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Digest of New Federal Rules of Civil Procedure

G. Dexter Blount

DIGEST OF NEW FEDERAL RULES OF CIVIL PROCEDURE

By G. DEXTER BLOUNT, *of the Denver Bar*

JUNE 18, 1934, the Congress enacted a statute authorizing the Supreme Court of the United States to prescribe uniform rules of practice and procedure in civil actions at law and cases in equity in the United States District Courts. December 20, 1937, Chief Justice Hughes submitted the rules the Supreme Court adopted pursuant to that authorization. These rules go into effect September 16, 1938. They prescribe the practice and procedure to be followed in all civil actions at law and cases in equity, except certain designated actions, such as admiralty proceedings, habeas corpus, etc., in which the procedure is prescribed by statute. Every suit is to be known as a "civil action." Distinctions between law suits and equity actions are eliminated. The rules govern all proceedings in actions brought after they take effect, and in actions then pending, where feasible.

Commencement of Action

A civil action is commenced by filing a complaint in the United States District Court. The clerk shall forthwith issue a summons to the marshal, or to a person specially appointed by the court to serve it. Service shall be made substantially as provided by the Colorado code, except that service upon a partnership may be made by serving an agent, service may be made upon the United States or its representatives as specified, and the summons and complaint must be served together. Parties may be served only within the state where the District Court is held, except as otherwise provided by statute.

Pleadings and Motions

All pleadings and motions subsequent to the complaint, unless otherwise ordered by the court, shall be filed and served on opposing parties or their counsel by delivering a copy or mailing it to the last known address of the party to be served, or if no address is known, by leaving it with the clerk of the court. Service by mail is complete upon mailing. A motion must be served not later than 5 days before the time set for hearing. The motion must be accompanied by affidavits, if

any, which support it. Opposing counsel may file opposing affidavits at least 1 day before the hearing. If the notice is served by mail, an additional 3 days is added.

The pleadings consist of a complaint and answer, a counterclaim or cross-claim and answer, and a third party complaint and answer. The court may order a reply to an answer, but otherwise none is required. All motions must be made in writing, unless made during trial. No technical forms of pleadings are required. Demurrers, pleadings, and exceptions for insufficiency of pleadings are abolished. The cause of action is called "claim for relief." It must consist of: (1) allegation of jurisdiction; (2) a simple, concise and direct statement of the claim (not of the "facts"); (3) a demand for judgment. Relief or defense in the alternative, or of several different types may be demanded. The defending party shall state, in short and plain terms, his defense to each claim asserted. He may deny the allegations generally, or specifically, or state that he is without knowledge or information sufficient to form a belief as to the truth of an averment. Special defenses, such as accord and satisfaction, contributory negligence, estoppel, laches, statute of limitations, and waiver, must be set forth affirmatively. All averments in the claim for relief, other than those as to the amount of damages, are admitted if not denied. All affirmative allegations in the answer are considered as denied without the filing of a reply.

It is not necessary to aver the capacity or the authority of a party to sue or be sued, or the legal existence of a corporation except to show jurisdiction. The party raising an issue as to such matters must specifically plead his defense in detail. Circumstances constituting fraud or mistake must be stated with particularity. Malice, intent, knowledge and other condition of mind may be averred generally. In pleading performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed. A denial of performance or occurrence must be made specifically and with particularity. In pleading an official document or act it is sufficient to aver that the document was issued or the act done in compliance with law. In pleading a judgment or decision of a board of officers it is sufficient to aver the decision or judgment without setting forth matter showing juris-

diction. Items of special damage must be specifically stated. All pleadings after the complaint may state the names of only one plaintiff and one defendant in the caption with appropriate indication of others. Statements in one pleading may be adopted by reference in that or any subsequent pleading. Exhibits may be incorporated by reference. All pleadings must be signed by the individual name of at least one attorney or by the party. They need not be verified, except as specifically provided by rule or statute. Signature by the attorney is a certification of good faith.

A motion or responsive pleading must be filed and copies served within 20 days after notice is received of the complaint or of the other pleadings to which response is made, except that the United States is granted 60 days. If the court disposes of a motion, the responsive pleading must be served within 10 days after notice of the court's action.

Every defense to a claim for relief must be asserted in a responsive pleading, except that a defense of lack of jurisdiction, improper venue, insufficiency of process or service of process, and failure to state a claim upon which relief can be granted may be presented by motion, or included in the answer or other response. Such defenses when presented by motion shall be heard before trial. A motion may be made for a more definite statement or for a bill of particulars, but it must point out the defects complained of and the details desired. A motion may be made to strike matters that are redundant, immaterial, impertinent or scandalous. The various motions may be joined in one document. All defenses not presented by motion or answer are waived, except the defense of failure to state a claim or a legal defense. They may be made by a later pleading or by motion for judgment on the pleadings, or at the trial. And the question of lack of jurisdiction may be raised at any time.

Counterclaim and Cross-claim

A pleader must set forth by counterclaim against any opposing party any claim he has, not the subject of a pending action, and not requiring the presence of parties over whom the court cannot acquire jurisdiction, arising out of the transaction on which the opposing party's claim is based, and he may pre-

sent a counterclaim for any claim not arising out of the transaction. The counterclaim may be for any amount. A claim maturing or accruing after the pleader has served his pleading may be presented by a supplemental pleading. A cross-claim may be filed against any co-party, if based upon any claim arising out of the transaction involved in the suit. Additional parties may be brought in and cross-claims filed against them if the court can obtain jurisdiction over them, and if their presence is required for the granting of complete relief.

Third Party Practice

A defendant may file a complaint and serve summons against a third party who may be liable to him or to the plaintiff for all or part of the plaintiff's claim against the defendant. The third party defendant may bring into the case any additional party who may be liable to the third party, or whose liability might relieve the third party. When a counterclaim is asserted against a plaintiff he may cause a third party to be brought in under similar circumstances.

Amendments and Supplemental Pleadings

All amendments and supplemental pleadings that may be necessary to enable the parties to properly protect their interests shall be permitted.

Pre-trial Procedure

The court may require the attorneys for the parties to confer with the court before trial to simplify the issues, amend the pleadings, obtain admissions of fact and of documents, limit the number of expert witnesses, consider the advisability of reference of issues to a master, and to determine such other matters as may aid in the disposition of the suit. The conclusions reached at the conference shall be binding upon all parties. The court may also establish a pre-trial calendar for the consideration of cases as they might be considered in conference.

Parties

Actions must be brought in the name of the real party in interest, but a trustee and others similarly situated need not join the beneficiaries. The capacity of an individual to sue or

be sued shall be determined by the law of his domicile or the law of the state where the District Court is held. A partnership or unincorporated association may sue or be sued in its common name. Infants or incompetent persons may appear by legal representative or guardian ad litem.

Joinder of Claims

A party may join in his complaint, or counterclaim, as many claims, either legal or equitable, as he has against an opposing party. Plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him and obtain judgment for both in the same suit.

Joinder of Parties

All persons having an interest may be joined either as plaintiffs or defendants. Separate judgments may be rendered in favor of or against one or more of the parties, either plaintiff or defendant. Misjoinder or non-joinder of parties is not ground for dismissal. Parties may be dropped or added on motion. Claims arising between several parties may be severed and proceeded with separately.

Interpleader

All parties having claims against a plaintiff arising out of the same transaction may be required to interplead if otherwise plaintiff might be subjected to double or multiple liability. A defendant likewise may require parties to interplead to a counterclaim or cross-claim. This remedy is in addition to the existing interpleader statute.

Class Actions

One or more persons of a numerous class may maintain suit on behalf of the entire class under certain prescribed restrictions. Suits by stockholders are subject to substantially the same limitations stated in the Federal Equity Rules.

Intervention

Upon serving upon all interested parties a timely motion to intervene, any person having a legal interest in the subject of the suit shall be permitted to intervene, or may be, in the manner set forth in the rules.

Substitution of Parties

Parties may be substituted in case of the death, incompetency, or transfer of interest of a party if application for substitution is made by legally interested persons within maximum periods of from 6 months to 2 years.

Depositions and Discovery

The deposition of any person, including a party, may be taken orally or on written interrogatories for the purpose of discovery or for use at the trial. Subpoenas may be issued by the clerk and subpoenas duces tecum by the clerk upon order of court. Examination of the witness may cover any matter, including the production of documents, that is relevant. The whole or any part of the deposition may be used upon trial, insofar as admissible, for contradiction or impeachment of the deponent, or for any purpose if the deponent is a party or officer or managing agent of a corporation or partnership which is a party, or the deponent is not readily available in person as a witness. Objections to admissibiliy of the evidence may be made during the trial. Taking a deposition of an adverse party does not make him a witness for the party taking the deposition. That party may introduce evidence rebutting any statements contained in the deposition. Depositions may be taken to perpetuate testimony either before suit is filed or pending an appeal. Oral depositions may be taken upon stipulation, or upon notice served on opponent, subject to the court's approval as to time, place and limitation of inquiry. Written depositions may be taken by stipulation or upon service of notice on opponent, together with a copy of the interrogatories. Opponent must file cross-interrogatories within 10 days or waive his right to cross-examine. Redirect interrogatories must be filed within 5 days and recross interrogatories within 3 days. Irregularities are waived unless written objection is made. Other objections are not waived unless they could have been remedied if made at or before the deposition was taken. Details as to the methods of taking and returning depositions, and before whom taken, are specified. They do not differ substantially from present rules.

Interrogatories to Parties

Any party may require an adverse party to answer material written interrogatories within 15 days after service of

demand, unless the court orders otherwise upon objection of the adverse party.

Discovery and Production of Documents

Upon motion, the court may order any party to produce and permit the inspection and copying or photographing of pertinent documents, or may order a party to be permitted to inspect land or property in possession of an adverse party.

Physical and Mental Examination of Persons

The court may order any party to submit to a physical or mental examination by a physician, when material. A copy of the physician's report shall be available to the adverse party, who may be required to furnish copies of the reports of his own physicians.

Admission of Facts and Genuineness of Documents

A party, by serving written notice upon an adverse party, may require that party to admit or deny the genuineness of designated relevant documents.

Penalties

If any person refuses to have his deposition taken or to answer relevant questions, or if any party refuses to answer interrogatories, produce documents, permit inspection, permit physical and mental examination, admit or deny facts or genuineness of documents, or make discovery, he may be subjected to punishment for contempt and other penalties.

Jury Trials

Trials by jury of cases in which the right is guaranteed by the Constitution may be demanded by any party serving written notice therefor on the adverse party within 10 days after service of the last pleading or by endorsing the demand upon one of his pleadings. He may limit the demand to the trial of certain stated issues. The adverse party may then demand that other or all issues be submitted to the jury. If no demand is made a jury trial is waived. A demanded jury trial may be waived by written stipulation. The court may require an advisory jury.

Dismissal of Actions

A case may be dismissed without prejudice by plaintiff at any time before service of the answer, or by stipulation, but the dismissal shall be with prejudice if a former case involving the same cause of action has been dismissed either in a state or Federal court. Other dismissals shall be by order of court. A case may be dismissed for failure to prosecute or failure of plaintiff to comply with the rules or an order of court. Defendant, without waiving his right to offer evidence in the event his motion is not granted, may move for dismissal at the conclusion of plaintiff's evidence on the ground that upon the facts and the law the plaintiff has shown no right to relief. Such dismissal operates as an adjudication on the merits unless the court otherwise orders. Counter-claims, cross-claims and third party claims may be dismissed in the same ways as the original claim. If a party brings a second action upon a cause of action set forth in a dismissed suit, the court may require him to pay costs of the previous suit before proceeding.

Consolidation—Separate Trials

All actions pending before the same court and involving a common question of law or fact may be consolidated for trial. The court may require separate trials of any separate issues.

Evidence

All evidence is admissible which would be admissible under the existing laws of the United States or of the state in which the case is tried. Leading questions may be asked hostile witnesses and an adverse party, who may be called to testify and contradicted or impeached. Cross examination is limited to the subject matter of the examination in chief. After an objection to a question propounded to a witness has been sustained, the examining attorney may make a specific offer of proof, out of the presence of the jury, or in a trial to the court. Motions may be supported by evidence, or affidavits.

Proof of Official Record

Official records may be proven by official publications or by a copy attested by the officer having legal custody of the record, or by his deputy. Proof of the non-existence of an

official document may be made by a written statement signed by the officer or deputy in charge. Proof of official records may be made also in the other ways now prescribed by statute.

Subpoenas

Subpoenas and subpoenas duces tecum for the trial may be issued by the clerk without court order, and may be served by any person not a party and over 18 years of age, by delivering a copy to the witness and tendering him fees for one day's attendance and mileage. A resident of the district in which the deposition is to be taken may be required to attend to give his deposition only in the county wherein he resides or is employed or transacts his business in person. A non-resident may be required to attend only in the county where served, or within forty miles of the place of service, or at such other place as is fixed by order of court. The subpoena for a witness to attend a trial may be served at any place within the district, or any place without the district that is within 100 miles of the place of trial, or otherwise as provided by statute.

Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary, provided the party has made known to the court the action he desires the court to take, if the party has had such opportunity.

Jurors

The court shall permit the attorneys to examine, or supplement the examination of, prospective jurors. One or two alternate jurors may be impaneled. Parties may stipulate for trial to a jury of less than twelve, or that a verdict may be rendered by a stated majority. Special verdicts may be required. Also, answers to written interrogatories.

Motion for Directed Verdict

Motions for directed verdicts by one or all parties do not waive submission to the jury. Such motions shall be specific. If a motion is not granted the submission to the jury is subject to a later determination of the legal questions raised by the motion. Within 10 days after reception of a verdict the losing party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. Likewise, if

the jury disagrees. A motion for a new trial may be joined and new trial prayed for in the alternative.

Instructions to Jury

At the close of the evidence, or prior thereto during the trial, as the court directs, any party may file written requests for jury instructions, which the court must pass upon, and so inform counsel, prior to their arguments to the jury. Specific objections to instructions must be made before the jury retires. Opportunity to make the objections must be given attorneys out of hearing of the jury. The jury shall be instructed after the arguments are made.

Masters

Standing or special masters may be appointed and may include a referee, an auditor and an examiner. The master may not retain his report as security for his compensation, but may collect by execution in the pending case. References to a master shall be exceptional. His authority shall be prescribed and limited by the order of appointment. His findings of fact in non-jury cases shall be subject to review but shall be conclusive unless clearly erroneous. His findings in jury cases shall be admissible as evidence.

Judgments

A "judgment" includes what is now known as a "decree" and any order from which an appeal may be taken. The judgment shall not contain a recital of pleadings, report of master, or record of prior proceedings. A separate judgment may be entered disposing of each claim. The case may then proceed as to the other claims. Enforcement of each judgment may be withheld until final determination of all issues. A default judgment shall not exceed the amount demanded in the pleadings. Other judgments may grant the relief to which the party is entitled, whether demanded or not. A default judgment may be entered by the clerk when the claim is for a sum certain. Otherwise, by the court, upon proper application.

Summary Judgment

A summary judgment may be entered upon motion served at least 10 days before the time specified for the hearing. The motion may be supported by affidavits and resisted by counter affidavits and shall be granted if no genuine issue as to

material facts exists. After the motion is made, the court, by examining the pleadings and evidence and interrogating counsel, shall ascertain what substantial controverted and uncontroverted material facts exist and enter an order limiting the trial to the controverted facts. The supporting affidavits shall be on personal knowledge and in detail. Punishment shall follow affidavits made in bad faith.

Declaratory Judgments

A jury trial may be demanded in declaratory judgment cases. The existence of another adequate remedy shall not preclude a declaratory judgment. A case of that kind may be advanced on the calendar.

Entry of Judgment

Unless otherwise directed, the clerk shall enter judgment upon receipt of the verdict of the jury.

New Trials

New trials may be granted on all or part of the issues in jury cases and non-jury cases. In non-jury cases the court may open judgment, take additional testimony and enter a new judgment. A motion for new trial must be served not later than 10 days after the entry of judgment, unless otherwise ordered. Supporting affidavits, if any, must be served with the motion. Opposing affidavits may be served within 10 days thereafter, or an additional period not over 20 days, if the court so orders. The court may order a new trial of its own initiative within 10 days after judgment.

Relief from Judgment

Clerical mistakes may be corrected at any time. On motion filed within six months after a judgment is rendered, the court may grant relief from a judgment entered through mistake, inadvertence, surprise, or excusable neglect, and otherwise as prescribed by statute. No new trial shall be granted unless called for by substantial justice. Unsubstantial trial errors shall be ignored.

Stay of Proceedings

Enforcement of a judgment shall be automatically stayed for 10 days, except judgments for injunctions, appointment of receivers, or accounting in an action for infringement of patent. The court may order a further stay pending disposi-

tion of motion for new trial, or for other relief from a judgment. The court may suspend, modify or restore an injunction during the pendency of an appeal in an injunction case. An appellant, by giving a supersedeas bond at or after the filing of a notice of appeal or of procuring an order allowing an appeal, may obtain a stay, to be effective when the bond is approved. A further stay to prevent a lien upon property of the judgment debtor shall be granted if so provided by the state statute. The appellate courts may grant further stay in accordance with their rules.

Disability of Judge

A substitute judge may conduct the case after verdict is rendered in the event of death, sickness or disability of the trial judge.

Seizure of Personal Property

Remedies providing for seizure of personal property to secure satisfaction of a judgment, such as attachment and garnishment, shall be enforced according to the state statutes.

Injunctions

No preliminary injunction shall be issued without notice. No temporary restraining order shall be issued without notice unless it appears by affidavit or verified complaint that immediate and irrevocable damage will result if notice is given. The restraining order shall expire within not to exceed 10 days unless within that period an extension is granted or the adverse party consents to a longer period. If a restraining order is granted the motion for a preliminary injunction shall be set for hearing at the earliest possible time and shall take precedence. The adverse party, on two days' notice, may move to dissolve the restraining order. Neither the order nor the injunction shall issue without bond for payment of costs and damages. Each restraining order and injunction shall set forth the reasons for its issuance, be specific in terms and describe in detail the acts to be restrained. The rules regarding injunctions do not modify requirements of other statutes affecting employer and employee, actions of interpleader and actions to enjoin the enforcement of acts of Congress.

Receivers

The prevailing practice in receivership estates shall continue, except in matters of appeal.

Deposits in Court

A party may deposit in court money or any other thing capable of delivery, involved in the suit.

Offer of Judgment

At any time more than 10 days before the trial begins, any party may make a tender of the amount of money or property admitted to be due and thereby protect himself against costs if a judgment for a larger amount is not rendered.

Execution

Procedure on execution and in supplementary proceedings shall comply with the laws of the state, except as governed by Federal statutes. The judgment debtor may be required to submit to an examination by deposition.

Judgment for Specific Acts

The court may enforce, by contempt, attachment or sequestration of property the performance of a judgment for specific acts; or may enter judgment divesting title, which shall have the effect of a conveyance. A person not a party to an action may enforce obedience to any order of court in his favor by the same processes as if he were a party.

Appeals

Appeal to the Supreme Court shall be taken by petition for appeal accompanied by an assignment of errors. An appeal to the Circuit Court of Appeals shall be taken by filing with the District Court a notice of appeal. The clerk shall mail copies of the notice of appeal to all parties to the judgment, except appellant, or their attorneys. A bond of $250, or a different amount fixed by the court, for costs on appeal shall be filed with the notice of appeal, when required by statute. If a supersedeas bond is filed, no separate bond on appeal is required. The bond filed is subject to objections by appellee. If appellant desires a stay on appeal, he must present a supersedeas bond covering the amount of the judgment, costs, interest and damages for delay if the judgment is for money. If it is not for money the amount of the bond shall be sufficient to afford ample security to appellee. If a bond is not filed within the time specified, or is insufficient, an additional or amended bond may be filed by order of court. The surety's liability

may be enforced on motion, without an independent suit, by service of notice on the clerk. The record on appeal shall be filed in the appellate court and the case there docketed within 40 days from the date of the notice of appeal, unless further time is granted by order of court, not to exceed 90 days from the date of the first notice of appeal. Joint or several appeals may be taken.

Record on Appeal to a Circuit Court of Appeals

Promptly after an appeal is taken, the appellant shall serve upon the appellee, and file with the District Court, a designation of the portions of the record, proceedings and evidence to be contained in the record on appeal. Within 10 days thereafter the adverse party may serve and file a designation of additional portions. The appellant shall file with his designation two copies of the reporter's transcript, or portions thereof, and may be required, at his own expense, to file two copies of additional portions justly demanded by the appellee. The testimony of witnesses need not be, but may be, in narrative form. The statement of evidence may be supplemented by appellee. If the complete record, proceedings and evidence are not included, the appellant shall serve with his designation a concise statement of the points on which he intends to rely on appeal. All matter not essential to the decision of the questions presented on appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document shall be excluded. Documents shall be abridged by omitting irrelevant portions. The parties may stipulate as to the record on appeal. The clerk shall transmit to the appellate court a true copy of the matter designated by the parties, which shall always include the material pleadings, the verdict, findings of fact, conclusions of law, direction for entry of judgment, master's report, opinion, and judgment or part thereof appealed from, the notice of appeal, with date of filing, the designations or stipulations of the parties as to matter to be included in the record and any statement by appellant of the points on which he intends to rely. The matter so certified constitutes the record on appeal. The clerk shall transmit a copy of the record for use in printing if the appellate court so requires. The trial judge is not required to approve the record on appeal, but if differences arise between counsel he may settle the record, either

before or after the record is transmitted to the appellate court, which, itself, may provide for correction of the record. Original papers or exhibits may be transmitted to the appellate court for inspection when deemed necessary. The case may be docketed in the appellate court for preliminary hearings, such as a motion for dismissal, upon the clerk certifying to the appellate court copy of such portion of the record as is needed. When more than one appeal is taken, a single record on appeal may be used. In lieu of a record on appeal the parties may file a statement signed by them showing what they deem necessary to a decision of the questions involved.

District Courts and Clerks

The rules contain many provisions with reference to the details of handling the business of the court which are not of particular interest to the practicing attorney, except that the court may appoint an official stenographer, whose fees are to be fixed by the court and taxed as costs.

Applicability in General

The rules do not apply to certain designated special actions, such as proceedings in admiralty, arbitration, and labor controversies. Writs of scire facias and mandamus are abolished. The procedure set forth in the rules shall be adapted to suits removed from the state courts so far as practicable. The rules do not extend nor limit the jurisdiction of the District Courts. Each district judge may make rules that are not inconsistent with these rules.

Appendix of Forms

Attached to the printed rules are model forms of pleadings recommended by the Supreme Court which are so simple and concise that they should be followed in the handling of suits in the state courts as well as in the Federal courts.

Conclusion

The foregoing brief digest does not purport to state all of the detailed requirements of each rule but has been prepared as a general guide. There are 86 rules, covering 104 printed pages. To become thoroughly familiar with the rules and to be able to use them to the best advantage, it is necessary that the practitioner study them carefully.