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January 25, 1990

TO: The Honorable Joseph F. Weis, Jr., Chairman
Standing Committee on Rules of Practice and Procedure

FROM: John F. Grady, Chairman
Advisory Committee on Civil Rules

I am please to report that the Civil Rules Committee has published for comment by the bench and bar a substantial package of amendments to the Federal Rules of Civil Procedure. The Committee will evaluate the comments on these proposals at its meeting on June 6-8, 1990, and expects soon thereafter to recommend promulgation of many of these proposed amendments.

A few of these revisions are remnants of proposals published for comment in 1985, but never recommended for the reason that they composed too slight a package to merit the attention of the bar.

Rule 4.

This rule would be almost entirely re-written to serve eight purposes: (1) to provide suitable alternative means of notifying defendants in any judicial district of action pending in any other district; (2) to permit nationwide exercise of personal jurisdiction in federal question cases unless Congress otherwise provides; (3) to clarify and extend the cost-saving practice of securing waivers of actual service of process; (4) to achieve greater national uniformity in the rule; (5) to call attention to the Hague Convention and other pertinent treaties; (6) to reduce the risk that a plaintiff may lose a meritorious claim against the United States for failure to serve process properly on it; (7) to allow the United States to effect service more economically; and (8) to reorganize a frequently amended rule to make it more coherent.

Rule 4.1.

This would be a new rule. It contains only matter eliminated from the old Rule 4 to secure greater textual clarity.

Rule 5.

This rule would be revised in two respects. First, the revision would authorize the use of electronic or other advanced methods of service of papers on opposing parties and counsel. Second, it would foreclose the local practice in some districts of requiring the clerk to reject for filing instruments that do not conform to specified standards.

Rule 12.

This rule would be amended to strike an unnecessary and disharmonious reference to state law, and to conform the rule to the amended Rule 4.

Rule 14.

This rule would be amended to assure that third-party defendants are provided with copies of pleadings previous to third-party complaints.

Rule 15.

This rule would be amended to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense. It would compel a different result in cases like Schiavone v. Fortune, 106 S.Ct. 2379 (1986).

Rule 16.

An amendment to subdivision (b) is proposed with respect to the time for scheduling. The present rule requires that this be done within 120 days after filing, but it is possible that the defendant may not have been served by then. The Civil Rules Committee proposes that the time for scheduling be within 60 days after service of an opposing party.

A proposed revision of subdivision (d) is derivative from the proposals to be made with respect to Rules 50, 52, and 56.

Rule 24.

This amendment would merely conform the rule to a controlling statute requiring notice to a state Attorney General when the constitutionality of state legislation is challenged.

Rule 26.

Two revisions of this rule are proposed. The first is to subdivision (a) and creates a preference for internationally agreed methods of discovery when such methods are available. The second revision is to add a paragraph to subdivision (b) to impose on parties asserting privileges a duty to disclose as much information as can be disclosed without compromise of such privileges.

Rule 28.

This rule would be revised to make effective use of the Hague Convention on the Taking of Evidence Abroad.

Rule 30.

This rule would be revised to facilitate the use of videotape and other modern methods of recording testimony at depositions. The revised rule would authorize the party taking the deposition to designate the method of recording. Any other party could provide additional recordings by other means at the other party's expense. Other technical changes are made to accommodate to this principle.

Rule 34.

This proposed amendment conforms to a proposal made with respect to Rule 45; it provides for a subpoena to compel non-parties to produce documents and things and to submit to inspections on premises.

Rule 35.

This proposed amendment reflects changes in the rule made by Congress in 1988 to provide for mental examinations by clinical psychologists.

Rule 38.

This purpose of this revision is to remove a possible inconsistency in the present rules with respect to the failure of a party to file a jury demand as required by Rule 5.

Rule 41.

This rule would be revised to delete the provision for its use as a method of evaluating the sufficiency of the evidence presented at trial by a plaintiff. This language would be replaced by a new provision found in Rule 52(c) that would be more broadly useful.

Rule 44.

This proposed revision would take advantage of the Hague Public Documents Convention. The rule would also be amended to delete references to specific jurisdictions no longer subject to the sovereignty of the United States.

Rule 45.

This rule would be completely re-written. The aims of revision are (1) to clarify and enlarge the protections afforded non-parties who are subject to subpoenas; (2) to facilitate access outside the deposition procedure to documents and things in the possession of non-parties; (3) to facilitate service of subpoenas at places distant from the district in which the action is pending; (4) to enable the court to compel a witness found within its state to attend trial; and (5) to clarify the text of the rule.

Rule 47.

This revision would eliminate the institution of the "alternate" juror. This, together with the amendment of Rule 48 will permit all jurors who sit through the case to participate in the verdict.

Rule 48.

This revision conforms the rule to existing practice in requiring at least six jurors. It would also provide that all jurors who hear the evidence would be permitted to participate in the verdict.

Rule 50.

This rule would be revised for several purposes. One is to enable the court to render judgment at any time during a jury trial that it becomes clear a party is entitled to such judgment. A second is to abandon familiar terminology that carries a burden of anachronisms suggested by the text of the present subdivision 50(a). A third is to articulate the standard for entry of judgment as a matter of law with sufficient clarity that an uninstructed reader of the rule can gain some understanding of its function. The standard is not changed from the present law.

Rule 52.

This rule would be revised to add subdivision (c) authorizing the court to enter judgment at any time during a non-jury trial that it becomes clear a party is entitled to such judgment. This provision is a companion to the proposed revision of Rule 50. The two proposals are also reflected in the language that would be added to Rule 16. Their shared purpose is to reduce the number of long trials. Judges using these devices as intended may schedule the course of a trial in such manner as to reach first any dispositive issues on which either party is likely to fail to carry a burden of production or proof.

Rule 53.

This rule would be revised to impose on special masters the duty to distribute their reports to the parties. This would reduce dependence on the office of the clerks to perform this service.

Rule 56.

This rule would be substantially re-written. The purposes of this revision are to (1) enlarge the availability of the device of summary establishment of fact

provided in subdivision (d) of the present rule; (2) provide for the summary establishment of law to control further proceedings; (3) assure a party opposing summary action of reasonable opportunity for discovery; (4) integrate this rule with Rules 50 and 52; and (5) provide guidance on several troublesome issues arising under the present rule. Some unnecessary text has been deleted from the rule, notably the former subdivisions (a) and (b).

This revision shares the purposes of the revisions of Rules 50 and 52 in providing means to reduce the compass of dispute. Where those rules are designed to confine long trials, this rule is designed to confine protracted discovery.

Like the proposed revision of Rule 50, this proposed Rule 56 would articulate the standard for the rule, explaining the relation between this rule and Rules 50 and 52, and the burdens of production and proof. This is not a revision of those standards, but should make the rule more accessible to users.

The revised rule specifies the requirements imposed on both the moving and non-moving parties, and is more explicit than the present rule in providing for the use of evidentiary materials to make a "pretrial record."

Rule 63.

This proposed revision would facilitate the use of substitute judges, especially in long bench trials.

Rule 72.

This revision would eliminate discrepancy in the present rule in measuring the time for objection to a magistrate's action.

Rule 77.

This revision is proposed to conform to a proposed revision of the Federal Rules of Appellate Procedure that will enable the district courts to deal with the increasingly frequent problem of a losing party receiving no notice of an unfavorable judgment from which an appeal might be taken.

Admiralty Rule C.

This revision would conform the rule to Rule 4 as amended in 1983.

Admiralty Rule E.

This revision would conform the rule to Rule 4 as amended in 1983.