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Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Proposed Revision to Rules 7 and 10

Dear Ms. Womeldorf:

Rules 7 and 10 govern the general appearance of papers filed in federal district courts, including their captions. Unfortunately, portions of these rules are internally inconsistent and vague, and do not reflect modern federal practice. The problems have become more significant after the abrogation in 2015 of Rule 84 and Form 1 from the Appendix of Forms. With that form available for additional guidance, litigants had a model for working around the troublesome language identified below. Without the Forms, it is advisable to amend Rules 7 and 10.

The central problem involves motions and papers other than pleadings. Rule 7(b)(2) says, “The rules governing *captions* and *other matters of form in pleadings* apply to motions and other papers” (emphasis added). This alludes to Rule 10, but when carefully considered, the cross-reference an impossibility with regard to captions, and to vagueness and purposelessness with regard to “other matters of form.”

1. The Impossible Caption and the “Rule 7(a) Designation”

A motion or other paper filed using Rule 7(b)(2) is to use the same caption as a pleading, which Rule 10(a) tells us must include a “Rule 7(a) designation.” But a *motion or other paper* filed under Rule 7(b)(2) cannot have a Rule 7(a) designation, because Rule 7(a) is the short list of permitted *pleadings*. I propose replacing the troublesome phrase “Rule 7(a) designation” in Rule 10(a) with “name of the paper.” The proposal uses the word “paper” (rather than “document”) to be consistent with Rules 5, 7 and 11.

Rule 10(a) has seen no substantive revisions since its introduction in 1938. The Rule states that a caption must include “a title.” Most practitioners, asked to identify the “title” of a court paper, would point to the short phrase that appears in the right half of the caption and often in the footer, such as “Complaint” or “Opposition to Motion to Compel Discovery.” However, as used in Rule 10(a), the word “title” clearly means the title of the action – *Smith v. Jones*. This is a necessary implication of the second sentence in Rule 10(a), which requires titles of complaints to name all parties. So where in the caption should a litigant indicate the name of the paper? By process of elimination, it must be the “Rule 7(a) designation.” But that term by definition cannot encompass court papers other than pleadings, even though Rule 7(b)(2) implies that it should. This tension could be seen in the former Form 1, which depicted a caption. That form indicated a location for something it called “Name of Document,” but nowhere suggested a location for the “Rule 7(a) designation.”



Replacing Rule 10(a)'s phrase "Rule 7(a) designation" with "name of the paper" does no harm to the pleading process. Any necessary "designating" of a paper as one of the listed pleadings is accomplished through other rules. Rule 7(a)(3) allows an answer to "a counterclaim designated as a counterclaim," which indicates that counterclaims should be designated as such, and Rule 8(c)(2) gives more detail on the problem of ambiguously or incorrectly designated counterclaims. Rule 10(a) need not mention "Rule 7(a) designation" to deal with this problem, if indeed it does. (In fact, the phrase "Rule 7(a) designation" has potential to be a trap for the unwary if interpreted to mean that a counterclaim may only be "designated" by words in the caption, as opposed to other clear language in the body of the pleading.)

In addition, the Rule governing captions would benefit from a form visually depicting a caption, based on the former Form 1. The proposed language connecting Rule 10(a) to its accompanying form is based on similar language in current Rule 4(d)(1)(C). As with Rule 4's form for requesting and granting waivers of service, a form illustrating a caption seems particularly helpful for two reasons.

(a) The bare language of Rule 10(a) does not indicate the visual design of a caption. (This can be contrasted with the form for a third-party subpoena that once accompanied Rule 45. That form did little more than repeat the language found within the rule, so the current Rule 45(a)(1)(A)(iv) simply says the subpoena should set forth the language from Rule 45(d) and (e). The proposed form for Rule 10 provides substantive information not found elsewhere.)

(b) The second sentence of Rule 10(a) demands that all parties be named in the title of "the complaint." This raises a potential ambiguity regarding the formatting of third-party complaints under Rule 14, which from the perspective of the third-party defendant might or might not be "the complaint." The former Form 1 concisely showed parties how to style third-party complaints, providing necessary information not found within the text of Rule 10 or Rule 14.

2. The Mysterious "Other Matters of Form"

Rule 7(b)(2)'s reference to "rules governing ... *other matters of form* in pleadings" is vague. When we carefully consider which rules those "other matters of form" might be, almost every candidate fails when applied to motions and other papers. The Rule can and should be made more explicit and more accurate.

Which Rules contain "other matters of form in pleading"? Rules 8, 9, 13, 14, and 17 might conceivably be implied, but they are better understood as rules for matters of *substance* in pleadings. From 1983 to 2007, Rule 7(b)(3) expressly directed that Rule 11's signature requirement applied to motions and other papers. This was, correctly enough, deleted as redundant because Rule 11 applies by its own plain language, see Advisory Committee Note to the 2007 amendments, whether or not it is intended to be a "matter of form in pleadings." This leaves Rule 10, titled "Form of Pleadings."



Which parts of Rule 10 can sensibly apply to motions and other papers?

(a) The “other matters” cannot be the caption requirement of Rule 10(a), since captions are expressly mentioned in Rule 7(b)(2) and hence cannot be matters “other” than captions.

(b) The “other matters” could conceivably involve paragraph numbering under Rule 10(b), but only to accomplish a trivial result. To explain:

(1) The first sentence of Rule 10(b) requires that “claims” and “defenses” appear in numbered paragraphs that describe “a single set of circumstances.” Claims and defenses are asserted in pleadings, not in motions or other papers – and those documents need not limit their paragraphs to allegations involving “circumstances.” In practice, numbered paragraphs are used only for pleadings, not other documents.

(2) The third sentence of Rule 10(b) also speaks of the presentation of “claims” and “defenses,” which would not apply to papers other than pleadings.

(3) The second sentence of Rule 10(b) allows a later pleading to refer to a paragraph number in an earlier pleading. This idea could be incorporated without violence into Rule 7(b)(2) – a motion or other paper might refer by number to a paragraph in an earlier pleading. But it hardly seems necessary to create a vague puzzle in Rule 7(b)(2) if its only purpose is to authorize this innocuous practice that no one would otherwise challenge.

(c) The “other matters” could conceivably involve adoption by reference under Rule 10(c), but also in limited ways that serve little purpose while also inviting confusion. To explain:

(1) The first sentence of Rule 10(c) says that a “statement” in a pleading may be “adopted by reference” in “any other pleading or motion.” Since this sentence already allows adoption by reference in a *motion*, the only point behind incorporating it into Rule 7(b)(2) would be to allow adoption by reference in *papers* that are neither pleadings nor motions. If for some reason it is important to expressly authorize this, the clearer method would be to add the words “or paper” in the second sentence of Rule 10(c), and not to conceal it as the answer to a vagueness puzzle posed in Rule 7(b)(2).

(2) The second sentence of Rule 10(c) – treating an instrument attached as an exhibit as part of the pleadings – is important when specifying the record for motions to dismiss for failure to state a claim under Rule 12(b)(6) and motions on the pleadings under Rule 12(c). There is no comparable significance in saying that instruments attached to motions or other papers become “part” of those papers “for all purposes.” Instruments attached to a motion or a declaration may be “materials” considered on summary judgment, see Rule 56(c), and may be “matters outside the pleadings” that force conversion of an improperly designated motion into a summary judgment motion, see Rule 12(d). In either case, it does not matter whether we say the exhibit is “part of” the paper to which it is attached. All that matters is that it is not part of a pleading – which counsels against muddying the waters by implying in Rule 7(b)(2) that the rule regarding adoption of instruments in pleadings also applies to non-pleadings.



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In short, the only meaningful work done by the phrase “other matters of form in pleadings” is to expressly authorize certain innocuous forms of cross-reference. Retaining the current vague language invites an inquiry that is not worth the effort and may even risk confusion when read in conjunction with Rule 12(d).

I recognize that the problems noted in this letter are quite technical. In practice, litigants and counsel simply ignore the problematic language, if they notice it at all. The proposed changes are nonetheless warranted for two main reasons. First, the Rules should not contain insoluble paradoxes – at least when they are so easily repaired. If nothing else, as a teacher of Civil Procedure, I find it awkward to instruct students that the best thing to do with a rule is to ignore what it actually says. Second, the amendments would remedy problems that unintentionally became more difficult to resolve after Form 1 was abrogated in 2015.

Please let me know if I can provide any more information regarding this proposal. Thank you for your consideration.

Sincerely,

Aaron H. Caplan



PROPOSED AMENDMENTS TO RULE 7

(a) *Pleadings*. Only these pleadings are allowed:

- (1) a complaint;
- (2) an answer to a complaint;
- (3) an answer to a counterclaim designated as a counterclaim;
- (4) an answer to a crossclaim;
- (5) a third-party complaint;
- (6) an answer to a third-party complaint; and
- (7) if the court orders one, a reply to an answer.

(b) *Motions and Other Papers*.

(1) *In General*. A request for a court order must be made by motion. The motion must:

- (A) be in writing unless made during a hearing or trial;
- (B) state with particularity the grounds for seeking the order; and
- (C) state the relief sought.

(2) *Form*. The caption requirement of Rule 10(a) applies ~~The rules governing captions and other matters of form in pleadings apply~~ to motions and other papers.

PROPOSED ADVISORY COMMITTEE NOTE

Rule 7(b)(2) previously required that “the rules governing captions and other matters of form in pleadings” apply to motions and other papers, but most provisions of Rule 10 (titled “Form in Pleadings”) cannot actually apply to papers other than pleadings. The amendment therefore eliminates the indefinite term “other matters.” Associated revisions are made to Rule 10(a) to ensure that its caption may be used on motions and other papers.



PROPOSED AMENDMENTS TO RULE 10

(a) *Caption; Names of Parties.* Every pleading must have a caption with the court's name, a title of the action, a file number, and a name of the paper, arranged to resemble the form appended to this Rule 10 Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

(b) *Paragraphs; Separate Statements.* A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense.

(c) *Adoption by Reference; Exhibits.* A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.

Form of a Caption

[Court's Name]

United States District Court for the _____ District of _____.

[Title of the Action]

[File Number]

A B, Plaintiff

v.

[Name of Paper]

C D, Defendant.

v.

E F, Third-Party Defendant

[Use if Needed]



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PROPOSED ADVISORY COMMITTEE NOTE

Rule 10(a) sets forth the requirement of a caption on pleadings, but Rule 7(b)(2) calls for the same caption to be used for motions and other court papers. To ensure that a caption of the type described in Rule 10(a) may also be used on other papers, the revision replaces the archaic term “Rule 7(a) designation” with the more flexible and comprehensible term “name of the paper.” Because the first sentence of Rule 10(a) does not indicate the visual layout of a caption, the Rule includes a form that may be used for pleadings (including third-party complaints under Rule 14), motions, and other papers.