02-CV-F



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May 30, 2002

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Suggestions for Amendments to the Federal Rules of Civil Procedure

Dear Mr. McCabe:

Submitted for the Committee's consideration is a copy of my article, *Action Is an Action Is an Action Is an Action*, 77 Wash. L. Rev. 65 (2002). This article (in Part III) contains a number of suggestions for amendments to the Federal Rules of Civil Procedure. I would appreciate it if this article could be forwarded to the Advisory Committee on Civil Rules for consideration.

Thank you for your assistance. If you should have any questions, my direct telephone number is (208) 885-7842, and my e-mail address is <bshannon@uidaho.edu>.

Very truly yours,

Bradley Scott Shannon

Bradley Scott Shannon
Visiting Associate Professor

02-CV-F
Supplement



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June 28, 2002

BY FAX AND MAIL

Judy Krivit
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Suggestions for Amendments to the Federal Rules of Civil Procedure

Dear Ms. Krivit:

This letter supplements my letter to the Committee dated May 30, 2002, and hopefully will help clarify the precise nature of the amendments I am proposing and the rationales therefor. Again, the rationales for these proposed amendments is set forth in greater detail in my article, *Action Is an Action Is an Action Is an Action*, 77 Wash. L. Rev. 65 (2002) (hereinafter "*Action*").

I respectfully propose the following amendments:

1. Where appropriate, the term "action" (and variations thereof) should be substituted for the words "case," "lawsuit," "litigation," "proceeding," and other, similar words (and variations thereof).

Rationale: "Action" is the term specified by the Rules to represent the concept of the sum of all claims in a federal civil judicial proceeding. Accordingly, the Rules should use the word "action," and no other, when attempting to communicate this concept. *See Action* at 89-102

2 Where appropriate, the term "averment" (and variations thereof) should be substituted for the word "allegation" and any other, similar words (and variations thereof).

Rationale: "Averment" is the term specified by the Rules to represent the concept of a fact pleaded in an affirmative pleading in an action. Accordingly, the Rules should use the word "averment" exclusively when attempting to communicate this concept. *See Action* at 107-09.

3 Rule 41(a)(1) should be amended to read: "Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action or claim may be dismissed . . . ." (added language underlined)

Rationale. Though Rule 41(a)(1) appears, by its language, to permit only the voluntary dismissal of entire actions, Rules 41(b) (governing involuntary dismissals) and 41(c) (governing the dismissal of counterclaims, cross-claims, and third-party claims) speak of dismissals of individual claims. There does not seem to be any reason why the voluntary dismissal of individual claims should not be permitted, and in fact this result frequently is accomplished, albeit through some bastardization of the language of this Rule, the utilization of some other, less applicable Rule, or the invocation of court's inherent power. *See Action* at 92-93.

4. Rule 41(a)(2) should be amended to read: "Except as provided in paragraph (1) of this subdivision of this rule, an action or claim shall not be dismissed . . . . If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the ~~action~~ plaintiff's claims shall not be dismissed . " (deleted language stricken and added language underlined)

Rationale: Same as with respect to proposed amendment three above, with the added substitution of "plaintiff's claims" for "action," which more accurately reflects the fact that the action is to continue with respect to the defendant's counterclaim(s).

5. The phrase, "that the action be dismissed on the merits" should be removed from Official Forms 31 and 32.

Rationale: Forms 31 and 32 appear to relate to dispositions of actions by trial. Dispositions by trial do not result in the dismissal of the action. The inclusion of the above language therefore is erroneous and potentially confusing. *See Action* at 116-41.

6 The phrase, "that party shall be dismissed from the action" should be removed from Rule 19(a), and the following phrase substituted therefor: "the action shall be dismissed as to the joined party."

Rationale: With one exception, the Rules speak only of the dismissal of actions or of claims. The one exception is Rule 19(a). The language proposed is similar to that currently employed in Rule 25(a)(1). *See Action* at 141-42.

7. Rule 58 should be replaced by the following:

Rule 58. Final Order

The court shall promptly prepare a final order, denominated as such, upon the disposition of all claims, setting forth the nature of each claim, the manner by which it was disposed, and the type and extent of the relief, if any, awarded to the claiming party. A final order shall be prepared at the conclusion of every action, regardless of the manner of disposition. The preparation of the final order shall not be delayed to tax costs, award fees, or determine post-disposition motions, though the final order shall be amended as necessary to reflect the manner by which each claim was finally disposed and the extent of the relief finally awarded to each party.

Rationale: As reflected in the commentary that led to the 1963 amendment to Rule 58, the idea of requiring that judgments be set forth on a separate document makes some sense in the abstract. Practically speaking, though, current Rule 58 suffers from several problems. Perhaps most significantly, it requires the district court (or worse, the district court clerk) to determine whether any particular order is appealable, and therefore constitutes a judgment This can be a difficult exercise, and one for which the district courts are ill-suited For this and other reasons, district courts frequently fail to prepare judgments in accordance with Rule 58 (and sometimes prepare papers purporting to be judgments that are not). The most recent amendments to Rule 58 do little more than erode whatever benefits might be derived from a separate judgment requirement

The proposed amendment to Rule 58 solves many of these problems by taking the district court out of the appealability determination business. The proposed amendment also would provide two important administrative benefits: it would result in the preparation of an order that would clearly mark the conclusion of the action, and it would provide a succinct summary, in one document, of each underlying claim and the disposition thereof. And unlike the current separate judgment rule, there would be no doubt as to whether such an order should be prepared, as the proposed amendment requires that a final order be prepared at the conclusion of every action, regardless of the nature of the disposition (i.e., even where there is no judgment, such as typically occurs where the action is disposed of by settlement). The proposed rule also makes it clear that it would be the court (and not the clerk) that would prepare such an order. *See Action* at 146-64.

A few general comments. First, for purposes of proposed amendments one and two, "where appropriate" refers to both the Rules themselves and to the Official Forms that follow Second, with respect to these same proposed amendments, the converse also should apply – that is, not only should terms such as "action" be used wherever appropriate, but they also should *not* be used where *not* appropriate (or potentially confusing). *See Action* at 101-02. Third, should the Committee be interested in adopting proposed amendments one and two, I would be happy to help the Committee locate those specific instances in the Rules and Forms where an inappropriate word currently is being used. Fourth, should the Committee be interested in

adopting amendments like proposed amendments one and two, the Committee might consider conducting a more plenary investigation into its Rules terminology. And finally, with respect to proposed amendment seven, the Committee should be aware that the adoption of this amendment would require amendments to other rules (including rules contained within the Federal Rules of Appellate Procedure). If desired, I would be happy to assist the Committee in locating those other rules that might be in need of amendment were my proposed amendment seven be adopted.

I hope this is helpful I would appreciate it if the foregoing also could be forwarded to the Advisory Committee on Civil Rules for consideration.

Thank you for your assistance. Of course, if you should have any further questions, I still can be reached by telephone ((208) 885-7842) or by e-mail address (bshannon@uidaho.edu).

Very truly yours,

Bradley Scott Shannon

Bradley Scott Shannon
Visiting Associate Professor

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



July 5, 2002

Professor Bradley Scott Shannon
University of Idaho
College of Law
Legal Aid Clinic
P.O. Box 442322
Moscow, Idaho 83844-2322

Re: *Proposed Amendments to Federal Rules of Civil Procedure, 02-CV-F*

Dear Professor Shannon:

Thank you for your proposed amendments to various terms in the Federal Rules of Civil Procedure. A copy of your letter and law review article have been sent to the chair and reporter of the Advisory Committee on Civil Rules for their consideration.

We welcome your suggestions and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe