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05-CV- 003

PROPOSED STYLE REVISION OF THE
FEDERAL RULES OF CVIL PROCEDURE

It is with considerable trepidation that I offer these comments, given the number of experts who have spent so much time already on this project, while I have been able to read through the proposed changes only once. I also recognize that some of my suggestions may have already been rejected, and others may be seen as a change in the law and hence are not part of this project. In addition, I have not researched these issues to determine whether case law supports a different result from the one that I propose. But since I did go over the changes with some care, I offer the following suggestions.

Rule 4(c)(1): The first sentence could be eliminated if the phrase "a copy of the" is inserted before "complaint" in the second sentence.

Rule 4(k)(2)(A): As written, it is less clear that the prior version, probably because of the use of the term "state's" which is ambiguous in this context. I agree with the use of the possessive, but it doesn't work here. Use the prior phrasing.

Rule 4(m): The final sentence causes much confusion, not in the context of Rule 4(m), but because it is incorporated by reference into Rule 15(c)(1)(C).[1] I agree that this Rule, which establishes times limits for service of process, should not apply to service in a foreign country, which is what the final sentence says. But because the time limit for obtaining relation back under Rule 15(c)(1)(C) relies on the time limit in Rule 4(m), the final sentence can be read to provide no time when service is made in a foreign country and thus there is, arguably, no right to obtain relation back. I believe that

[1] Citations are to the proposed revisions, not to the current Rules.

problem can be cured by adding the following phrase at the beginning of that sentence: "Except in calculating the time limits under Rule 15(c)(1)(C), ..." [2]

Rule 15(c)(1)(B): This provision uses the term "conduct," which is not found anyplace else in the Rules so far as I am aware, with the phrase "transaction or occurrence," which is also used in Rules 13(a)(1)(A), 14(a)(3), 20(a)(1)(A), and 24(a)(2)[only transaction], and perhaps elsewhere. So far as I know, "conduct" has no independent significance in the context of Rule 15(c), and hence it should be deleted.

Rule 16(b)(2): This provision is confusing because it uses two alternative dates for the scheduling conference and does not provide for one to control. For example, if a defendant is served on March 1st, the 120 days under the first clause would expire on June 29th. If another defendant were served on March 5th and filed an appearance on March 10th, the 90 days in the second clause would expire on June 9th. Under the Rule, it is unclear whether June 9th or June 29th is the final day for the scheduling conference. The matter can be clarified by striking "within" and adding either "by the later of" or "by the earlier of" after "in any event."

Rule 19: The title of the Rule uses the phrase "If Feasible" but subsection (a) does not, thus making the appearance of the phrase in line 2 of (b) somewhat confusing. This confusion can be eliminated by adding the term "if feasible" into (a)(1) after "joined as a party," or by substituting the phrase "under subsection (a)(1)" for "if feasible" in (b). In addition, subsections (b)(3) & (4), which ask the court to consider whether the judgment or remedy would be "adequate," do not tell the court from whose perspective – plaintiff or defendant or both – the court should inquire.

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[2] There is another problem with the incorporation of Rule 4(m) into Rule 15, which is probably beyond the scope of this project. Rule 4(m) allows for extensions beyond 120 days; is that also incorporated into Rule 15?

Rule 20: The term "will" is used in both (a)(1)(B) and (a)(2)(B), suggesting that joinder is permitted only if these common questions are certain to arise, and no one can know that. The term "may" seems too open ended, but the phrase "is likely to" seems about right. In (a)(3), second sentence, the term "may" seems inappropriate, and I suggest "must." Why shouldn't the court grant judgment for each party according to his or her own rights?

Rule 22(b): In the second sentence, the use of "it" is confusing because the nearest referent is Rule 20. I suggest that a substitution of "this Rule" or "Rule 22."

Rule 30(b)(2): The second sentence permits documents to be sought in connection with an oral deposition. In doing so, it incorporates Rule 34, but some of the subparts of Rule 34 are inconsistent with parts of Rule 30, in particular the time to respond under Rule 34(b)(2). Also, should a party be allowed to use a Rule 30 deposition to obtain an inspection of land or other tangible things, as allowed by Rules 34(a)(2) and (a)(1)(B)? It may be easier to specify the parts of Rule 34 that do apply – such as the description requirement under (b)(1)(A) –and not get involved with the rest of Rule 34.

Rule 54(d)(2)(C): The phrase "Subject to Rule 23(h)" is not clear, although the explanation in the note is. It would be clearer if that phrase were deleted, and paragraph (E) were amended to add after "1927" the phrase "or to fees and expenses subject to Rule 23(h)."

Rule 56(d)(2): The word "merely" in line 3 is an emphasis word (and also a conclusory one) that should be deleted since it adds nothing. I also question whether the word "may" in that sentence should be "must" since the consequences of not

submitting counter evidence, if facts are contested, is to forfeit the right to claim that facts in dispute.

Rule 60(b): The third line includes the phrase "or its legal representative," which, according to Appendix A, item # 1, is the only place it appears. The phrase does not appear to add anything that would not otherwise be implied, but if it adds anything, its absence from Rule 60(d)(1) – permitting "an independent action to relieve a party [but not its legal representative] from a judgment, order, or proceeding" – seems difficult to understand. I would delete it from Rule 60(b).

Rule 61: This Rule is titled "Harmless Error" but that phrase is not used in the Rule, and, as written, the new version is less clear than the prior one, yet it still contains substantial redundancy. For example, with the phrase "At every stage of the proceeding," why does there need to be a list of stages and motions, and which stages are not included and why? I think that the last sentence should be the basic text, with the word "harmless" substituted for "all," and the phrase "unless the interest of justice otherwise requires" appended to it. There are other ways to clarify and simplify this Rule, but this version does not help, although I agree that the prior Rule was verbose and somewhat internally inconsistent.

Rule 62(d): The second sentence deals with when an appeal bond may be given, which is normally after a notice of appeal has been filed, but the Rule allows a bond to be posted "after obtaining the order allowing the appeal." This phrase is not new, but its import is unclear. Since it is within the power of a person who has obtained an order authorizing an appeal to file a notice of appeal immediately, I do not see the need

for a separate, although perhaps minutely earlier, alternative time. It may be that I do not understand the function of this phrase, but otherwise it seems unnecessary and confusing.

Rule 66: The second sentence begins with "But." I do not object to using that word to start a sentence, but in this case, I do not understand why the word is needed.

Rule 72(a), (b)(2) & (b)(3). Each of those Rules has a sentence, or a phrase, that ends with the preposition "to." My English teachers always told me that was a No-No, and I see no reason for an exception here. In Rule 72(a), the focus is on what a party may assign as error, but it would make more sense to tell the court what errors it must ,and must not, consider, making what the party does irrelevant. Thus, the next to last sentence in Rule 72(a) can be dropped, and the final sentence changed to read as follows: "The district judge [delete "in this case" as unnecessary] must [delete "consider timely objections and" as redundant with the addition made below] modify or set aside any part of the order that is clearly erroneous or is contrary to law, *provided that a timely objection to the order was made to the magistrate judge"* (new material in italics).

Rules 73(a) & (c): Both sections contain an "in accordance with" reference to the applicable statutory provisions, but neither seems necessary, nor is the practice followed elsewhere in the Rules. There is a reference to another portion of the same statute in Rule 73(b)(1), but the function there is to identify the consent required, not to announce that the Rule is complying with the statute.

Rule 73(b)(2): Line 3 uses the phrase "may again advise" the parties that the magistrate is available to try the case, but the use of "again" is unclear and might even allow repeat reminders, which might become coercive. Perhaps the word "remind" would do the job better and more efficiently, either with or without the modifier "once."

Rule 77(c)(2): This Rule allows the clerk, subject to review by the district judge, to "enter a default" (B) or "enter a default judgment" (C), and my question is why is (B) necessary, recognizing that it was part of the prior version, although less obviously redundant? I suppose that a clerk could enter a default for failing to answer on time, but the real threat is the default judgment, and I would thus eliminate (B), unless there is something I am overlooking.

Rule 79(a)(3): This Rule deals with the more or less mechanical issues of what the clerk is supposed to enter in the docket, and subsection (a)(3) relates to jury trials. The second sentence directs the clerk to place the word "jury" in the docket only if "a jury trial has been properly demanded or ordered." I suggest the deletion of "properly" both because it require the clerk to do something that a clerk should not be called on to do – make a legal judgment as to whether the demand is proper – and it may result in confusion and fewer cases on a list that is established for managerial purposes. If a jury is demanded, the case should go on the jury list; if there is an objection, the judge will decide whether the demand was proper.