EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

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Implementing E-Government Act

The Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules submitted proposed uniform language for an amendment to Appellate Rule 25, and for new Bankruptcy Rule 9037, new Civil Rule 5.2, and new Criminal Rule 49.1 with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments and new rules implement the privacy and security provisions of § 205 of the E-Government Act of 2002 (Pub. L. No. 107-347, as amended by Pub. L. No. 108-281), governing electronic filings in federal court. The amendments and rules were published for public comment for a six-month period. The scheduled public hearings were canceled because only one witness requested to testify. That witness testified at the Committee's January meeting with the chairs of the advisory committees present.

The proposed package of amendments and new rules is derived from the privacy policy adopted by the Judicial Conference in September 2001 to address concerns arising from public access to electronic case filings (JCUS-SEP/OCT 01, pp. 52-53). The Conference policy requires that documents in case files generally be made available electronically to the same extent that they are available at the courthouse, provided that certain "personal data identifiers" are redacted in the public file, including the first five digits of a social-security number, the name of a minor, and the date of a person's birth.

In accordance with the Act's call for uniformity, the proposed new rules are identical in many respects. For example, certain pre-existing records of administrative, agency, and state-court proceedings and pro se habeas corpus filings are exempted from the redaction requirement under each of the proposed rules. Under another uniform provision, a court may, for good cause, authorize redaction of information in addition to personal identifiers or limit a nonparty's remote electronic access to documents to safeguard privacy interests. Each proposed rule also permits the filer of a document to elect not to redact the filer's own personal-identifier information, waiving the rule's protections.

There are a few differences in the proposed rules to account for factors unique to each set of rules. Proposed Civil Rule 5.2 specifically limits remote access to social security and immigration electronic case filings. The Social Security Administration and Department of Justice asked the advisory committee to give special treatment to these cases due to the prevalence of sensitive information and the volume of filings. Remote electronic access by nonparties is limited in these cases to the docket and the written dispositions of the court unless the court orders otherwise. Proposed new Criminal Rule 49.1 permits the partial redaction of an individual's home address and an exemption from redaction for certain information needed for forfeitures. Additional filings are exempted from the redaction requirement, including arrest and search warrants, charging documents, and documents filed before the filing of a criminal charge. Proposed Bankruptcy Rule 9037 uses several different terms consistent with terms used in the Bankruptcy Code. It also requires disclosure of the full names of a debtor, even if a minor. New Appellate Rule 25(a)(5) would apply the privacy rule that had applied to the case below to govern in the case on appeal.

The Committee on Court Administration and Case Management raised a concern during the public-comment period that remote electronic access to an indictment might jeopardize the

safety of the foreperson signing it. Under Criminal Rule 6(c), the foreperson must sign all indictments, and under Rule 6(f) an indictment must be returned in open court. No empirical data has been presented showing added risks to forepersons whose signatures on indictments have been publicly available. Such evidence as there is suggests that forepersons have not been subject to threat because the indictment has been part of the public case file. Nor is an easy practical administrative solution apparent to redact a foreperson's name from the record. For these reasons and because the advisory committee determined that redaction of the foreperson's name would raise sensitive policy questions about the public nature of criminal proceedings, the advisory committee decided that the issue requires further careful study. The advisory committee will undertake this study promptly. However, the advisory committee decided that the study should not delay proceeding with the proposed new rule. The Committee on Court Administration and Case Management approves of this approach to this issue.

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FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules completed a comprehensive "style" revision of the Civil Rules and the Forms. The revisions are the third set in the project to make "style" revisions to the Federal Rules of Appellate, Criminal, and Civil Procedure to clarify and simplify them without changing their substantive meaning.

The advisory committee submitted four separate sets of proposed amendments to the Civil Rules and Illustrative Forms related to the style project. The first set is the proposed style only amendments to Rules 1 to 86. The second set is a small number of proposals for minor technical amendments that were noncontroversial, made clear improvements, but arguably changed substantive meaning. These "style/substance" changes were approved separately from the restyled rules, to become effective at the same time. The third set is proposed style changes

to the Civil Rules amendments due to take effect on December 1, 2006 – new Rule 5.1, amended Rule 50, and the amended rules involving electronic discovery – to make them consistent with the comprehensive style revisions. Finally, the advisory committee proposed a comprehensive revision of the Illustrative Forms consistent with the style conventions followed in the amended rules.

The Process Used in the Style Project

The work to make the Criminal, Appellate, and Civil Rules clearer, simpler, and easier to understand began in 1992. A nationally recognized legal-writing scholar prepared drafting guidelines to serve as a common set of style preferences and conventions and prepared a first draft of the restyled Civil Rules using those guidelines. The then-chair of the advisory committee refined the draft. The work on the Civil Rules was deferred while the Criminal Rules, then the Appellate Rules, were successfully revised using the uniform drafting guidelines. The improvement in the rules resulting from the style revisions led the advisory committee to return to the work on the Civil Rules.

The advisory committee and the Committee set up a procedure that required repeated and numerous levels of review to ensure that the style revisions were as clear as possible without changing substantive meaning. The Committee appointed a style subcommittee to work with a prominent legal-writing scholar and a consultant to review the style revisions. The style subcommittee members analyzed the implications of every proposed change. Three law professors recognized as leading experts in civil procedure – including the advisory committee's reporter, Professor Edward Cooper – reviewed, researched, and revised, providing a reliable basis for the many drafting decisions the project required. The revised draft was submitted to the advisory committee, which divided itself into two subcommittees to subject the proposed style revisions to further study before they were presented to the full advisory committee for review.

This process occurred before the proposed style amendments were published for comment and was repeated to revise and refine the proposals in light of the comments received. The process took two and half years and produced more than 750 documents.

The proposed style rule amendments and the minor, technical "style/substance" amendments were published in February 2005 for approximately ten months for public comment; the proposed style amendments to the forms were published in August 2005 for approximately six months. In addition, copies of the proposed revisions were sent to all major bar groups, including liaisons from each state bar association. Major bar organizations, including the American College of Trial Lawyers and the American Bar Association provided substantial input, both before and after the proposals were formally published. Approximately 25 comments were submitted in the public comment period on the proposed Civil Rules style revisions. Two public hearings were cancelled because no one asked to testify. A third scheduled public hearing on the proposed rules amendments was held at which two witnesses spoke on behalf of a group of practitioners and academics who had reviewed the entire set of revised Civil Rules.

Most of the comments received from the bench, bar, and public were favorable and included some very helpful suggestions that further improved the revisions. Some members of two groups that studied the proposed amendments raised concerns that the changes might create inadvertent substantive changes and would generate satellite litigation. The advisory committee did not view this as a significant problem in light of the extensive work to identify and avoid substantive changes, the fact that the meaning of the rules is inevitably dynamic, and the likelihood that the improvement in simplification and clarity would reduce rather than foment "satellite litigation." Two individuals expressed a concern that the style amendments might supersede any conflicting statutory provisions in effect when the amendments became effective.

The advisory committee studied this issue carefully, noting that this had not been a problem when the Criminal and Appellate Rules were "restyled," concluded that the supersession concern did not raise a significant problem for the Civil Rules style amendments, and recommended a revision to Rule 86 to make the absence of any supersession effect clear.

The Drafting Approaches Used in the Style Project

The style project is intended to clarify, simplify, and modernize expression, without changing the substantive meaning of the Civil Rules. To accomplish these objectives, the advisory committee used formatting changes to achieve clearer presentation; reduced the use of inconsistent and ambiguous words; minimized the use of redundant words and terms; and removed words and terms that were outdated.

Formatting changes made the dense, block paragraphs and lengthy sentences of the current rules much easier to read. The advisory committee broke the rules down into constituent parts, using progressively indented paragraphs with headings and substituting vertical for horizontal lists. These changes make the structure of the rules graphic and make the rules clearer, even when the words are unchanged.

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. The seventy years of adding new rules and amending rules led to inconsistent words and terms. For example, the present rules use "for cause shown," "upon cause shown," "for good cause," and "for good cause shown"; the rules also use "costs, including reasonable attorney's fees"; "reasonable costs and attorney's fees"; "reasonable expenses, including attorney's fees"; and "reasonable expenses, including a reasonable attorney's fee." Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistency by using the same words to express the same meaning. For example, consistent expression was achieved by changing "infant" in many rules

to “minor” in all the rules; from “upon motion or on its own initiative” and variations to “on motion or on its own”; and from “deemed” in some rules and “considered” in other rules to “considered” in all rules. Some variations in expression were carried forward when the context made it appropriate to do so. For example, the words “stipulate,” “agree,” and “consent” appear in different rules, and “written” qualifies these words in some rules but not others. The advisory committee reduced the number of variations but at times the former words were carried forward to avoid changing substantive meaning. A chart containing the advisory committee’s resolution of inconsistent phrases that recur throughout the rules is attached to the text of the proposed restyled rules.

The restyled rules also minimize the use of inherently ambiguous words. For example, the word “shall” can mean “must,” “may,” or “should,” depending on context. The potential for confusion is exacerbated by the fact that “shall” is no longer generally used in spoken or clearly written English. The restyled rules replace “shall” with “must,” “may,” or “should,” depending on which one the context and established interpretation make correct in each rule.

The rules have numerous “intensifiers,” expressions that might seem to add emphasis but instead state the obvious and create negative implications for other rules. For example, some of the current rules use the words “the court may, in its discretion.” “ May” means “has the discretion to”; in its discretion is a redundant intensifier. The absence of intensifiers in the restyled rules does not change their substantive meaning.

Outdated and archaic terms and concepts were removed. For example, the reference to “at law or in equity” in Rule 1 has become redundant with the merger of law and equity. The references to “demurrers, pleas, and exceptions” in Rule 7(c) and to “mesne process” in Rule 77(c) are clearly outdated and have been removed from the style rules.

A number of redundant cross-references were also removed. For example, several rules include a cross-reference to Rule 11, which is unnecessary because Rule 11 applies by its own terms to "every pleading, written motion, and other paper."

The advisory committee declined to make more sweeping changes to the rules that might have resulted in improvements but would have burdened the bar and bench. The advisory committee did not change any rule numbers, even though some of the rules might benefit from repositioning. Although some subdivisions have been rearranged within some rules to achieve greater clarity and simplicity, the advisory committee took care that commonly used and cited subdivisions retain their current designations. The restyled rules include a comparison chart to make it easy to identify redesignated subdivisions. Words and terms that have acquired special status from years of interpretation were retained. For example, there is no revision of the term "failure to state a claim upon which relief can be granted."

Rules Recommended for Approval and Transmission

The advisory committee submitted proposed amendments to Rules 1 through 86 with a recommendation that they be approved and transmitted to the Judicial Conference. Each rule is accompanied by a Committee Note that explains that the rule "has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only." The Notes to some rules are more expansive in explaining a particular change.

The advisory committee carefully considered the concern expressed during the public comment period about a possible supersession effect of the style amendments. The supersession provision of the Rules Enabling Act (28 U.S.C. § 2072(b)) provides that laws that conflict with an Enabling Act rule "shall be of no further force or effect after such rule[] [has] taken effect." The concern raised was that although conflicts between the Civil Rules and other laws are

admittedly rare, adopting the style rules might generate an argument that all provisions in every Civil Rule have "taken effect" on the date the style rules are promulgated – anticipated to be December 1, 2007 – making them supersede any inconsistent statute enacted before that date. The advisory committee concluded that this concern lacked foundation. The Civil Rules style project, and the earlier Appellate and Criminal Rules style projects, are not intended to affect the supersession relationships. Nonetheless, the advisory committee believed it useful to state explicitly and clearly in the proposed amendment to Rule 86 that the relationship between the Civil Rules and existing laws is unchanged, to foreclose any supersession argument.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 1 through 86 and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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The Style/Substantive Amendments

The advisory committee submitted proposed amendments to Civil Rules 4, 9, 11, 14, 16, 26, 30, 31, 40, 71.1, and 78 with a recommendation that they be approved and transmitted to the Judicial Conference. These proposed amendments were circulated to the bench and bar for comment in February 2005, along with the comprehensive style revision of the Civil Rules. Two public hearings were cancelled because no one requested to testify. A third scheduled public hearing on the proposed rules amendments was held at which two witnesses spoke, but they directed their comments to the comprehensive style revision of the Civil Rules.

The proposed style/substance amendments are noncontroversial and so minor that if not accomplished in connection with this project, would likely not be made, despite the fact that they improve the rules. An example is the addition of language requiring lawyers to include e-mail

addresses as well as telephone and fax numbers. Because these changes, while minor, did or could change substantive meaning, the advisory committee did not include them in the style revision. Instead, it proposed these improvements as a separate "style/substantive" package, to become effective at the same time as the style amendments.

Rule 4 would be amended to delete a statutory citation that is unnecessary in light of an earlier general provision recognizing personal jurisdiction authorized by a federal statute.

Rule 9 would be amended to delete a redundant provision that cross-references Rule 15.

Rule 11 would be amended to require the attorney – or a party if the party is not represented by an attorney – signing a paper to provide an e-mail address if there is one.

Rule 14 would be amended to permit a plaintiff to bring in a third party when either a claim or counterclaim is asserted against the plaintiff, if the rule allows a defendant to do so.

Rule 16 would be amended to permit a party or its representative to attend a pretrial conference by any suitable means, whether by telephone or other communication device with the court's permission.

Rule 26 would be amended to require an attorney – or a party if the party is not represented by an attorney – signing a disclosure or discovery request to provide an e-mail address if there is one.

Rule 30 would be amended to allow a party to arrange transcription of a deposition regardless of the means of recording.

Rule 31 would be amended to require a party who noticed a deposition to notify all other interested parties when it is completed.

Rule 40 would be amended to eliminate unnecessary limitations on local rules governing scheduling of trials.

Rule 71.1 would be amended to require the telephone number and e-mail address of the plaintiff's attorney.

Rule 78 would be amended to delete provisions that have been superseded by provisions in Rule 16.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 4, 9, 11, 14, 16, 26, 30, 31, 40, 71.1, and 78 and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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New Rule 5.2 Implementing E-Government Act and Conforming Amendments to Rule Changes Scheduled to Take Effect on December 1, 2006

The advisory committee submitted proposed new Civil Rule 5.2 and proposed amendments to new Civil Rule 5.1 and amended Civil Rules 16, 26, 33, 34, 37, 45, and 50, which are due to take effect on December 1, 2006, with a recommendation that they be approved and transmitted to the Judicial Conference.

During the extended work on the style project, the Judicial Conference and the Supreme Court approved amendments to several rules to address the discovery of electronically stored information and other issues. The amendments are expected to take effect on December 1, 2006. Although these proposals used many of the style project drafting guidelines and principles, they were published and approved as amendments to existing rules. Minor revisions are required to incorporate them into the restyled rules and to make them fully consistent with the style project. The amendments were not published for public comment because the advisory committee considered them to be technical or conforming amendments.

The advisory committee proposed new Rule 5.2 to implement the E-Government Act, which is discussed earlier in this report.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 5.1, 16, 26, 33, 34, 37, 45 and 50 and new Civil Rule 5.2 and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.[1]

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The Illustrative Forms

The advisory committee submitted proposed revisions to Illustrative Forms 1 through 35 (to become Forms 1 through 82) contained in the Appendix of Forms to the Federal Rules of Civil Procedure with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed revisions were circulated to the bench and bar for comment in August 2005. The scheduled public hearing on the proposed revisions was canceled because no one asked to testify.

The Illustrative Forms have not been revised or updated for many years. The advisory committee applied the same style conventions and principles to the forms as was used with the restyled rules. It declined to make changes to the substance of the forms, consistent with its style-project policy, even though some of the forms represent approaches to pleading and other submissions that may not be consistent with current practices. For example, the "complaint" forms call for allegations that are far briefer than are commonly found in cases filed in the district courts. Similarly, the advisory committee did not change the choice of examples in the

[1]The proposed revisions to Civil Rules 5.1 and 50 are included in the style rules. For clarity, the revisions to the proposed electronic discovery amendments and new Civil Rule 5.2 are set out together in the E-Government and electronic discovery amendments.

forms; the "negligence complaint" form continues to use the example of an automobile striking a pedestrian.

The forms have been reorganized and grouped by subject area. The revised forms place "special" forms as Forms 1-9; "complaint" forms as Forms 10-21, "answer" forms as Forms 31-31; "motions" forms as Forms 40-42; "discovery" forms as Forms 50-52; "condemnation" forms as Forms 60-61; "judgment" forms as Forms 70-71; and forms for "assignment to magistrate judges" as Forms 80-82.

The pleading dates in the forms were eliminated and a uniform blank date was substituted. Explanatory Notes were also eliminated, because the forms are intended to stand on their own as simple and brief illustrations.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed revisions to Illustrative Forms 1 through 35 (to become Forms 1 through 82) contained in the Appendix of Forms to the Federal Rules of Civil Procedure and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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