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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: **June 29, 2007**

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

Introduction

This message accompanies publication for comment of proposed amendments to Rules 8(c), 13(f), 15(a), 48, and 81(d) of the Federal Rules of Civil Procedure, as well as proposed new Rule 62.1. These amendments were approved for publication at the January and June meetings of the Standing Committee on Rules of Practice and Procedure in 2006 and 2007. The discussion of the proposals is taken from the corresponding Civil Rules Advisory Committee Reports to the Standing Committee.

The proposed changes are:

to Rule 8(c), removing "discharge in bankruptcy" from the list of affirmative defenses enumerated in Rule 8(c)(1) to reflect changes in the Bankruptcy Code;

to Rule 13(f), deleting this subdivision, so that amendment to add an omitted counterclaim is governed by Rule 15;

to Rule 15, clarifying and simplifying the procedures for amendment as a matter of course;

to Rule 48, adding a provision on jury polling in civil cases that parallels the provision in the Criminal Rules;

to add new Rule 62.1, which accompanies a parallel change in the Appellate Rules to clarify the procedures for district-court action on a motion that cannot be granted because of a pending appeal; and

to Rule 81(d), which defines "state" for rules that incorporate state practice, to include commonwealths, territories, and possessions as well as the District of Columbia.

Additional proposed rule changes are published separately as part of the Time-Computation Project. These are proposed amendments to Rules 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, and 81; Supplemental Rules B, C, and G; and Forms 3, 4, and 60 of the Federal Rules of Civil Procedure.

The discussion below describes the proposed rule changes – other than those published as part of the Time-Computation Project – and identifies issues relating to proposed amendments to Civil Rules 15(a) and 81(d) on which public comment would be particularly helpful. Soliciting comments on certain issues is not meant to discourage comments on other aspects of the proposals.

Present Rule 15(a) enables a defendant to cut off a plaintiff's right to amend a complaint once as a matter of course by filing an answer. If a defendant challenges the complaint by moving to dismiss without filing a responsive pleading, on the other hand, the right to amend once as a matter of course persists while the motion remains under consideration. The proposed amendment would change both aspects of this practice by treating a motion to dismiss and an answer the same way. The right to amend once as a matter of course would end 21 days after service of a motion to dismiss, curtailing the indefinite opportunity to amend as a matter of course that exists under the present rule. But the right to amend once as a matter of course would also extend for 21 days after service of an answer, defeating the defendant's opportunity under the present rule to terminate that right by answering. Concern has been expressed that this opportunity should not be withdrawn.

Those who express this concern recognize that in most cases, defendants move to dismiss before they answer. They also recognize that even if leave of court to file an amended pleading is required, the first motion for leave to amend is often granted. The issue is whether the present rule leads plaintiffs to take greater care in framing the first amended complaint if leave is required, and provides better protection to defendants by the closer scrutiny that follows if leave to amend is sought more than once. Comments on experience under the present rule will be valuable, particularly with respect to the quality of amendments made as a matter of course after a motion to dismiss is filed without a responsive pleading, experience with granting or denying leave to amend after a responsive pleading is filed, and the frequency with which defendants seek to cut off the right to amend as a matter of course by filing an answer that includes Rule 12(b) grounds for dismissal.

Present Rule 81(d) defines "state" to include the District of Columbia, where appropriate. The proposed amendment would add "commonwealths, territories, and possessions." Comment is invited from those familiar with procedures in the commonwealths and territories. If there are a significant number of local practices unsuitable for adoption into federal practice, it may not suffice to rely on "where appropriate" as an escape clause. Comment is separately invited on the question whether to include "possessions." The Criminal Rules include "possessions." Even if the United States does not now have any relevant possessions, symmetry with the Criminal Rules might support retaining the reference on the chance that a possession might be acquired in the future.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE[*]

Rule 81. Applicability of the Rules in General; Removed Actions

1 * * * * *

2 **(d) Law Applicable.**

3 **(1)** ***"State Law" Defined.*** When these rules refer to
4 state law, the term "law" includes the state's
5 statutes and the state's judicial decisions.

6 **(2)** ~~***District of Columbia***~~ ***"State" Defined.*** The term
7 "state" includes, where appropriate, the District of
8 Columbia and any United States commonwealth,
9 territory [, or possession]. ~~When these rules~~
10 ~~provide for state law to apply, in the District~~
11 ~~Court for the District of Columbia:~~

12 ~~(A) the law applied in the District governs; and~~

13 **(3)** ***"Federal Statute" Defined in the District of***
14 ***Columbia.*** ~~**(B)**~~ In the United States District Court for the

[*]New material is underlined. Matter to be omitted is lined through. Includes amendments to rules that will take effect on December 1, 2007.

15 District of Columbia, the term "federal statute" includes any

16 Act of Congress that applies locally to the District.

COMMITTEE NOTE

Several Rules incorporate local state practice. Original Rule 81(e) provided that "the word 'state' * * * includes, if appropriate, the District of Columbia." The definition is expanded to include any commonwealth, territory [, or possession] of the United States. As before, these entities are included only "where appropriate." They are included for the reasons that counsel incorporation of state practice. For example, state holidays are recognized in computing time under Rule 6(a). Other, quite different, examples are Rules 64(a), invoking state law for prejudgment remedies, and 69(a)(1), relying on state law for the procedure on execution. Including commonwealths, territories[, and possessions] in these and other rules avoids the gaps that otherwise would result when the federal rule relies on local practice rather than provide a uniform federal approach. Including them also establishes uniformity between federal courts and local courts in areas that may involve strong local interests, little need for uniformity among federal courts, or difficulty in defining a uniform federal practice that integrates effectively with local practice.

Adherence to a local practice may be refused as not "appropriate" when the local practice would impair a significant federal interest.

Discussion

Consideration of Rule 81(d)(2) began with the Time-Computation Project. Civil Rule 6(a) and its counterparts extend a time period that ends on a state holiday. The reasons that make it useful to integrate federal time-counting practices with state practices seem to apply as well in a commonwealth or territorial court. If the more general proposal to publish Rule 81 for comment is deferred, it is recommended that Civil Rule 6(a)(6)(B) be amended by adding a new final sentence: "The word 'state,' as used in this Rule, includes [the District of Columbia] and any commonwealth, territory], or possession] of the United States." ("District of Columbia" is shown in brackets. It is

not necessary in Rule 6(a) because the District already is defined as a state by Rule 81(d)(2). More than a few casual readers might be misdirected, however, if forced to remember Rule 81 when reading Rule 6(a).)

The reasons for including commonwealths, territories, and perhaps possessions in the rules that incorporate state practice are sketched in the Committee Note. The closest analogue in the Rules is Criminal Rule 1(b)(9): "The following definitions apply to these rules * * * (9) 'State' includes the District of Columbia, and any commonwealth, territory, or possession of the United States." The Criminal Rule does not include the qualifying "where appropriate" found in Style Rule 81(d)(2) and carried forward by this proposal. Retaining "where appropriate" seems desirable in light of the inability to know or foresee all of the ways in which a territorial procedure, for example, might prove unsuitable for adoption into federal-court practice.

Comment should be particularly invited from those familiar with procedures in the commonwealths and territories. If there are a significant number of local practices unsuitable for adoption into federal practice, it may not suffice to rely on "where appropriate" as an escape clause.

Comment should be separately invited on the question whether to include "possessions." There is at least some reason to believe that the United States does not now have any possessions. Even if that is so, symmetry with the Criminal Rules might support retaining the reference on the chance that a possession might be acquired in the future.

Finally, an apparent miscue in the Style Rule is corrected. Present Rule 81(e) provides that "the term 'statute of the United States' * * * includes * * * any Act of Congress locally applicable to and in force in the District of Columbia." Style Rule 81(d)(2) limits this provision by the introductory language: "When these rules provide for state law to apply, in the District Court for the District of Columbia * * * (B) the term 'federal statute' includes any Act of Congress that applies locally to the District." That is at best narrower than present Rule 81(e), and at worst confusing.

Authority to adopt the proposed definition of "state" seems secure. The Rules Enabling Act, 28 U.S.C. § 2072(a), establishes Supreme Court authority to adopt procedure rules for "the United States district courts." 28 U.S.C. § 451 defines "district court of the United States" for all of Title 28 — it "mean[s] the courts constituted by chapter 5 of this title." Chapter 5 in turn includes §§ 132(a) and 133. Section 132(a) provides for a district court in each judicial district, "known as the United States District Court" for the district. Section 133 enumerates the districts; the list includes Puerto Rico but not Guam, the Northern Mariana Islands, or the Virgin Islands. Up to this point, authority to make rules for federal courts in those places seems uncertain. But the Enabling Act rules are incorporated by the territorial organic acts for each place — as an Enabling Act Rule is "promulgated and made effective," it is incorporated in territorial court practice. 48 U.S.C. §§ 1424-4 (Guam); 1614(b) (Virgin Islands); 1821(c) (Northern Mariana Islands).