injunction was worth more than $10,001. The judgment thus was better than the offer, defeating any sanctions for refusing to accept the offer. The court, however, observed that it is difficult to compare money to specific relief, and suggested that the Committee might consider amending Rule 68 to address this difficulty.

Rule 68 provokes periodic suggestions for revision. More than ten years ago, the Advisory Committee devoted substantial effort to elaborating drafts that sought to implement a thoughtful proposal by Judge William W Schwarzer. The effort was eventually abandoned. Many difficulties were found in the attempt to develop a rule that might have greater effect and still be fair. These difficulties led to increasingly complex provisions. They also led some Committee members to doubt the wisdom of having any offer-of-judgment procedure.

The Second Circuit's suggestion is the most recent in a series of suggestions that emerge periodically. The Advisory Committee has carried them forward without any clear sense that Rule 68 provides an opportunity for useful amendments. The Federal Judicial Center provided valuable assistance for the last thorough review. It may be that further empirical work could point the way to improvements. The next step, if any, will be to determine the relative urgency of Rule 68 in relation to other projects that might be undertaken.

2. Class Actions

After the 2003 amendments to Rule 23, followed by the 2005 enactment of the Class Action Fairness Act, the Civil Rules Committee determined to continue to monitor class-action litigation to see if further rule amendments should be pursued. The FJC has progressed on its empirical study of the effects of CAFA on class-action litigation in the federal courts. The combination of the passage of time since the 2003 amendments and the enactment of CAFA, the empirical information on some of CAFA's impacts, and case law development present issues to be examined.

One area of particular concern is the absence of a specific rule provision on certifying class actions for the purpose of settlement. A very recent Second Circuit decision, *In re: Initial Public Offering Securities Litigation (Miles v. Merrill Lynch & Co., Inc.*, 2006 WL 3499937 (2nd Cir. Dec. 5, 2006)), is likely to provoke new interest in reviewing Rule 23. The appeals court reversed a grant of class certification in six "focus cases" in an MDL that consolidated 310 class actions. The Second Circuit emphasized that it was clarifying the standard for a district court to use in deciding whether the certification requirements were met, in light of the 2003 amendments to Rule 23. The court held that: (1) a district judge may not certify a class without making a ruling that each Rule 23 requirement is met and that a lesser standard such as "some showing" for satisfying each requirement will not suffice; (2) a district court must resolve factual disputes relevant to each Rule 23 requirement in deciding whether the requirement is met; (3) the fact that a Rule 23 requirement might overlap with an issue on the merits does not avoid the court's obligation to make a ruling as to whether the requirement is met; (4) in making this ruling, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and (5) a district judge has discretion to limit the extent of discovery and a hearing on the Rule 23 requirements, to ensure that a class certification hearing does not "become a pretext for partial trial of the merits." In applying these standards, the Second Circuit did not remand the case for a new determination on certification, because the plaintiffs' own allegations and the record showed that predominance could not be satisfied. The

result was decertification of the classes. The effect appears to be to endanger class certification for a settlement that amounted to hundreds of millions.

The case is likely to provoke renewed interest from both plaintiffs and defendants on whether the rules should provide a basis to certify cases for settlement even if they could not be certified for trial for reasons other than manageability. The Rules Committee will monitor these developments.

F. STYLE PROJECT

The Civil Rules Style Project was approved by the Judicial Conference at its September meeting and has been submitted to the Supreme Court. It remains on track for submission to Congress this spring, aiming at an effective date of December 1, 2007.