Legal Aid Society
OF THE DISTRICT OF COLUMBIA
MAKING JUSTICE REAL

August 14, 2017

Via Electronic Mail to Laura.Wait@dcsc.gov

Ms. Laura M.L. Wait
Assistant General Counsel
Superior Court of the District of Columbia
500 Indiana Avenue, N.W., Room 6715
Washington, D.C. 20001

Re: Comments on Proposed Amendments to the Superior Court Rules of Procedure for the Small Claims and Conciliation Branch

Dear Ms. Wait,

The Legal Aid Society of the District of Columbia[1] ("Legal Aid") submits these comments on the proposed amendments to Superior Court Rules of Procedure for the Small Claims and Conciliation Branch ("Small Claims Rules").

The Superior Court Rules Committee ("the Committee") has proposed comprehensive amendments to the Small Claims Rules. A preamble to the present rules states that they are "current as of January 1, 2012" (although many of the rules were adopted much earlier). As a result of the passage of time, some of the current rules are obsolete and others are not consistent with current practice in the Small Claims Branch, especially with respect to the Wednesday debt collection calendar.[2] Legal Aid supports the Committee's effort to finally bring these long-needed rules amendments to fruition.

The Small Claims Branch is often thought of and referred to as a "people's court"—involving the disputes of individual plaintiffs and defendants, often without legal representation on either side of the case. But the Wednesday debt collection calendar, sometimes referred to as

[1] Legal Aid is the District's oldest and largest general civil legal services organization. Since 1932, Legal Aid lawyers have been making justice real in individual and systemic ways for persons living in poverty in the District. We have a special interest in promoting access to justice for District residents, including persons who engage the court as self-represented litigants.

[2] Since 2012, Legal Aid and Legal Counsel for the Elderly ("LCE") have had attorneys in court every Wednesday as part of the Consumer Law Court Based Legal Services Project, providing same-day advice and representation to eligible low-income defendants in consumer debt collection matters.

the "commercial calendar," has a completely different character. Cases on the debt collection calendar involve liquidated debts (e.g., credit card debt, consumer loans, medical debt, or debt related to rental housing) and may be filed by the original creditor or a purchaser or assignee of the debt. The debt collection calendar also includes actions for recovery by a subrogee—predominantly cases brought by auto insurers.[3] But no matter the type of case, all matters on the Wednesday debt collection calendar have one thing in common: the plaintiffs are corporate entities, and, as required by rule, they are all represented by counsel. Almost all defendants having matters on the Wednesday debt collection calendar, on the other hand, are unrepresented (except for those who retain counsel through legal services attorneys available in court).

The inherent power imbalance on the debt collection calendar between corporate plaintiffs represented by experienced counsel, on the one hand, and unrepresented individual defendants, on the other, presents special access to justice challenges and opportunities. For that reason, Legal Aid believes that the small claims rules should incorporate some provisions that apply specifically to the Wednesday debt collection calendar.[4]

These comments are organized into three parts: (A) comments regarding rule amendments that would provide necessary procedural protections and access to justice enhancements for the predominantly unrepresented defendants on the Wednesday debt collection calendar; (B) comments on other proposed amendments; and (C) comments on the proposed amendment to Small Claims Rule 2 (identifying issues relating to both over- and under-incorporation of specific Civil Rules in that rule).

A. Procedural and Access to Justice Enhancements for the Debt Collection Calendar

1. Rule 3 (Commencement of Actions)

Forms: The proposed amendment to Rule 3 would delete the current reference to specific Small Claims Forms as the required forms for small claims pleadings. Instead, the rule would state only that "pleadings must be in a form prescribed by the court" and that, as in the current rule, the "statement of claim must contain a simple but complete statement of the plaintiff's claim and be accompanied by a copy of any contract, promissory note, or other instrument on which the claim is based."

Legal Aid supports the deletion of the reference to specific small claims forms (many of which should be updated or otherwise revised). By removing the reference to particular forms from the rules, the court and clerk's office will have greater flexibility to make necessary updates

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[3] There is little to distinguish the debt collection and subrogation calendar in the Small Claims Branch from the debt collection and subrogation calendar in the Civil Actions Branch other than the jurisdictional amounts: up to $10,000 for small claims and over $10,000 in civil actions.

[4] There is direct precedent for this. Small Claims Rule 4 has long provided different time periods for effecting and filing proof of service in "actions seeking collection of a liquidated debt or recovery by a subrogee." Similarly, there is a special rule for debt collection and subrogation cases in the Civil Actions Branch. *See* Civil Rule 40-III.

to forms with the input of key stakeholders without going through the formal rules amendment process.[5]

Identification of original creditor: Many or most of the cases on the debt collection calendar are filed by debt buyers, i.e., companies that purchase pools of charged-off debt for pennies on the dollar. But the debt buyers that regularly file cases in the Small Claims Branch often do not identify the original creditor in the statement of claim itself. Instead, the identity of the original creditor and the status of the plaintiff as an alleged assignee of that creditor can only be determined (if at all) from a review of exhibits attached to the statement of claim.

Unrepresented defendants are often mystified when they see that they are being sued by a company whose name they do not recognize and with whom they had no prior relationship. There is a simple solution to this longstanding problem. For cases on the debt collection calendar, Rule 3 should require that the "simple but complete statement of the plaintiff's claim" filed by a plaintiff who is not the original creditor must identify the original creditor and identify the plaintiff as an assignee.

Prejudgment interest: Many cases on the debt collection calendar, including most cases filed by financial institutions on auto or other consumer loans, assert a claim for prejudgment interest under the contract or note on which the claim is based. These cases generally involve high interest rates that has been running for years. As a result, the amount of prejudgment interest that has accrued by the time of filing can approach or even exceed the outstanding principal amount. Yet rather than stating the actual *dollar amount* of prejudgment interest being claimed, many plaintiffs claiming prejudgment interest simply indicate in the statement of claim that they are seeking prejudgment interest at a certain rate from a certain date. Others state only that they are seeking prejudgment interest.

The lack of specificity regarding prejudgment interest can make the bottom line statement of the claim amount highly misleading to a defendant. The potential for harm is compounded when defendants go to mediation and reach settlements that require payment of accrued and accruing prejudgment interest without disclosure of the already accrued amount or of the fact that most of their installment payments under the settlement will be applied to interest.

For cases on the debt collection calendar, a plaintiff seeking prejudgment interest should be required to allege, in the statement of claim itself, the prejudgment interest rate, the date from

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[5] With regard to the debt collection calendar, two of the current small claims forms in particular are urgently in need of revision to enhance access to justice. First, the Statement of Claim form should be substantially revised. Among other things, the court should separate the summons portion of the form from the claim portion (thereby providing for a separate and more prominent summons as in all other branches of the Civil Division), provide additional space for the claim language itself, and update and clarify the Information for Defendants page. Second, as the Court of Appeals stated in *Wylie v. Glenncrest*, 143 A.3d 73, 86 n.21 (D.C. 2016), the form the Superior Court uses to notify defendants that a default has been entered and an ex parte proof hearing scheduled is difficult to understand and inappropriate for unrepresented parties.

which interest ran, and the dollar amount of prejudgment interest already accrued (using a date that is within 30 days of filing the action).

2. Rule 4 (Service of Process)

Rule 4 currently requires the plaintiff in actions seeking collection of a liquidated debt or recovery by a subrogee to effect service and file proof of service within 180 days of filing the complaint. The time limit is 60 days in all other cases. The proposed amendment to Rule 4 would reduce the 180-day time limit for cases on the debt collection calendar to 90 days. We strongly support that change. (Consistent with the pleading terminology dictated by Rule 3, however, the rule presumably should refer to the time from the filing of the "statement of claim" rather than the "complaint.")

Six months is an unduly long time period for effecting service. For statute of limitations purposes, the limitations "deadline" is the filing of the action and not the notice provided to the defendant from the later service of process. Because most actions on the debt collection docket are subject to a three-year statute of limitations, the additional six months allowed for notifying the defendant under the current rues is significant. Further, the proposed shorter time period will make it easier for all parties to address a dispute over whether the alleged service was effective and prevent cases from languishing on the docket.

3. Rule 5 (Pleadings)

Rule 5 states the important small claims principle that defendants are not generally required to file an answer. Rather, the only instance in which a defendant must file an answer is to assert a set-off or counterclaim. The Committee has proposed only stylistic revisions to the current rule.

For cases on the debt collection calendar only, we believe that plaintiffs should be required to file an answer to a counterclaim, as would be required in the Civil Actions Branch under Civil Rule 12(a)(1)(B). All plaintiffs on the debt collection calendar are represented by attorneys. Adding this requirement to Small Claims Rule 5 will therefore impose little burden on plaintiffs. Further, in many instances the defendants who file counterclaims have obtained counsel and the resulting counterclaims (which are not subject to a jurisdictional amount) are substantially more detailed than the original claim.

The amendment could read as follows: "In actions seeking recovery of a liquidated debt or recovery by a subrogee, the plaintiff must serve an answer to a counterclaim within 21 days after being served with the pleading that states the counterclaim."

4. Rule 12 (Proceedings by the Court)

Rule 12 addresses proceedings by the court. The proposed amendments would delete most of the current rule and organize the new rule into five subsections: (a) calling the calendar; (b) entry of a default when defendant fails to appear; (c) remedies when plaintiff fails to appear; (d) remedies when both parties fail to appear; and (e) conduct of the trial.

The proposed amended rule implicates important access to justice issues for the debt collection and subrogation calendar. These issues involve the call of the calendar, the entry of defaults and default judgments, and the "do substantial justice" principle stated in the conduct of the trial provisions. We address each of these in turn, with particular focus on what we see as the most important access to justice issue presented by the proposed amendments to the small claims rules: the default process described in subsection (b).

Subsection (a) (Calling the Calendar)

The Committee has proposed that subsection (a) state only the following: "After the judge or magistrate judge completes the introductory statement, the clerk must call the cases for that day to determine which parties are present." That statement may be appropriate for the regular small claims calendar, but it is not consistent with the longstanding and actual practice of the court on the Wednesday debt collection calendar.

On the debt collection calendar, rather than conducting a roll call as described by the proposed rule, the clerk determines which parties are present by checking the parties in *before* the judicial officer takes the bench and by giving late arriving parties other opportunities to check in. Eventually, after all the cases are called in which both parties or their representatives are present, the clerk calls the cases in which only one party has appeared.[6] This process works well and should be continued.

More fundamentally, though, we believe that a separate subsection of the rule could be employed to describe other key elements of the call of cases for initial hearings on the debt collection calendar. (Some of the following suggestions also may apply to the calendar of initial hearings on other days.)

On Wednesdays, the call of the calendar at 9:00 a.m. is principally directed to initial hearings (and secondarily to continued initial hearings and ex parte proof hearings) for which both parties are present. (Motions are scheduled for 10:30 a.m.) There are at least three process points concerning initial hearings that should be incorporated into a new subsection of Rule 12 (either as a separate subsection applicable to the debt collection calendar or, as appropriate, a generally applicable subsection):

- Each party will be asked to consent to having the case heard by a magistrate judge (and the consequence of non-consent);

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[6] One of the regular substitute magistrate judges uses a variation of this system in which certain preliminary matters that can be disposed of quickly are heard first, prior to the morning announcement and the call of cases scheduled for initial hearings.

- For cases before the court on initial hearings or continued initial hearings, each case will be immediately referred to a private mediation conducted by a Multi-Door mediator;[7]

- If the mediation does not result in a settlement, the court ordinarily sets a trial date (unless a continuance of the initial hearing is obtained by consent or granted for good cause).

Regarding continuances, it is important that the rule recognize that there may be good cause for scheduling a continued initial hearing or status hearing rather than setting the case for trial on the next available trial date. For the debt collection calendar, good cause would typically include a defendant's desire to secure counsel or to give newly retained legal services counsel an opportunity to investigate the case or the need for formal or informal discovery, either for trial or to facilitate a second mediation.

Subsection (b) (Entry of a Default When the Defendant Fails to Appear)

Although the small claims rules incorporate Civil Rule 55 (Default; Default Judgment), the small claims approach to defaults has long differed from the approach generally used in civil actions because it allows both a default and a default judgment to be entered in one step on the date set for a defendant to appear for an initial hearing. In contrast, Rule 55 provides a two-step process for the entry of a default judgment in which the entry of a default is followed by notice to the defendant and entry of a default judgment (if at all) only at a later date.[8] This two-step process also applies to the debt collection and subrogation calendar established under Civil Rule

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[7] Despite the centrality of first-day mediation to the entire small claims system, there is currently no reference to mediation in the small claims rules or in the proposed amended rules. The proposed deletion of the Conciliation Rules (due to the establishment of the Multi-Door Division) makes it especially important that this point be clarified in the rules.

[8] First, a "default" is entered under Rule 55(a) and the defendant is notified of the default order by the clerk's office. That default "will not take effect until 14 days after the date on which it is docketed and must be vacated if the court grants a motion filed by defendant within the 14-day period showing good cause why the default should not be entered." Second, in most cases, the plaintiff must then file a motion for a default judgment under Rule 55(b)(2), requesting the setting of an ex parte proof hearing (with another notice to defendant issued by the clerk's office). As a result, the defendant receives a mailed notice from the clerk's office when the default is entered and receives another notice when an ex parte proof hearing is scheduled.

40-III,[9] and to the relatively new high-volume calendar established for judicial foreclosure actions.[10]

In the Small Claims Branch, by contrast, current Rule 11 describes a one-step default judgment process in which, under certain conditions, the clerk immediately enters a default judgment in the amount of any liquidated damages based on the defendant's failure to appear at the initial hearing. The clerk is to do so if: (1) the defendant or a representative does not appear; (2) "there is no question as to the validity of service"; and (3) the plaintiff does not seek attorneys' fees. If those conditions are not present or if the plaintiff is requesting damages that are not liquidated, only a default is entered and the matter is scheduled for ex parte proof.

The current practice, however, is somewhat different from what is stated in the rule. First, only the court (and not the clerk) determines whether a default or default judgment can be entered. Second, the court distinguishes between cases in which the defendant was served by substitute service and cases in which the defendant was served personally. Cases involving substitute service are routinely set for an ex parte proof hearing (with the clerk providing notice of the default and hearing to the defendant). This approach may be based on the presumption that substitute service cases inherently raise a question about the validity of service. If the defendant appears at the ex parte proof hearing, the court generally vacates the default.

Under the proposed amendments to the small claims rules, the default coverage would be removed from Rule 11 (Preliminary Proceedings), substantially revised, and transferred to Rule 12 (Proceedings by the Court). The new default rule would appear in Rule 12(b). Apart from stylistic revisions, the new rule would maintain condition (1) above; revise condition (2) to state "the court determines that proper service was made on the defendant;" delete condition (3); and add a new condition (that plaintiff has submitted a Servicemembers Civil Relief Act form).

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[9] Although subject to a two-step default judgment process, cases on the Civil Actions Branch debt collection calendar differ from other civil actions in another respect. In other civil actions, the clerk's office automatically schedules an initial scheduling conference upon the filing of a complaint and issuance of a summons. On the civil actions debt collection calendar, however, an initial scheduling conference is not scheduled unless and until the defendant responds to the complaint. Legal Aid has proposed an amendment to Rule 40-III that would require cases on the debt collection calendar to be scheduled for an initial scheduling conference at the outset of the case, consistent with other civil actions. *See* Legal Aid Comments to Proposed Amendments to the Superior Court Rules of Civil Procedure, Nov. 28, 2016.

[10] On the judicial foreclosure calendar, the court initiated a further procedural enhancement, serving as a model for other calendars. That enhancement involves the court maintaining the initial hearing on the court's calendar even when a defendant does not timely file a response to the complaint, resulting in the issuance of a default by the clerk's office. Rather than vacating the initial hearing, the court sends an enhanced notice of default encouraging the defendant to come to the initial hearing. The enhanced court notice and opportunity for defendants to appear for a hearing has resulted in volumes of homeowners being able to participate in their court cases (and in many cases, save their homes) who otherwise would have likely lost their homes to foreclosure by default judgment.

The current default rule, the proposed amendments to the rule, and current practice all recognize that there should be a two-step default judgment process that gives the defendant another opportunity to appear whenever there is doubt as to the validity of service. Legal Aid believes that the rule should require a two-step process in *all* cases on the debt collection calendar, without regard to the apparent validity of service based on the affidavit of service. Scheduling an ex parte proof hearing and mailing the defendant notice of the default and hearing date and time substantially increase the chances that a defendant will receive *actual* notice of the case and appear at the next hearing.

We recognize that plaintiffs' counsel may prefer a faster track to default judgments. But the importance and benefits of our suggested approach are strongly supported by what many of us have consistently observed in small claims and on the judicial foreclosure calendar for several years: (1) some defendants are not getting actual notice of their cases, despite affidavits alleging personal service; (2) defendants often do not receive actual notice of the case where there is substitute service; and (3) when defendants receive a mailed notice directly from the court with clear instructions telling them where and when to come to a hearing, they often do.[11]

For these reasons, Legal Aid recommends that subsection (b)(2) of proposed Rule 12 be revised to create a different approach for cases on the debt collection calendar with related revisions in proposed subsections (b)(1) and (b)(3) as follows:

> (1) *In General. Except as provided in subsection (b)(2), when the plaintiff . . . .*
>
> (2) *Actions for Collection and Subrogation.*
> In actions seeking collection of a liquidated debt or recovery by a subrogee, the court will enter only a default subject to ex parte proof. Unless the plaintiff requests a longer period, the ex parte proof hearing will be scheduled to take place approximately 30 days after the entry of default.
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> (3) *Actions for Property Damage.*
> . . .

Subsection (e) (Conduct of the Trial)

Subsection (e) of the revamped Rule 12 would continue to state the "do substantial justice" principle that has long been incorporated in the small claims rules. The amended rule would state (in language similar to the current language): "The court must conduct the trial in a manner that does substantial justice between the parties according to the rules of substantive law and is not bound by the provisions or rules of practice, procedure, pleading, or evidence, except the provisions relating to privileged communications." As a practical matter, judges presiding in

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[11] Based on Legal Aid's informal analysis of small claims debt collection cases in 2016, approximately 19% of defendants against whom defaults were initially entered were able to avoid a default judgment as a result of the two-step process (either by appearing for the ex parte proof hearing and getting the default vacated, or by resolving the case with the plaintiff in advance of the ex parte proof hearing).

small claims apply this admonition more broadly to all proceedings in the branch, including contested motions, and not just the trial itself.

Legal Aid acknowledges the practical and other benefits of applying this "do substantial justice" principle in small claims. It is important, however, that in applying this principle the court consider whether, in the typical two-party case, one, both, or neither party is represented by counsel. Where neither party is represented by counsel (as is often the case on the "people's court" calendar), conducting the proceedings without being bound by the rules of practice, procedure, pleading, or evidence is fully warranted. Conversely, where both parties are represented by counsel, the interests of justice may be better served by holding the parties to something closer to the usual rules of practice, procedure, and evidence. The most difficult situation for the court is where only one party is represented, as is generally the case on the debt collection calendar. In those circumstances, doing substantial justice may require the court, consistent with the Code of Judicial Conduct and the Strategic Plan of the District of Columbia Courts, to make special accommodations for the unrepresented party as to all procedural matters. *See generally Wylie v. Glenncrest*, 143 A.3d 73, 86 n.21 (D.C. 2016) (citing Rule 2.6 and the Comment to Rule 2.6 of the Code of Judicial Conduct and Goal 2, Part B of the Strategic Plan of the DC Courts, 2013-2017).

For these reasons, we urge the Committee to include, either in the rule itself or in an official comment to the rule, a statement of this nature: "In applying the substantial justice objective stated in this rule, the judge or magistrate judge should consider whether the parties are represented by counsel and whether one or more parties is so represented while others are not."

B. Other Comments on the Proposed Amendments

1. Rule 4 (Service of Process)

The proposed amendment to Rule 4 substantially reorganizes and revises the rule. We noted our support for the change in time period to effect service for liquidated debt and subrogation cases in Part A, above. Another, more subtle change in practice proposed by the Committee is the deletion of qualification requirements for process servers. Currently, Small Claims Rule 4 imposes two requirements in addition to the civil rule requirement that the process server be at least 18 years of age and not a party or otherwise interested in the claim: (1) the person must be a bona fide resident of or have a regular place of business in the District; and (2) the person must be "specially appointed by the judge or approved by the Clerk . . . ." The proposed amendment would eliminate both of these requirements.

Legal Aid supports this revision as a matter of policy, given that the qualification requirements as currently implemented fail to provide meaningful protections against problematic process servers.[12] The best way to address the continuing problem of process servers who falsify affidavits of service (or claim valid substitute service without inquiry into the

[12] Elimination of the appointment requirement, however, could be at odds with D.C. Code § 16-3902(a), which states that process in the Small Claims Branch must be served by the United States marshal or "by a person not a party to or otherwise interested in the action especially authorized by the Clerk of the Small Claims and Conciliation Branch or appointed by the judge for that purpose."

residence of the person served) is for the court to impose sanctions when those issues are identified in individual cases.

That said, amended Rule 14 (Costs) continues to refer to the expense of service by persons "specially appointed by the court or approved by the court" as an expense that is not taxable as a cost. Consistent with the amendment to Rule 4, that rule should be amended to state that the expense of private process servers is not taxable as a cost.

Finally, in conforming Small Claims Rule 4 to Civil Rule 4, the Committee may have inadvertently failed to delete the word "house" from the phrase "dwelling house or usual place of above" in subsection (e)(2)(B) consistent with recent revisions to the civil rule and the federal rule on which it is based.

2. Rule 6 (Jury Demand)

The small claims rules provide for cases to be heard by the Civil Actions Branch in two distinct circumstances: (1) when a party demands a jury trial under Rule 6; and (2) when a case is certified to that branch "in the interests of justice" under Rule 8. In addition, Civil Rule 73(a) requires that parties consent to having a civil case heard by a magistrate judge.[13] In the absence of such consent by either party, a small claims action is heard by an associate judge but proceeds under the small claims rules in the Small Claims Branch.

Under the current rules, only a Rule 8 referral to the Civil Actions Branch is classified as a "certification." Rule 6 does not use the words "certified" or "certification" (although Rule 10 does, in addressing discovery in jury cases). Under the proposed amendments, both Rules 6 and 8 would refer to their respective referrals to the Civil Actions Branch as a certification. This introduces an ambiguity that should be clarified. Currently, and under the proposed amendments, the rules state expressly that certifications under Rule 8 proceed under the Superior Court Rules of Civil Procedure (rather than the small claims rules). The absence of such a statement in Rule 6 currently suggests that, apart from the jury trial procedures themselves and the requirement for filing an answer, the case continues to proceed under the small claims rules. That interpretation is supported by a statement in Rule 10 that the small claims discovery rule applies to cases certified to the Civil Actions Branch for a jury trial.

We recommend that Rule 6 be clarified to state expressly that cases certified to the Civil Actions Branch for a jury trial continue to proceed under the small claims rules so far as practicable. We also recommend that Rule 12 on proceedings by the court include a reference to the consent process under Civil Rule 73(a).

3. Rule 7 (Trials)

This rule has been substantially revised to address only the topic of trials. As such, it is now out of place in the sequence of the rules. The more logical place for the rule as amended would be following Rule 12, addressing proceedings by the court at the initial hearing and

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[13] Civil Rule 73(a) is incorporated in the small claims rules by Rule 2, but there are no other mentions of the consent requirement or the consequence of non-consent in the small claims rules.

conduct of the trial. If the Committee accepts this recommendation, subsection (e) of Rule 12 addressing conduct of trials should be combined with what is now Rule 7 as a new Rule 13.

4. Rule 8 (Certification to the Civil Actions Branch)

The only non-stylistic change to Rule 8 is the proposed deletion of the statement that certified actions under this rule proceed under the Superior Court Rules of Civil Procedures. The rationale for the deletion is that the same statement appears in Rule 1.

We recommend that the redundancy instead be resolved by deleting the statement in Rule 1 (where it will likely be overlooked) and maintaining here (where it likely won't be).

More important, both the current and amended rule are unclear as to how a request for certification is to be made, and to whom. We recommend that the matter be clarified with the addition of this provision: "A party requesting certification under this rule must file a motion in the Small Claims and Conciliation Branch showing good cause for the certification. The clerk will refer the motion to the Presiding Judge of the Civil Division."

5. Rule 11 (Preliminary Proceedings)

Currently, Rule 11 addresses preliminary proceedings by the clerk and Rule 12 addresses both proceedings by the court and the conduct of trial. With regard to Rule 11, the proposed amendment would strike most of the current rule and substitute this statement: "At the beginning of each session of the court, the judge or magistrate judge must make an introductory statement approved by the Chief Judge or his or her designee that describes the procedures and legal framework regarding cases."

Given the proposed amendments to both Rules 11 and 12, there is no longer any reason to maintain Rule 11 as a separate rule. Instead, the remaining sentence in Rule 11 should be incorporated into Rule 12 so that all preliminary proceedings, the conduct of initial hearings, and the default rules are all addressed in one place. As previously noted, we would also move the subsection of Rule 12 addressing the conduct of trials to a new rule addressing all matters related to trials.

With regard to the new introductory statement sentence in subsection (a), Legal Aid supports including the requirement for a pre-approved introductory statement in a rule. An approved script for the morning announcement (as it is generally called) is necessary when a session of court is presided over by a substitute judge rather than the regularly assigned judge. Further, a scripted announcement can be translated into other languages and made available to non-English speakers. It also ensures that the announcement does not inadvertently omit an important element.

We recommend that the proposed sentence be revised to make clear that the court will employ two different introductory statements, one for the "regular" small claims calendar and the other for the Wednesday debt collection calendar. This is necessary both because the nature of the cases on the debt collection calendar is materially different than on the regular calendar and because all plaintiffs on the debt collection calendar are represented while almost all defendants are not.

6. Rule 13 (Motions and Applications)

Legal Aid supports the substantive changes to Rule 13 on motions, which are summarized in the official comment. We have two suggestions. First, the new subsection addressing funds exempt from attachment would be better placed in a separate rule (in which case this rule could be titled "Motions" and the separate rule could be titled "Applications Regarding Exempt Funds"). Second, the Committee is currently considering a substantial amendment to Civil Rule 69-I addressing non-wage attachments. Among other things, that proposed rule would address the responsibilities of financial institutions regarding deposits of government benefits that are exempt from attachment by law. Because of the close relationship between this proposed small claims rule and proposed Civil Rule 69-I, we suggest that a reference to Civil Rule 69-I be placed in this rule.

7. Rule 13-I (Motions and Discovery in Cases Certified to the Civil Actions Branch)

As noted above in connection with Rules 6 and 8, there is some potential for confusion regarding what procedures apply to certifications to the Civil Actions Branch under Rule 6 versus Rule 8. The proposed amended title of this rule (which uses the word "Certified" instead of "referred" as in the current rule) could add to that confusion. We recommend changing the title to: "Motions and Discovery in Cases Certified to the Civil Actions Branch *for Jury Trial*." Alternatively, the Committee could consider reserving the use of the word "certified" to what happens under Rule 8 (as the only instance in which the case proceeds under the general civil rules) and continue to use the word "referral" with regard to jury matters and non-consents to having a case heard by a magistrate judge.

8. Rule 14 (Costs)

As noted in our comments on Rule 4, subsection (a)(2) of this rule on service or process costs continues to refer to expenses of a process server specially appointed by the court or approved by the clerk although the special appointment process is proposed for elimination in Rule 4. Assuming that change in Rule 4 is maintained, this rule should be revised to refer to the costs of a private process server as non-taxable (consistent with current practice).

9. Rule 15 (Judgment)

The Committee has proposed a new subsection (d) requiring all requests for entry of judgment by confession or consent to be submitted to the court. Legal Aid strongly supports that important addition to the rules.

10. Rule 16 (Installment Payment of Judgments)

The proposed amendments to Rule 16 (formerly Rule 17) are stylistic. Legal Aid urges the Committee to consider a further, substantive amendment to this rule. As currently formulated, subsection (a) merely states what the clerk is to do "[w]hen a judgment is ordered paid in installments." But the rule does not state how or on what basis a judgment can be paid in installments, nor does it address the procedure for requesting installment payments. Similarly, although the rule refers to "the stay of execution" that would be vacated if the judgment

defendant defaults on the installment payment obligation, there is nothing in the rule regarding the right to such a stay or how to obtain that stay in the first place.

Fortunately, the D.C. Code provides a clear basis (if not an imperative) for expanding the rule to address these matters. A longstanding statute governing proceedings in the Small Claims Branch addresses installment payment of small claims judgments, stays of *execution* to facilitate installment payments, and stays of the *entry* of judgment when installment payments are ordered. That provision, titled "[j]udgment; stay; installment payments; enforcement," states:

> When judgment *is to be rendered* in an action pursuant to this chapter and the party against whom it is to be entered requests it, the judge shall inquire fully into his earnings and financial status *and may stay the entry of judgment, and stay execution,* except in cases involving wage claims, and order partial payments in such amounts, over such periods, and upon such terms, as seems just in the circumstances and as will assure a definite and steady reduction of the judgment until it is finally and completely satisfied. Upon a showing that the party has failed to meet an installment payment without just excuse, the stay of execution shall be vacated. When a stay of execution has not been ordered or when a stay of execution has been vacated as provided by this section, the party in whose favor the judgment has been entered may avail himself of all remedies otherwise available in the Superior Court of the District of Columbia for the enforcement of the judgment.

D.C. Code § 16-3907 (emphasis added). The statute requires a process that can be initiated by a small claims defendant when judgment "is to be rendered," but before actual entry of judgment. At that point, the defendant can request a stay of entry of judgment and a stay of execution of judgment to facilitate installment payments, all on such terms as are just in the circumstances and only after inquiry into the defendant's "earnings and financial status."

The statute confers important rights on small claims defendants. Avoiding the life-disrupting impact of post-judgment execution procedures and the impact on a defendant's credit record from entry of a judgment are extremely significant, especially for defendants facing commercial creditors on the debt collection calendar. But the statute is balanced. The judgment creditor obtains the benefit of receiving payments satisfying the judgment without having to resort to post-judgment remedies. And the statute provides further balance by making clear that the stay of execution must be vacated when a party fails to make a payment without just excuse.

For these reasons, we ask the Committee to consider revamping subsection (a) of this rule to reference the underlying statute and to identify the process by which a defendant can seek an order providing for a stay of entry of judgment, a stay of execution, and installment payments.

11. Rule 18 (Attorney's Fees)

Rule 18, both current and as amended, addresses the award of attorney's fees. The rule seems to presume that attorney's fees can be awarded only to a plaintiff (and then only to a

plaintiff who has a right to attorney's fees under a contract). As amended, it would begin with this phrase: "Attorney's fees are not awarded in an action in this branch unless the *plaintiff's attorney* (1) provides the court the *instrument or agreement* on which the claim for attorney's fees is based. . . ." (Emphasis added.) Of course, there are other circumstances in which a party (plaintiff or defendant) could be entitled to attorney's fees. For example, a defendant may be entitled to an award of attorney's fees where he or she has prevailed on a counterclaim under a fee shifting statute. Other circumstances include Rule 11 motions or attorney's fees awarded as sanctions. The rule should be amended to clarify that it is addressing only the award of attorney's fees to a plaintiff under an instrument or agreement. The title of the rule could be amended to: "Award of Attorney's Fees to a Plaintiff Under an Instrument or Agreement."

C. Comments on Rule 2 Incorporations

The Committee has proposed substantial revisions to Rule 2, in part to specifically list the applicable civil rules with roman numeral designations (changing the prior approach under which all references to a particular civil rule included the –I, II, III, etc. extensions of that rule). Other changes may have been prompted by the recent renumbering of certain civil rules.

Legal Aid believes that Rule 2 as amended is both under- and over-inclusive in certain respects, i.e., it does not incorporate certain civil rules that should be incorporated and incorporates others that should not be incorporated. We address each in turn.

1. Under-Incorporation Issues

Civil Rule 7-I (Stipulations): Before the recent comprehensive revisions to the civil rules, this rule was in Civil Rule 43-III. That rule was incorporated into the small claims rules via current Rule 2, but amended Rule 2 does not refer to Civil Rule 7-I. There is no reason not to continue to incorporate this rule.

Civil Rule 12 (Defenses and Objections, etc.): Consistent with our proposed revision to Small Claims Rule 5 requiring answers to counterclaims filed on the debt collection and subrogation calendar, Civil Rule 12(a)(1)(B) should be added to the incorporated provisions of Rule 12.

Civil Rule 63-I (Bias or Prejudice of a Judge or Magistrate Judge): This rule is currently incorporated into the small claims rule via Rule 2's reference to Rule 63. But amended Rule 2 does not refer to Rule 63-I, meaning that it would now be excluded. There is no reason not to continue to incorporate this rule.

Civil Rule 65 (Injunctions and Restraining Orders): This rule is currently incorporated in the small claims rules via Rule 2. The amendment would delete the incorporation. Although the Small Claims Branch's jurisdiction is limited to claims for money damages, that does not mean that it has no power to grant equitable relief. Once the branch has jurisdiction over a properly filed claim for money damages, like most courts of law, it can and should exercise equitable powers in appropriate circumstances (which is an entirely different matter from the threshold question of jurisdiction). We note that Rule 2, both currently and as proposed, would incorporate the civil declaratory judgment rule, even though a declaratory judgment provides a form of relief distinct from money damages.

Civil Rule 81(d) (Law Applicable): This rule addresses the applicability of state and federal law by defining terms. It should apply in the Small Claims Branch.

2. Over-Incorporation Issues

Civil Rule 14(a)(2) (Third-Party Defendant's Claims and Defenses): Small Claims Rule 2 (current and as amended) incorporates the entirety of Civil Rule 14 on third-party practice. Embedded in that rule is a compulsory counterclaim requirement applicable to third-party defendants. Because the small claims rules do not incorporate Civil Rule 13 (and hence there are no rules-based compulsory counterclaims for defendants in small claims), the small claims rule should not make counterclaims compulsory for third-party defendants either. Further, the small claims rules do not incorporate any other aspects of counterclaim and crossclaim practice under Civil Rule 13 with regard to defendants. Therefore, Civil Rule 14(a)(2), which carries those matters over from Rule 13 with regard to third-party practice, should not be incorporated in the small claims rules for third-party defendants.

Civil Rule 16-I (deleted): This former civil rule has been deleted and should no longer be referenced in Small Claims Rule 2.

Civil Rule 55(a) and (b) (Entering a Default; Entering a Default Judgment): These provisions describe a process for entering defaults and default judgments that is inconsistent with the way defaults are handled in the Small Claims Branch. Under the proposed amendments to Small Claims Rule 12, the small claims default process would be addressed in a new subsection of the rule in a comprehensive fashion. Other subsections of Civil Rule 55 would have applicability in small claims.

Civil Rules 64 and 64-I (Seizing a Person or Property; Attachment Before Judgment): These are pre-judgment attachment rules. The circumstances in which it would be appropriate to seek pre-judgment attachment in small claims would be exceedingly rare and it should not be allowed in an action on the debt collection and subrogation calendar. We recommend that the references to these rules be deleted.

Civil Rule 71-I (Condemning Real or Personal Property): This is primarily an eminent domain rule that should not apply in the Small Claims Branch, which lacks authority to hear actions affecting an interest in real property. *See* D.C. Code § 11-1321.

Civil Rule 71.1-I (Proceedings for Forfeiture or Property): Because proceedings under this rule would not involve a claim for money damages, the Small Claims Branch would not have jurisdiction.

Conclusion

Legal Aid appreciates the Committee's consideration of these comments and recommendations. We would welcome an opportunity to make a presentation to the Committee on these matters, especially as to the access to justice objectives that inform these comments.

Sincerely,

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