November 30, 2005

COMMITTEE ON CIVIL LITIGATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Comments on Proposed Style Revisions and Amendments to the Federal Rules of Civil Procedure

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (the "Committee") has reviewed the proposed style revisions and proposed amendments to the Federal Rules of Civil Procedure, and submits the following comments.[1]

Originally, the Committee's objective in reviewing the proposed style revisions was simply to review all of the proposed style revisions in an effort to identify instances in which the proposed revisions might create ambiguities or unintended results. After we had finished this review, we became aware of a similar review conducted by an Ad Hoc Committee of Academics and Practitioners headed by Professor Stephen B. Burbank and Gregory P. Joseph, Esq. (the "Ad Hoc Committee"). Upon reviewing the report of the Ad Hoc Committee, we learned that a majority of that Committee was of the view that the costs of the restyling project outweigh its benefits. This prompted us to consider the question of whether or not the restyling project should be continued. The results of our consideration are presented in Part I below.

The Committee's comments on the proposed style revisions are set forth in Part II below. In reviewing the proposed style revisions, the Committee's principal focus was to determine whether the proposed revisions carried forward all of the substantive provisions of the former

[1] The United States District Court for the Eastern District of New York has authorized the submission of these comments, but responsibility for the substance of the comments remains with the Committee alone.

rule into the revised rule. We found some provisions in which ambiguities or unintended consequences may have been created, and we have identified such provisions below.

In addition, the Committee has some comments to offer on the proposed amendments to the Federal Rules of Civil Procedure. Those comments appear in Part III of this report.

I.

Overall Comments on the Style Revision Project

After completing our review of the proposed style revisions, and after reviewing the report and reasoning of the Ad Hoc Committee, a strong majority of our Committee has concluded that the costs and other disadvantages of the style revision project outweigh its benefits. In fact, this was the unanimous judgment of every member of the Committee who expressed a view on this question.

We are extremely concerned about the risk of unintended consequences from the proposed style revisions. While we recognize and appreciate the immense amount of effort that has gone into the proposed style revisions, we are troubled that both we and the Ad Hoc Committee have found a substantial number of ambiguities, apparent substantive changes, and apparent unintended consequences in the proposed style revisions. Importantly, there is almost no overlap between the points we found and those that were found by the Ad Hoc Committee. This suggests that there remain a significant number of unintended consequences that neither we nor the Ad Hoc Committee have spotted. This is of grave concern to us.

We are also concerned about the disruptions that will inevitably be caused by any style revision. Even though they are not meant to be substantive, the sheer magnitude of the rewording and subdivision of rules that have become familiar to the courts and the profession in their present form will complicate research and reasoning about the rules for many years to

come. This is also a cost that must be weighed against the possible benefits.

In addition, we are concerned that style revisions of this magnitude will make it more difficult to accomplish substantive revisions of the rules in the years ahead, because the courts and the profession will still be occupied in digesting the style revisions.

We respectfully suggest that, rather than seeking to accomplish style revisions in all the Federal Rules of Civil Procedure at a single stroke, the Committee might wish to consider, as an alternative, implementing style revisions in particular rules or groups of rules as the need for substantive changes in those rules or groups of rules becomes apparent. This would have the advantage of focusing the attention of the bench and bar on a limited set of proposed rule changes, which would make it much more likely that ambiguities and possible unintended consequences would be detected and brought to the Committee's attention.

II.

Comments on Proposed Style Changes

The Committee's comments and recommendations on the proposed style changes to the Federal Rules of Civil Procedure are as follows:

Rule 4: In proposed revised Rule 4(d)(1)(F), for the sake of consistency with the revised Rule 4(d)(2), we suggest that the words "to return the waiver" might be replaced by "to sign and return the waiver." If that change is made, we suggest a corresponding change in proposed revised Rule 4(d)(3), from "timely returns a waiver" to "timely signs and returns a waiver." If these changes are not made, then for consistency's sake we suggest instead deleting the phrase "sign and" from revised Rule 4(d)(2).

Rule 7: In proposed revised Rule 7(a)(3), we suggest that the word "answer" to counterclaim might be replaced by "reply" to counterclaim, to make it consistent with historical usage. We believe that changing "reply to counterclaim" to "answer to counterclaim" at this late date would be likely to engender unnecessary confusion.

Rule 11: In proposed revised Rule 11(a), we suggest the words "party's attention" might be replaced by "unrepresented party's attention" (which we assume is what is meant).

Rule 15: In proposed revised Rule 15(c)(2), for the sake of clarity, we suggest that the words "during the stated period" might be replaced by "during the period provided by Rule 4(m)."

Rule 16: In proposed revised Rule 16(d), we suggest that the word "should" might be replaced by the word "shall," because the proposed change seems to create the inference that there is discretion when, under the current Rule, there is not.

Rule 25: In proposed revised Rule 25(a)(1), we suggest that the words "the action by or against the decedent may be dismissed" effect a substantive change by creating an inference that there is discretion when, under the current Rule, there is not. The Committee is not necessarily advocating that the Rule should be a mandatory one,

but merely wishes to draw attention to the fact that a substantive change is being made.

Rule 26: In proposed revised Rule 26(a)(2)(B), for the sake of clarity, we suggest the words "this disclosure" might be replaced by "the expert disclosure required by 26(a)(2)(A)."

In proposed revised Rule 26(b)(4)(B), we suggest the word "only" be added to the phrase "a party may do so," so that the rule would read as follows: "a party may do so only:" This change would keep the Rule consistent with the current Rule which provides for discovery of an expert employed solely for trial preparation "only as provided in Rule 35(b) or upon a showing of exceptional circumstances."

Rule 42: In proposed revised Rule 42(a)(2), we suggest the word "and" might be replaced by the word "or," since courts have traditionally viewed these options in the disjunctive, even though they were set forth in the original Rule in the conjunctive.

Rule 44.1: In proposed revised Rule 44.1, we suggest the phrase "give notice by a pleading or other writing," might be changed to "give notice by a pleading or other reasonable written notice," as in the existing Rule. We believe that the elimination of the word "reasonable" from the proposed Rule might lead some to argue that any written notice – even if unreasonable – would satisfy the Rule.

Rule 56: In proposed revised Rule 56(c), (d)(1) and (e)(2), we suggest the word "should" might be replaced with the word "shall," as in the current Rule, because otherwise it would appear that a substantive change would result.

Rule 71A: In proposed revised Rule 71.1(i), the subheading "As of Right" (which appears in current Rule 71A(i)(1)) is eliminated. We suggest that the subheading "As of Right" should be reinserted into the Rule to make it clear that the plaintiff has this right and that it is not subject to the discretion of the court.

III.

Comments on Proposed Amendments

Below are the Committee's comments to the Proposed Amendments to Federal Rules of Civil Procedure 11, 16, 26, 30, 71.1, and 78:

Rule 11: In the proposed amendment to Rule 11, for the sake of clarity and to conform with current usage, we suggest that the words "electronic-mail address" might be replaced by "e-mail address". This change would make the rule consistent with the phrase used in the Advisory Committee Note to this amendment.

Rule 16: In proposed amendment to Rule 16, for the sake of clarity, we suggest that the words "be present or reasonably available by other means," might be replaced by "be present or reasonably available by telephone or other means." This would make clear that the telephone is a reasonable and acceptable means.

Rule 26: As we suggested above with respect to proposed amended Rule 11, we suggest the words "address, telephone number, and electronic-mail address" might be replaced by "address, e-mail address, and telephone."

We would further suggest the words "establishing new law" might be replaced by "for establishing new law" to make the language consistent with revised Rule 11(b)(2).

Rule 30: In the proposed amendment to Rule 30(b)(6), the term "Organization," as used in the caption, might be changed to "Organization or Entity." We further suggest that the phrase "organization or entity" be used throughout Rule 30(b)(6) to make this change consistent. We make this suggestion because the terms "organization" and "entity" are not coterminous, and we agree with the Advisory Committee that the coverage of Rule 30(b)(6) should encompass both.

Rule 71.1: As we suggested above with respect to proposed amended Rules 11 and 26, we suggest that, in proposed amended Rule 71.1(d)(2)(B), the words "electronic-mail address" might be replaced by "e-mail address."

Rule 78: In proposed amended Rule 78, we suggest that the phrase "Advancing an Action" in the caption should be deleted, since that subject matter is deleted from the rule; and further suggest adding the words "Submission on Briefs" to the caption, so

that the caption would read "Hearing on Motions; Submission on Briefs."

Respectfully submitted,

COMMITTEE ON CIVIL LITIGATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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