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March 13, 1984

Lynne Lester
District of Columbia Bar
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Dear Lynne:

Pursuant to D.C. Bar Division Guideline 13(c), I am submitting for distribution to the Board of Governors and to the other Divisions of the Bar the Report of Division IV's Court Rules Committee commenting on the preliminary draft of proposed amendments to the Federal Rules of Civil Procedure, a copy of which is enclosed. This report was adopted unamiously by the Steering Committee of Division IV on March 6, 1984, and will be transmitted to the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, on March 21, 1984.

Sincerely yours,

NOEL ANKETELL KRAMER
Chairperson, Division IV
(Courts, Lawyers and the Administration of Justice)
District of Columbia Bar

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REPORT OF THE COMMITTEE ON COURT RULES OF DIVISION IV ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Noel Anketell Kramer, Chair
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Division IV

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Committee on Court Rules
Division IV

Dated: March 1, 1984

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"The views expressed herein represent only those of Division IV: Courts, Lawyers, and the Administration of Justice of the D.C. Bar and not those of the D.C. Bar or of its Board of Governors."

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*/ Denotes principal author.

BACKGROUND

The Committee on Court Rules of Division IV of the District of Columbia Bar has reviewed the Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (hereinafter "Proposed Amendments") published in August 1983 by the Committee on Rules and Practice of the Judicial Conference of the United States. (Copy attached.) The Proposed Amendments were published for comment by the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure. These Proposed Rules have not been submitted to, nor considered by, the Judicial Conference of the United States or the Supreme Court. For this reason, the Advisory Committee should have substantially more flexibility in accepting revisions to its proposals.

Our Committee believes publication and comment at this early date is an excellent procedure, especially with regard to these Proposed Rules. Along with the recent changes to the discovery rules, these proposals seek fundamental changes designed to expedite the resolution of cases and reduce the heavy caseloads of the Federal courts. These changes are both important and difficult, and involvement of the Bar at an early stage is particularly important.

SUMMARY

The Committee believes some of the Proposed Amendments constitute substantial improvements to the Federal Rules. This is especially true with respect to changing the time limits

(Rule 6) and clarifying the place for depositions (Rule 45). With respect to tendering offers of settlement (Rule 68), and allowing local court experimentation (Rule 83), substantial restudy and revision are appropriate to maintain consistency and to provide the maximum improvement possible.

COMMENTS

1. Rule 5(a) and (d)

The first Proposed Amendment is to revise Rule 5 to recognize the change in terminology from "offer of judgment" to "offer of settlement." (See discussion below at 6-7). Most importantly, however, the Proposed Amendment to Rule 5(d) eliminates the need to file the offer of settlement. Our Committee supports these amendments should Rule 68 be revised because filing could well have a dampening effect on the use of the revised Rule 68 offer of settlement.

For these same reasons, however, we believe that an offer of settlement should not be required to be served on all parties. Rather, such an offer should be required to be served only on the party to whom the offer of settlement is directed. For example, if a plaintiff has sued two or more defendants, that plaintiff should be free to make a formal offer of settlement under Proposed Rule 68 to one of the defendants without disclosing that offer to the other defendants.

These revisions to the Proposed Amendment can be accomplished by deleting the words "offer of ~~judgment~~ settlement" from

line 8 of Proposed Rule 5(a) and adding the following sentence at the end of the first paragraph of Rule 5(a):

> Service of an offer of settlement under Rule 68 need be made only on that party or parties to whom the offer is made.

2. Rule 6

The Proposed Amendments to Rule 6 are designed to provide a more reasonable timetable during which action must be taken. The first change recognizes that weather conditions can make access to the clerk's office inaccessible. The more far-reaching modification provides that, when the period of time allowed by another rule is less than 11 days, Saturdays, Sundays and legal holidays are excluded. The rule previously discounted weekends and holidays only if the time was less than 7 days.

Our Committee supports the revision. With the revision, if a party is allowed 10 days to oppose a motion, that party now gets 10 full business days, or two full weeks, since weekends are no longer counted, as opposed to the prior rule when a party could have as little as 6 business days. Our Committee feels that this Proposed Amendment is an excellent change.

3. Rule 45

The Advisory Committee proposes to amend Rule 45(d)(2) to disregard county boundaries in determining where a deposition may be taken. The Proposed Amendment would allow a deposition to

be taken at any place within 100 miles of where a deponent lives, works, conducts business, or receives personal service of the deposition subpoena.

Our Committee generally supports this change, although the 100-mile limit may be too large. We believe that a deposition witness, especially in a small case, should not be required to travel such a distance for the convenience of the attorney who files the notice to take the deposition. A shorter distance, perhaps 50 miles, is more reasonable.

Our Committee is also concerned about one variation in language from the existing Rule 45(d)(2) which appears to be inadvertent but could have significant consequences. In existing Rule 42(d)(2), a deposition may be taken in the county where the deponent "transacts his business <u>in person</u>." (Emphasis added). The proposed amendment eliminates the "in person" language, and could be read to allow a deponent to be deposed wherever he or she (or, in the case of corporations, the company) transacts business, whether or not in person. Our Committee does not believe that a witness should be required to attend a deposition unless that witness personally transacts business in that district. Therefore, our Committee recommends that, in the revised Draft, the words "in person" be inserted after "transacts business" at line 14.

Finally, our Committee is concerned that the Advisory Committee's Proposed Amendment does not go far enough and that Rule 45(d)(1) should be amended to clarify from which District Court the deposition subpoena should issue. Rule 45(d)(1) now

requires that a deposition subpoena must be issued by the Clerk in the District Court "for the district in which the deposition is to be taken." This procedure could be placed in a state of confusion if Rule 45(d)(2) is amended in the manner proposed with no revision to Rule 45(d)(1).

A local example may explain the difficulties that will arise from Rule 45(d)(1) in the District of Columbia and in other urban districts if the proposed revision to Rule 45(d)(2) is implemented. Allowing a deponent to be deposed within a distance of 100 miles of his residence or place of business (without regard to district or county boundaries) would mean that a lawyer in Baltimore could, by subpoena issued from the District Court in Baltimore, require attendance of a resident of the District of Columbia at a deposition in Baltimore. However, if a Baltimore lawyer wishes to notice that deposition in the District of Columbia, probably a more convenient forum for the witness, the lawyer would need to utilize the foreign subpoena provisions in Rule 45(d)(1) and have the subpoena issued out of the D.C. District Court.

Our Committee does not believe a lawyer should need to follow more complex procedures to take a deposition in a place more convenient to the witness. Thus, Rule 45(d)(1) should be further amended to allow a subpoena under Rule 45 to be issued either from the District Court where the deposition is to be taken <u>or</u> from the District Court where the action is pending if that court is within 100 miles of the place where the deposition is to be taken. This amendment would allow optimum flexibility

and eliminate needless foreign subpoena procedures.*/

4. Rule 52

The Advisory Committee recommends amending Rule 52 to eliminate a conflict in the Circuits and establish a limited review of all findings of fact, regardless of whether that finding of fact was based on demeanor evidence or on purely documentary evidence. Our Committee supports this revision. However, we urge that the phrase "and to the need for finality" in line 11 of the proposed draft rule be deleted. We do not believe it adds any substance to the "clearly erroneous" standard that would be established by the amendment, and we think its inclusion gives the appearance of weighing the court's convenience more highly than the litigants' interest in a just result.

5. Rule 68

The major development in these Proposed Amendments is the revisions to Rule 68. Where previously Rule 68 allowed only an "offer of judgment" by a party defending a claim, the Advisory Committee proposes a total revision which would, *inter alia*,

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*/ This change may be accomplished by adding the following sentence to Rule 45(d)(1) between the first and second sentences:

> Provided, however, that if the deposition is to be taken within 100 miles of the place where the action is pending, the Clerk of the District Court may issue the subpoena even if the deposition is to be taken in another district.

Furthermore, a corresponding change would need to be made to Rule 37(a)(1).

(a) allow an offer of settlement so that the offeror could propose a dismissal instead of a judgment;

(b) allow the offer to be made by any party, not just the defending party;

(c) eliminate the requirement that the party making the offer agrees to pay accrued "costs" which are unknown and, in some instances, have been interpreted to include attorneys fees; and

(d) allow the recovery of reasonable attorneys fees, in addition to costs, if the final judgment is not more favorable to the party refusing the offer than the offer itself.

The offer of judgment rules have been invoked only rarely for many reasons. First, an offer of judgment required the defendant to accept a judgment which could have negative legal and practical implications. Second, the benefits to the offeror (costs only, generally not including attorney fees) were not sufficient to warrant the risks. Third, the offeror had to agree to accrued "costs" which eliminated the certainty of any offer.

Our Committee believes that the proposed revisions to Rule 68 may alleviate these problems but would create substantial additional problems and may be unfair to some parties. We also believe that the language of the revised rule leaves too much discretion in the District Court, and we were concerned about how these revisions would operate in practice. For that reason, our Committee is unable to support or oppose these revisions and recommends substantial further study.

6. Rule 71A

These revisions allow the court better to utilize the commission procedure in land condemnation cases. Our Committee fully supports these changes.

7. Rule 83

The Advisory Committee's proposed revisions to Rule 83 attempt to enhance the local rulemaking process. Our Committee fully supports the revision which requires notice and comment by the public before the promulgation of local rules or amendments to those rules. Our local Federal District Court works closely with the Bar in promulgation of rules, but we believe it is best to require such public participation in all courts.

Our Committee was concerned with the second revision to Rule 83 which allows a local District Court to impose local rules for a period of two years even if they are inconsistent with the Federal Rules. Such inconsistency is the antithesis of what the Federal Rules are designed to accomplish. Indeed, the amendments to Rule 52 are designed solely to remove such inconsistency. However, our Committee recognizes that local District Court experimentation is very useful in certain situations, especially for rule revisions which are more drastic in nature. A good example of a situation in which such experimentation may be useful is the proposed revisions to Rule 68.

Therefore, our Committee supports this revision in those cases where there is a certain need for District Court experimentation. This experimentation should be allowed only

in extraordinary circumstances and under controlled conditions. The experimental local rule should clearly provide that the rule is experimental and does not conform with the Federal Rules of Civil Procedure.

Finally, we fully support the Advisory Committee's concern over the problems created by one judge effectively overruling the Federal Rules or local rules by standing orders. Our Committee believes these standing orders should be fully consistent with Federal Rules and local rules.