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Comments:

February 5, 2004

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: Comments on Proposed Amendments to Civil and Appellate Rules

Dear Mr. McCabe:

I am writing as the chair of the State Bar of Michigan, Committee on the United States Courts ("U.S. Courts Committee"), to convey the Committee's comments on certain proposed amendments to the Civil and Appellate rules, published in August 2003. The U.S. Courts Committee is a standing committee of the State Bar of Michigan composed of practitioners and judges from both the Eastern and Western Districts of Michigan. The charge of the U.S. Courts Committee is "to concern itself with the administration, organization and operation of the United States Courts for the purpose of securing the effective administration of justice." In furtherance of this purpose, the U.S. Courts Committee has commented periodically on proposed amendments to the Federal Rules of Practice and Procedure,

focusing especially on the effect of proposed amendments from the practitioners' viewpoint. The comments submitted herein were approved at the Committee's meeting of December 9, 2003, and represent only the views of the Committee and not those of the State Bar of Michigan or its Board of Commissioners or Representative Assembly.

Rules of Civil Procedure

Rule 5.1, Constitutional Challenge to Statute – Notice and Certification; Rule 24(c), Intervention, Procedure. The proposal requires a party to give notice to the US or state attorney general when a filing questions the constitutionality of a federal or state law. The requirement is moved from Rule 24(c) to a new Rule 5.1. The rule is based on the requirement in 28 U.S.C. § 2403 for the court to certify such challenges to the attorney general and permit the attorney general to intervene.

The proposed amendment adds a requirement that a party not only "call the attention of the court" to the existence of such a challenge (present Rule 24(c)), but that the party also serve the attorney general. This is in addition to the court's notice to the attorney general. The proposal also adds a requirement for the court to set a deadline for the attorney general to intervene.

We recommend the following:

(a) The word "sued" should be deleted from proposed Rule 5.1(a)(1) and (a)(2), so that they read, respectively:

(1) if the question addresses an Act of Congress and no party is the United States, a United States agency, or an officer or employee of the United States sued in an official capacity

(2) if the question addresses a state statute and no party is the state or a state officer, agency, or employee sued in an official capacity

As proposed, the rule would require notice when a governmental officer or employee is a plaintiff in an official capacity and a constitutional issue is raised, since, in that case, the officer is not "sued in an official capacity." The notice requirement should not apply in such a case, since the attorney general presumably represents an officer or employee suing in an official capacity. Dropping the word "sued" would limit the scope of the rule to cases where there is no governmental party or officer, either as a plaintiff or defendant. Fed. R. App. P. 44, a similar rule requiring notice of constitutional issues in the court of appeals, applies when an

agency, officer, or employee "is not a party in an official capacity" rather than "is not sued in an official capacity." Rule 5.1 should parallel the language of Fed. R. App. P. 44.

(b) The provisions in proposed Rules 5.1(a)(1)(B) and (a)(2)(B) requiring a party to serve notice on the attorney general should be deleted. This additional obligation on the party, not required by 28 U.S.C. § 2403, duplicates the court's certification of the issue to the attorney general under proposed Rule 5.1(b), a certification that the statute requires. There is no justification for placing a duplicative obligation on a party. Fed. R. App. P. 44, the corresponding appellate rule, does not require a party to serve notice but leaves it to the clerk to do so.

The advisory committee's report states that the "dual-notice requirement was drafted because the Department of Justice wishes to make quite sure that notice comes to its attention in timely fashion." We do not see why the court's certification would not provide timely notice, since the court presumably will give notice promptly after a party's filing of a notice of constitutional question under proposed Rule 5.1(a)(1)(A) or (a)(2)(A).

(c) If the advisory committee nonetheless decides to retain the provision requiring a party to serve notice, we recommend that proposed Rule 5.1(a)(2)(B) be revised to specify the manner of service on a state attorney general. Rule 5.1(a)(1)(B), by reference to Rule 4(i)(1)(B), specifies that service on the US attorney general is by registered or certified mail. The same method of service should be used for service on a state attorney general. We recommend that the phrase "by sending copies by registered or certified mail" be added to the end of Rule 5(a)(2)(B).

Rule 6(e), Additional Time After Certain Kinds of Service. Before commenting on the specific amendment proposed to Rule 6, we take this opportunity to advocate a complete overhaul of the methods of computing time set forth in the Federal Rules. It should now be clear that the computation of time under the Federal Rules has become unduly complicated and that ambiguities will remain, even after adoption of the amendment. For this reason, we strongly suggest that the Standing Committee reexamine the entire question of computation of time under the Civil, Criminal and Appellate Rules. We support a single method of computing time, applicable to all trial and appellate proceedings, based upon running time tied to a calendar week or multiples thereof. The only exception to the rule would arise when the last day of the period falls on a weekend or holiday. We are aware of several state systems that have adopted this method, including the State of Michigan. See Mich. Ct. R. 1.108.

We turn now to the proposed amendment, which deals

with an ambiguity in the current rule for the extension of a prescribed period of time by 3 days when service is by mail, by leaving a copy with the clerk for a person with no known mailing address, or by other consented means. The rule clarifies that the 3 days is added after the prescribed period of time, instead of before the period. The distinction makes a difference, as set out in the advisory committee's report. The amendment also clarifies that the 3 days is added "after the period" rather than added "to" the period. \1

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1. This makes a difference, for example, for a 10-day period. If 3 days are added "to" the period, it becomes a 13-day period and the exclusion of intervening weekends and holidays under Rule 6(a) does not apply. Adding the 3 days "after the period" preserves the exclusion of intervening weekends and holidays from the 10-day period and then adds the 3 days after computation of the period.

This amendment is desirable but does not address two other ambiguities in counting days. First is the question of whether the 3 days added under Rule 6(e) is itself a "period of time" under Rule 6(a) from which intervening weekends and holidays must be excluded. E.D. Mich. LR 6.1(b) addresses this by stating that the additional 3 days is "three consecutive calendar days." Although the advisory committee's report says that treating the 3 days as a separate period "can be rejected without regret," the proposed rule itself does not clearly exclude it. We recommend that the rule address this by modifying the last phrase in the rule to state "3 consecutive calendar days are added after the period."

The second ambiguity that should be addressed is how to apply the provision in Rule 6(a) extending the time period when the last day of the period falls on a weekend or holiday. Should that be applied before or after adding the 3 days under Rule 6(e)? E.D. Mich. LR 6.1 resolves this by specifying that the 3 days are added first and then, if the period as extended by 3 days ends on a weekend or holiday, the Rule 6(a) extension applies. We recommend that the following language be added: "The 3 days must be added before determining whether the last day of the period falls on a day that requires extension under Rule 6(a)."

The same problems addressed by the proposed amendment and our comments above arise under Fed. R. Crim. P. 45 and Fed. R. App. P. 26, the criminal and appellate counterparts to Fed. R. Civ. P. 6. Whatever amendments are proposed for the civil rules, there should be consistent amendments to the criminal and appellate rules.

Rules of
Appellate Procedure

New Rule 32.1, Citation of Unpublished

Opinions. This new rule would require courts to permit the citation of judicial opinions, orders, judgments or other written dispositions that have been designated as unpublished, non-precedential or the like. New Rule 32.1 would also require parties who cite unpublished or non-precedential opinions that are not available on a publicly accessible electronic database (such as Westlaw) to provide copies of those opinions to the court and to the other parties. The proposed rule does not address the precendential value that appellate courts must give to unpublished opinions.

The current local rules of some federal appellate courts abjuring the precedential value of their own unpublished opinions raises a troubling and controversial issue, and we agree with the criticisms of that practice set forth in the Advisory Committee note. For this reason, we would prefer that the proposed rule resolve this question completely by abolishing such restrictions. Nevertheless, we think that the proposed rule is a step in the right direction, as it will at eliminate local rules that restrict citation to unpublished authorities, such as 6 Cir.R.28 (g), and thereby bring uniformity among the Circuits and eliminate the threat of sanctions against those who transgress those local rules.

We appreciate the opportunity to comment on these proposed rule amendments.

Very truly yours,

/s/

Joseph G. Scoville

Chair, Committee on U.S Courts

State Bar of Michigan

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