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August 31, 2016

Hand-Delivered

Honorable Joseph R. Biden, Jr.
President, United States Senate
Washington, D.C. 20510

Dear Mr. President:

On April 28, 2016, the United States Supreme Court submitted to Congress the amendments to the Federal Rules of Civil Procedure that it adopted under Section 2072 of Title 28, United States Code. As the Rules Enabling Act provides, those amendments will become effective on December 1, 2016, unless otherwise provided by law.

I write regarding the pending amendment to Federal Rule of Civil Procedure 4(m), which adds a reference to "4(h)(2)" to the existing rule. It comes one year after another change to Rule 4(m) that became effective on December 1, 2015. Neither rule has generated any controversy or, for that matter, much interest. I write out of an abundance of caution to underscore the net effect of the two successive amendments to Rule 4(m) based on an inquiry from a law professor who raised a question about the interrelation of the two amendments.

Rule 4(m) addresses the time limit for service of a civil summons and lists certain types of service to which Rule 4(m) does not apply. Prior to 2015, the last clause of Rule 4(m) stated:

> "This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1)."

In 2015, Rule 4(m) was amended to add the following bolded phrase:

> "This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) **or to service of a notice under Rule 71.1(d)(3)(A)**."

The 2016 proposed amendment to Rule 4(m), now pending before Congress, adds the following bolded language but does not mention the language added and approved in 2015:

> "This subdivision (m) does not apply to service in a foreign country under Rule 4(f), **4(h)(2)**, or 4(j)(1)."

The minor amendment to Rule 4(m) now pending before Congress does not purport to undo the 2015 amendment. It adds "4(h)(2)" but does not delete "or to service of a notice under Rule 71.1(d)(3)(A)." The "or to service…" phrase was not included at the beginning of the current Rules Enabling Act process because it had not yet been approved. Indeed, that change did not become effective until after the notice and comment period had ended and after the relevant rules committees and the Judicial Conference had approved the amendment adding 4(h)(2).

The materials forwarded to Congress on April 28, 2016, confirm the point. To delete text from an approved rule, the Rules Committee would have to go through the same Rules Enabling Act procedure it would have utilized if it had wanted to add text. To delete text, it would have to provide Congress with a redline version of the text showing the "strike through" of the deleted material. And it would explain the deletion in the Committee Note. Here we have done neither of those things. The redline version of the proposed 2016 amendment does not have a "strike through" of the language regarding Rule 71.1(d)(3)(A). And the Committee Note for the 2016 amendment explains the addition of "4(h)(2)" but does not mention any deletion of the Rule 71.1 language added in 2015.

Any potential confusion arises in part from the multi-year nature of the Rules Enabling Act process. We published for comment the addition of "4(h)(2)" at the same time that we sought approval of the addition of "Rule 71.1(d)(3)(A)." Because the Rule 71.1(d)(3)(A) language had not yet been formally approved, we could not include it in the text sent out for public comment as if it had been approved. After the Rule 71.1(d)(3)(A) language was approved, it would have made sense to update the language sent out for public comment and to include it in the latest submission to Congress. That realization has prompted us to make a change in our procedures. In the future, we will make sure that, when multiple proposals add different, complementary language to a particular rule and are submitted to Congress in close proximity to one another, each version contains the most up-to-date version of the proposed rule. But any omission this time does not change the net effect of the two valid amendments approved through the Rules Enabling Act process.

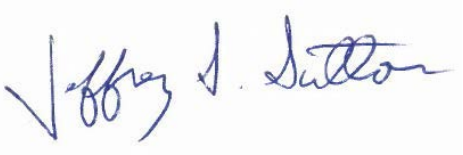
To conclude: if the current amended rule pending before Congress goes into effect on December 1, 2016, it henceforward will read:

> "This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A)."

In other words, if the 2016 amendments are approved, both the 2015 and 2016 changes will be in effect.

Please feel free to contact me (614-849-0134) or Rebecca Womeldorf in the Rules Committee Support Office at the Administrative Office of the U.S. Courts (202-502-1355) if you have any questions.

Sincerely,



Jeffrey S. Sutton

JSS:jmf

cc: Scott S. Harris, Clerk of the Supreme Court of the United States
James C. Duff, Director of the Administrative Office of the U.S. Courts