SUPERSESSION AND THE STYLE PROJECT

I. Introduction

The public comments to the Style Project include expressions of concern that the Style amendments to the Civil Rules may "supersede" conflicting provisions in statutes in effect when the amendments are enacted. The supersession provision of the Rules Enabling Act, Section 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 is that adopting the Style Rules will generate arguments that all provisions in every Civil Rule have "taken effect" on the date the Style Rules were enacted – anticipated to be December 1, 2007 – making them supersede any inconsistent statute enacted before that date.

This issue is not new to the Style Project. It was raised and addressed in the earlier Style Amendments to the Appellate and Criminal Rules. The first two parts of this memorandum explore the reasons why the concern about supersession does not present a problem for the Civil Rules Style Project. At the same time, this memorandum recognizes that just as it is important for the Style Project to state explicitly and clearly that the amendments are intended to be stylistic only, it is also useful to state explicitly and clearly that the relationship between the Rules and existing laws is unchanged. The third part of this memorandum examines alternative ways to accomplish this goal. The memorandum recommends a statement in Rule 86 that addresses and should foreclose the supersession concern.

Adoption of a new Rule 86(b) would make explicit the relationship between the Style amendments and existing statutes and address the supersession concern described at length in the memorandum that follows. The proposed rule and committee note take into account the new E-Government Act rule, Rule 5.2, which is also expected to take effect on December 1, 2007. Rule 5.2 must be kept on the same schedule as the corresponding E-Government Act provisions in the

Appellate, Bankruptcy, and Criminal Rules. The supersession effect of Rule 5.2 is properly measured from December 1, 2007. The Rule 86(b) draft accommodates this by stating that the December 1, 2007 "amendments" do not "change" the effective date, and the Committee Note explicitly addresses Rule 5.2.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 86. Effective Dates

* * * * *

(b) *December 1, 2007 Amendments.* The amendments adopted on December 1, 2007 do not change the date on which any provision that conflicts with another law took effect for purposes of 28 U.S.C. § 2072(b).

Committee Note

The amendments adopted on December 1, 2007 take effect on that date for all purposes other than comparing the effective dates of a rule and another law that conflicts with the rule. These amendments do not change the meaning of any rule, except new Rule 5.2 which was first adopted on December 1, 2007. If there is a conflict, the portion of the rule that conflicts with another law took effect on the day that part of the rule was first adopted. A conflict between any rule other than Rule 5.2 and another law should be resolved under 28 U.S.C. § 2072(b) on December 1, 2007 in the same way it would have been resolved on November 30, 2007. Amendments adopted after December 1, 2007, will be treated in the same way as amendments adopted before then.

Finally, an appendix to this memorandum provides further research supporting the Supreme Court's authority to improve the expression of the rules, without changing substantive meaning or supersession consequences, within the Rules Enabling Act.

II. The Supersession Concern

The Rules Enabling Act begins with §§ 2072(a) and (b):

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

The second sentence of § 2072(b) is often referred to as the "supersession" clause. By general acceptance, it operates on a last-in-time principle akin to conflicting statutes. An Enabling Act rule provision supersedes an earlier conflicting statute; a statute supersedes an earlier conflicting Enabling Act rule provision. The words "no further force or effect" can refer only to a statute existing at the time a rule is adopted.

Whether a rule conflicts with an existing statute depends on the meaning of each. The Style Project is intended to make it easier to understand the Civil Rules and to make style and terminology consistent throughout the Rules. The changes are stylistic only. Each rule will have the same substantive meaning on December 1, 2007, that it had before that date. Because substantive meaning does not change when the Style Rules take effect, the relationship between the Civil Rules and any previously-enacted conflicting statute also remains the same.

Prior experience with rule amendments fully supports this conclusion. The Rules Enabling Act rules have been amended a number of times. Those amendments range in purpose and nature from adding entirely new rules to changing the substantive meaning of portions of rules to making small or technical changes that have little if any effect on meaning. A rule does not supersede a statute with a conflicting provision whenever there is an amendment to any part of that rule, no matter how small, how technical, or how unrelated to the conflicting statutory provision. Instead, supersession is determined by looking to the nature and purpose of the amendment and comparing

the date of the statute with the date the particular substantive rule provision that is inconsistent with that statute first "took effect."

There are very few conflicts between the Civil Rules and existing statutes and the issue is unfamiliar to most lawyers and judges. There are good reasons for the scarcity of conflicts. Many procedure statutes disappeared after enactment of the Rules Enabling Act in 1934 and recodification of the Judicial Code in 1948. Since then, Congress generally has been content to entrust development of procedural rules to the Enabling Act process, and the Supreme court and the Judicial Conference have been careful to avoid knowing supersession of statutory provisions. The occasions for colorable claims of conflict between statute and rule are rare. But some do occur. The most commonly cited conflict is the relationship between Civil Rule 11 and the Private Securities Litigation Reform Act. Rule 11 was last substantively amended in 1993. The PSLRA was enacted in 1995. It includes provisions that are inconsistent with Civil Rule 11.[1] In 1995, the PSLRA superseded the inconsistent provisions of Rule 11 that took effect in 1993. If the remaining steps in the Style Project occur on schedule, Rule 11, amended only for style, will take effect on December 1, 2007. Because the Style amendments do not change the substantive meaning of Rule 11, that date does not affect the relationship between Rule 11 and the PSLRA. That relationship is determined by the time when the Rule's substantive provision that is inconsistent with the PSLRA first took effect, compared to the effective date of the PSLRA. Because the substance of the inconsistent provisions of Rule 11 took effect two years before the PSLRA, the Style amendments – which are unrelated to the substance of the conflicting provisions – do not change the supersession relationship. The statute still trumps the rule.

Stated more generally, the supersession determination depends on comparing the date the substantive rule provision that conflicts with the statute became effective with the date the

[1] The PSLRA also establishes special pleading standards and provides for a stay of discovery on terms that may be inconsistent with the Civil Rules.

conflicting statute became effective. The later date controls, not subsequent dates when the rule is again amended in some way that does not affect or have any bearing on the substance of the conflicting provision. The Style Project does not change supersession effects because the changes – including those made in the few rules that may conflict with statutory provisions in effect on December 1, 2007 – are intended to be stylistic only.

III. Precedents on Supersession

Past style revisions provide supporting precedent for the conclusion that the Style Project will not change the supersession relationship between the Civil Rules and statutes in effect on December 1, 2007. Most of the Civil Rules were amended in 1987 to achieve a gender-neutral style. There is no evidence of any suggestion that those amendments had an effect on supersession. The Appellate Rules were the first to be completely restyled. As described below, the few cases that address supersession after the Appellate Rules were restyled recognize that the style changes do not affect supersession. One case appears to have adopted a different approach, but that case did not focus on the issue.

The Criminal Rules were the next to be restyled. The Rules Committees recognized that the pre-Style version of Criminal Rule 48(b) had been followed by the Speedy Trial Act, which was inconsistent in important respects. The 2002 Committee Note accompanying the Style Rules stated that "[i]n re-promulgating Rule 48(b), the Committee intends no change in the relationship between that rule and the Speedy Trial Act." There is no evidence of any attempt to argue that Rule 48(b) now supersedes the Speedy Trial Act. Instead, the Speedy Trial Act continues to apply over inconsistent provisions of Style Rule 48(b).

The decisions that focus on the supersession question follow the approach set out above. There are a few cases that could be read to support a different approach, but they did not actually focus on the question. The existence of these cases, however, provides another reason to make an

explicit disclaimer of any supersession effect from adopting the Style version of the Civil Rules.

Autoskill Inc. v. National Education Support Systems, Inc., 10th Cir. 1993, 994 F.2d 1476, is clear. Autoskill won a preliminary injunction against NESS. Six days later NESS filed a voluntary Chapter 11 petition. Commencing the Chapter 11 proceeding constituted an "order for relief." Sixty-six days after the injunction issued and 60 days after the order for relief, NESS filed a notice of appeal. The appeal was timely under 11 U.S.C. § 108(b)(2), which allows 60 days after the order for relief to file any notice that would have been timely if filed when the order for relief entered. The appeal was not timely under the 30-day provision in Appellate Rule 4. The Rule 4 period was established in 1968 when the Appellate Rules first took effect. Section 108(b)(2) was adopted in 1978. But Appellate Rule 4 was amended in 1979. The court looked to the nature of the 1979 amendments and the Committee Note. It found that "[t]he change was made for clarity only and did not change the meaning of the rule." Thus "the two changes that have been made * * * were not substantive, and do not affect our application of § 2072." 994 F.2d at 1485 & n. 8. The statute prevailed; the style change did not alter the pre-Style supersession relationship.

Local 38, Sheet Metal Workers v. Custom Air Systems, Inc., 2d Cir. 2003, 333 F.3d 345, follows the *Autoskill* decision. It agreed that "[a] statute enacted subsequently to a rule * * * trumps the rule." The 1979 Rule 4 amendments did not establish Rule 4 as the more recent enactment: "To be sure, there were minor revisions to Rule 4(a) subsequent to the enactment of § 108(b), but as the Tenth Circuit explained, those changes were not substantive and thus do not affect our analysis." 333 F.3d at 348 n. 2.

U.S. v. Wilson, 5th Cir. 2002, 306 F.2d 231, 235-237, is less clear, but seems to support the same approach. The government appealed a suppression order by notice filed 32 days after the order was signed and dated but only 29 days after the order was entered on the docket. 18 U.S.C. § 3731 set the time for a government appeal at 30 days after the order was "rendered." Appellate Rule 4(b) set the time at 30 days after entry of the order. The court held the appeal timely by applying Rule

4(b). "[W]here a conflict exists between a Rule and a statute, the most recent of the two prevails." Implicit repeal is disfavored in the same way when a Federal Rule is offered to repeal a statute as when a statute is offered to repeal another statute. But there is a difference between "rendering" an order and "entering" an order. "Rule 4(b) trumps § 3731." In reaching this result, the court looked to several sets of dates. "Rendered" was first used in the Criminal Appeals Act long before the Appellate Rules were first adopted in 1968. Section 3731 was most recently amended in 1994. Appellate Rule 4(b) was last amended [by the Style amendments] in 1998. The court expressed its confidence that the Supreme Court considered the conflict between rule and statute in determining that Rule 4(b) would run appeal time from entry of the order. "In any event, the Rules were promulgated after § 3731 was enacted; the Rules, including Rule 4(b), have been amended more recently than § 3731; and, the terms rendered and entered date to the respective establishment of the Criminal Appeals Act and the Rules, the latter being the most recent." Finally, § 3731 itself says that the provisions for government appeals are to be liberally construed. The *Wilson* opinion properly looked to the respective dates on which the conflicting provisions were first adopted. Rule 4(b) with "entry" came after adoption of § 3731 with "rendered," so Rule 4(b) controls. Some ambiguity is introduced by the portion of the opinion that notes the dates of the most recent amendments, even though they did not change the respective and controlling words — and even though the 1998 Rule 4(b) amendment was part of the Appellate Rules Style Project.

Baugh v. Taylor, 5th Cir. 1997, 117 F.3d 197, 201, also reflects the proper approach. This case addressed 28 U.S.C. § 1915(a)(3) and Appellate Rule 24. Section 1915(a)(3) provides that an appeal may not be taken in forma pauperis if the trial court certifies in writing that the appeal is not taken in good faith. Appellate Rule 24 provides that a party denied leave to proceed in forma pauperis on appeal could move for permission in the court of appeals. The Fifth Circuit found no conflict and no supersession, observing that the provision set out as § 1915(a)(3) by amendment in 1996 was in § 1915(a) long before Rule 24(a) was adopted in 1967 "to spell out the procedural

implementation of * * * § 1915. The [1996 statute] merely moved this provision from subsection (a) of section 1915 to subsection (a)(3). We do not view this relocation as evidence of congressional intent to abrogate procedures in Rule 24 that have coexisted peacefully for three decades with the identical provision." Although the setting presented the converse question whether a more recent statute had superseded an earlier Enabling Act rule, the principle is constant. A cosmetic or technical change that does not change meaning does not count in determining whether statute or rule is more recent.

Two cases in one circuit deserve particular attention because of inconsistency with the approach demonstrated in the cases described above. In *Floyd v. U.S. Postal Service*, 6th Cir. 1997, 105 F.3d 274, the court reached a conclusion opposite to the ruling in the *Baugh* case. It found that § 1915(a)(3) was inconsistent with Appellate Rule 24(a) and that as the later in time, § 1915(a)(3) superseded Rule 24(a). Two years later, in *Callihan v. Schneider*, 6th Cir. 1999, 178 F.3d 800, 802-804, the court reversed course because Appellate Rule 24(a) was amended [as part of the Style Project] in 1998, carrying forward without change the provision for moving in the court of appeals for leave to appeal in forma pauperis. The court did not follow the approach of the cases described above and analyze the relationship of the substantive provisions of the statute and rule, or when those substantive provisions became effective. Instead, the court simply stated that Appellate Rule 24 became the newest provision upon its amendment and superseded the once superseding statute. There is no explanation, no recognition of the effect of the fact that the revisions carried forward the rule's meaning without change, and no explanation of the reason for concluding that the supersession relationship should be reversed by a style amendment that was recognized to carry forward the once-superseded meaning.

McConville v. U.S., 2d Cir. 1952, 197 F.2d 680, 682 presented an appeal-time question under then Civil Rule 73(a). "[E]ffective March 19, 1948," Rule 73(a) shortened the time to appeal but also excepted the time to consider such motions as the timely Rule 52(b) motion made in that

case. As measured by Rule 73(a), the appeal was timely. The appeal may not have been timely under the provisions of 28 U.S.C. § 2107 as it stood when Rule 73(a) was amended. Section 2107, however, was almost immediately amended to reflect the Rule 73(a) period but even as amended did not reflect the provision for tolling appeal time. The court first said that the new version of § 2107 should be construed to conform with Rule 73(a) "since the new statute was so obviously 'in conformity with * * * proposed amendment to Rule 73 * * *,' as the Reviser's Note states." But the court went on to say that "the rule was reenacted (with some changes not here pertinent) on December 29, 1948, effective October 20, 1949, and, in accordance with * * * § 2072, supersedes all inconsistent statutory enactments." Although that passage may seem to suggest that any amendment of a Rule establishes superseding effect even though the amendment does not touch an existing inconsistency between the rule and a superseding statute enacted before the amendment, this suggestion is weakened by footnote 1, which adds that an amendment of May 24, 1949, before the effective date of the October 20, 1949, amendment, "had no connection with this issue."

The cases are few in number but seem to support two conclusions. First, the Supreme Court is authorized by the Enabling Act to restyle the Rules to improve and clarify expression, without changing substantive meaning, and to adopt the restyled rules without affecting the supersession relationships between those rules and previously-enacted statutes. This conclusion is squarely supported by the rule that revision and consolidation of laws change their effect only if change is clearly intended.[2] Second, an explicit disclaimer of any supersession effect will be helpful. Such a disclaimer should avoid misapplied supersession analyses that can occur because supersession is so rarely encountered and because it is easier to compare the dates a rule amendment and a statute took effect than to examine the nature and purpose of the rule amendment and to compare the dates

[2] *E.g., Finley v. U.S.*, 1989, 490 U.S. 545, 553-554, 109 S.Ct. 2003, 2009. The 1948 codification of the Judicial Code did not expand supplemental jurisdiction under the Federal Tort Claims Act: "Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.' *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 * * * (1912)."

when the substance of the conflicting rule provision and statute were first enacted. The safer course is some explicit provision to ensure that the Style Project neither expands nor contracts the supersession effects of each rule. The clear effectiveness of the explicit disclaimer in the Criminal Rules Style Project provides a model.

IV. Supersession Provisions

The apparent effectiveness of the explicit disclaimer frames the question for the Civil Rules Style Project: how best to ensure that the December 1, 2007, Style Amendments do not affect the supersession relationships between any Civil Rule and any statute enacted before December 1, 2007.

The easiest to execute would be the addition of language to the Committee Note for each rule stating that the Style amendments do not affect supersession relationships. A second approach would adopt an express rule provision stating that the Style amendments do not affect supersession relationships. A third approach would be to state the proposition in the message transmitting the Style Rules from the Supreme Court to Congress. A combination is also possible, such as a new rule combined with a Committee Note in Rule 1, the Notes for the Rules that are candidates for supersession arguments (such as Rule 11), or all the Committee Notes, referring to the new rule text. Each method has some advantages and also some disadvantages, but the best solution may be to adopt an express rule text and support it by cross-references in Committee Note.

A. Committee Note Approach

The advantage of addressing supersession in Committee Notes is that it is easy to provide a clear statement without worrying about the fine points of rule drafting. There also is some reason to hope that Committee Notes will be an obvious point of inquiry when something as exotic as a supersession question arises. The well-established "later-in-time" approach will in any event require the parties and court to identify the time when the rule provision and statute took effect. It would seem natural to consult the contemporary Committee Note to identify the purpose of the rule or

amendment. Even those who (unfairly) view Committee Notes with the skepticism that often greets legislative "history" should be willing to accept a statement of the Style Project's purposes.

One disadvantage of relying on Committee Notes is that busy courts and lawyers do not always look beyond rule text and statutory language. Another is that a statement in a single Committee Note, whether appended to Rule 1, to Rule 86, or to some other rule, may not be sufficient. The Notes repeatedly admonish that the Style Project does not affect substantive meaning, but the supersession issue is not a problem for every, or even for many, rules.

Any use of Committee Notes to address this issue should include Rule 1. The question is whether to include the Note language in every rule or only in those rules likely to raise the issue, such as Rule 11. The Note language would also be a useful way to distinguish any non-Style Rule or amendment adopted at the same time. For example, if new Civil Rule 5.2 should take effect at the same time as the Style Rules, the Rule 5.2 Committee Note would not have the "Style-only" language. If it seems useful, distinctions also could be made in the Committee Notes for the rules amended on the "Style-Substance" track.

Committee Note language for each of the rules (or for those identified as candidates for raising the issue) can be illustrated as an addition to the language that is standard for each of the Style Rules:

> The language of 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. As a result, they do not change the effect of this rule in determining whether a law that conflicts with this rule has "no further force or effect" by virtue of 28 U.S.C. § 2072. The rule's effect for this purpose is the same on December 1, 200X as it was on November 30, 200X.

An alternative might be to add a somewhat longer generic statement to the Committee Note

for Rule 1, supplemented by an explicit cross-reference in the separate Committee Note for each rule or for some of the Rules. The Rule 1 Note language might look like this:

> 28 U.S.C. § 2072(b) provides that "All laws in conflict with such rules [adopted under § 2072(a)] shall have no further force or effect after such rules have taken effect." The style changes made in Rule 1 and in each of the other Civil Rules are stylistic only and do not change the effect of the Civil Rules on any other law. The existence of conflict is determined as of the original effective date of the substantive provision that raises the conflict question.

Still another alternative would be to adopt express rule text and then add a brief cross-reference either in Committee Note 1 or in all or some of the Committee Notes: "As stated in Rule 86(b), these changes do not affect the supersession relationships between this rule and any conflicting laws."

B. Rule 86(b)

A provision negating any supersession effects from the Style amendments could be added to an existing rule or could become a new separate rule. An express rule provision has at least two advantages. One is that there can be no quibbling about the authority of a mere Committee Note. A second is that the Committee Note to a new rule provision could be somewhat more elaborate than a common statement included in all or some Committee Notes. Candidates that have been suggested from among the current rules include Rules 1, 81, and 86. Of these, Rule 86 seems the most likely. It deals with effective dates and the effect of amendments on pending actions. A "no-new-supersession" provision essentially says that earlier effective dates control for supersession purposes. That logical connection may not actually draw many readers to Rule 86, but it may bolster the case for Rule 86 over competing candidates. A separate rule could be used as an alternative. The most attractive locations are likely to be up front, as a new Rule 1.1, or at the very end as a new Rule 87. The model sketched here is framed as a new Rule 86(b):

Rule 86. Effective Dates.

(a) ***Effective Dates.*** These rules * * *.

(b) ***December 1, 2007 Amendments.*** The amendments adopted on December 1, 2007 do not change the date on which any provision that conflicts with another law took effect for purposes of 28 U.S.C. § 2072(b).

Committee Note

The language of Rule 86 * * *.

The subdivisions that provided * * *.

Rule 86(b) is added to express the relationship between the [general] restyling of all the Civil Rules and other laws. The amendments adopted on December 1, 2007 take effect on that date for all purposes other than comparing the effective dates of a rule and another law that conflicts with the rule. These amendments do not change the meaning of any rule, except new Rule 5.2 which was first adopted on December 1, 2007. If there is a conflict, the portion of the rule that conflicts with another law took effect on the day that part of the rule was first adopted. A conflict between any rule other than Rule 5.2 and another law should be resolved under 28 U.S.C. § 2072(b) on December 1, 2007 in the same way it would have been resolved on November 30, 2007. Amendments adopted after December 1, 2007, will be treated in the same way as amendments adopted before then.

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As noted, a complicating drafting issue arises from the expectation that new Rule 5.2 will take effect on December 1, 2007. It is important to keep Rule 5.2 on the same schedule as the E-Government Act provisions in the Appellate, Bankruptcy, and Criminal Rules. The supersession effect of Rule 5.2, in its initial form, will be measured from December 1, 2007. The Rule 86(b) draft is intended to accommodate this difficulty in stating that the December 1, 2007 "amendments" do not "change" the effective date. The Committee Note is explicit. It would be possible to add an explicit exception for Rule 5.2 in the rule text: "The amendments adopted on December 1, 2007, except for [new] Rule 5.2, do not change * * *"; or perhaps at the end: ", but Rule 5.2 takes effect on December 1, 2007."

C. Supreme Court Message

A third method of addressing supersession is to include a statement in the message that transmits the Style Rules from the Supreme Court to Congress. This method is not likely to prove effective as the sole means of making the point. It seems likely that more than a few lawyers and judges will not think to look for the message, particularly as the Style Rules come to be viewed as

the way the Rules always have been. But it could be a wise precaution to repeat the no-supersession point in the Court's message. The message would reassure Congress that there is no intent to smuggle through any clandestine amendments of statutory procedure.

V. Conclusion

The Supreme Court has authority to restyle the rules to improve expression and achieve easier, more consistent, and better application. Style changes do not affect the supersession relationships between the few rules that may conflict with statutes. The best way to foreclose arguments that the Style Amendments change the supersession effect of a rule is by express rule language. A new Rule 86(b) will foreclose uncertainty — on and after the date of adopting the Style amendments the Civil Rules will have the same relationship to conflicting statutes in force on the date of adoption as they had the day before adoption.

Appendix: Authority to Avoid Supersession

Section 2072 establishes rulemaking authority and decrees that a § 2072(a) rule supersedes a conflicting law. It can be claimed that the supersession provision takes the question out of the Supreme Court's hands — that if there is a conflict, a later-adopted rule must supersede an earlier statute no matter what the Court intends. The Court, on this view, must take the Enabling Act as an integrated whole that denies authority to adopt a rule that does not supersede.

The better view is that the Supreme Court can decide whether an Enabling Act rule supersedes an inconsistent statute. The Civil Rules themselves include several provisions illustrating this point by expressly providing that a rule operates unless "a statute provides otherwise."

So too the Court should have authority to amend one part of a rule without expanding the supersession effect of other parts. Rule 11 can be used as an example. Present Rule 11(c)(1)(A) provides a "safe harbor" period of 21 days to withdraw or correct a challenged position. It is possible that consideration of this period in the Time Project might lead to a conclusion that the period should be 14 days or 28 days. If Rule 11 were amended solely by substituting "14" or "28" for "21," there would be no reason to conclude that all of Rule 11 takes effect anew, reversing the supersession effects of statutes adopted between the next-most-recent version and the new rule. It would be impossible to live with such supersession consequences. Surely the answer is that supersession is measured by the effective date of the first amendment that added the rule provision that conflicts with a statute. Nor should the answer depend on the form chosen for adopting the amendment. A mere change in the number of days for the safe harbor likely would be published and adopted without setting out all of Rule 11, nor even all of Rule 11(c). But there is no clear formula for determining how much of a rule is published to show the place and effect of a proposed amendment. The choice is made by looking for sufficient context to illustrate the amendment, and may be affected by a desire to make other small adjustments (including style improvements) at the same time. These expository choices should not be constrained by fear of unintended supersession

consequences.

The same conclusion holds for style amendments. The clear intent to carry forward present meaning mandates that the same meaning have the same supersession consequences. The Style Project cannot be made impossible by the assertion that on the effective date the entire set of Civil Rules supersedes any conflicting law that until then had superseded a Civil Rule. The Supreme Court's authority to implement the intent to achieve supersession neutrality inheres in the language, purpose, and structure of the Enabling Act.

The Enabling Act reflects a sturdy accommodation of congressional and judicial responsibilities. Congress has the authority to create the inferior federal courts, and with that the authority to regulate most matters of procedure. But this is the authority to create "courts," vested with some part of the "judicial power." The courts have some measure of inherent responsibility to function as courts acting to discharge a judicial power. Congress could not, in the name of reducing cost and delay, direct that cases be decided by tossing a coin. Apart from whatever modest constraints these concerns may impose on legislative regulation of judicial procedure, the courts have real advantages in developing and implementing rules of procedure. The central feature of the Enabling Act is the supervised delegation of rulemaking authority, subject in the first instance to acquiescence by Congress and further subject to congressional revision.

Supersession reflects a special element in this delegation. The central purpose has been to ensure that an Enabling Act rule that first undertakes to establish procedure in a particular area will displace statutes that had been necessary before then. Examples are provided by the initial Civil Rules,[3] the Appellate Rules,[4] the merger of the Admiralty Rules into the Civil Rules,[5] and such

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[3] Penfield Oil Co. v. §, 1947, 330 U.S. 585, 589 & nn 4, 5, 67 S.Ct. 918, 920-921 & nn. 4, 5.

[4] *American Paper Institute v. ICC*, D.C.Cir.1979, 607 F.2d 1011; *Griffith v. NLRB*, 9th Cir.1977, 545 F.2d 1194, 1197 n. 3; *Feeder Line Towing Serv. v. Toledo, Peoria & Western R.R.*, 7th Cir.1976, 539 F.2d 1107, 1108-1109; *Motteler v. J.A. Jones Constr. Co.*, 7th Cir.1971, 447 F.2d 954; *Jack Neilson, Inc. v. Tug Peggy,* 5th Cir.1970, 428 F.2d 54, 55; *Waterman S.S. Corp. v. Cottons*, 9th

specific matters as the 1951 adoption of Civil Rule 71A to establish uniform condemnation procedures in place of a welter of statutory provisions.[6]

Other supersession questions arise from court rules that are not part of a generalized program to substitute court rules for a procedural system generally governed by statutes. *Henderson v. U.S.*[7] is the leading Supreme Court example. The 1920 Suits in Admiralty Act directed that service be made "forthwith" on the Attorney General and the United States Attorney. In 1982 Congress enacted its own Rule 4 amendments as part of a package designed to transfer service obligations from the marshals to plaintiffs. The version in effect at the time of service in the *Henderson* case, then Rule 4(j), allowed 120 days for service and authorized an extension for good cause. Henderson served the Attorney General 47 days after filing, and — after obtaining a good-cause extension — served the United States Attorney 148 days after filing. Finding that at least the 148-day period was not "forthwith," the Court held that Rule 4(j) superseded the Act. The central point of dispute focused on the question whether service forthwith was a condition of the United States' waiver of immunity; the Court ruled that it was not. Going on to find an irreconcilable conflict, the Court further concluded that Rule 4(j), "as is the whole of Rule 4," is "a nonjurisdictional rule governing 'practice and procedure', * * * rendering provisions like the Suits in Admiralty Act's service 'forthwith' requirement 'of no further force or effect,' § 2072(b)." There is one special twist in the decision.

Cir.1969, 419 F.2d 372; *Albatross Tanker Corp. v. S.S. Amoco Delaware*, 2d Cir. 1969, 418 F.2d 248.

[5] *Hansen v. Trawler Snoopy, Inc.*, 1st Cir.1967, 384 F.2d 131, 132. (Several of the cases cited in note 4 above involved supersession by Appellate Rule 4 of statutory appeal-time provisions for admiralty cases. The shift from focus on former Civil Rule 73(a) in the *Trawler Snoopy* case reflects the short interval between the 1966 merger of admiralty practice into the Civil Rules and the 1968 effective date of the Appellate Rules.)

[6] *See Kirby Forest Indus., Inc. v. U.S.*, 1984, 467 U.S. 1, 4 n. 2, 104 S.Ct. 2187, 2191 n. 1; *U.S. v. 93.970 Acres of Land*, 1959, 360 U.S. 328, 333 n. 7, 79 S.Ct. 1193, 1196 n. 7; *Northern Border Pipeline Co. v. 64.111 Acres of Land*, 7th Cir.2003, 344 F.3d 693; *Southern Nat. Gas Co. v. Land, Cullman Cty.*, 11th Cir.1999, 197 F.3d 1368.

[7] 1996, 517 U.S. 654, 116 S.Ct. 1638.

Although the passage just quoted seems to rely directly on § 2072(b), the Court recognized in an earlier passage that Rule 4(j) "was not simply prescribed by this Court pursuant to the Rules Enabling Act. * * * Instead, the Rule was enacted into law by Congress * * *. As the United States acknowledges, however, a Rule made law by Congress supersedes conflicting laws no less than a Rule this Court prescribes."[8]

Many of the remaining cases involve claims that a statute has superseded a court rule. In that setting the Supreme Court has referred to "the necessary clear expression of congressional intent" to supersede.[9] Lower courts frequently look for a "clear statement,"[10] and refer to a presumption that court rules apply.[11] Calls for "clear statement" also appear in decisions dealing with arguments that a rule has superseded a statute.[12]

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[8] The Court then quoted the brief for the United States: "'We agree * * * that Section 2072(b) provides the best evidence of congressional intent regarding the proper construction with Rule 4(j) and its interaction with other laws.'" 517 U.S. at 668-669, 116 S.Ct. at 1646.

[9] *Califano v. Yamasaki*, 1979, 442 U.S. 682, 698-701, 99 S.Ct. 2545, 2556-2558 (a class action may be maintained under Civil Rule 23 for review of determinations that Social Security benefits were overpaid; the statute does not impliedly preclude this procedure).

[10] *Jackson v. Stinnett*, 5th Cir.1996, 102 F.3d 132, 135-136 (PLRA supersedes in part Appellate Rule 24; even absent a clear statement, irreconcilable conflict requires that a later statute be followed); *Robbins v. Pepsi-Cola Metro. Bottling Co.*, 7th Cir.1986, 800 F.2d 641; *Gaubert v. Federal Home Loan Bank Bd.*, C.A.D.C.1988, 863 F.3d 59, 67; *Grossman v. Johnson*, 1st Cir.1982, 674 F.2d 115, 118-123; *U.S. v. Gustin-Bacon Div., Certain-Teed Prods. Corp.*, 10th Cir.1970, 427 F.2d 539 (The requirement in 42 U.S.C. § 2000e-6(a) that complaint set forth facts pertaining to a pattern or practice of resistance to the full enjoyment of statutory rights "ought to be construed to harmonize with the Rules, if feasible"; compliance with the notice-pleading standards of Civil Rule 8 suffices, in part because an insistence on fact pleading would "directly contradict the spirit and purpose of Rule 8(a) and the general concept of modern federal pleading").

[11] "There is a firm presumption that the Federal Rules of Civil Procedure apply in all civil actions * * *." *Walsh v. Ford Motor Co.*, D.C.Cir.1986, 807 F.2d 1000, 1009 (the Magnuson-Moss Warranty Act's protective policies do not warrant departure from the class-certification standards in Civil Rule 23); *Weiss v. Temporary Inv. Fd.*, 3d Cir.1982, 692 F.2d 928, 936, vacated on other grounds 1984, 4365 U.S. 1001, 104 S.Ct. 989.

[12] *Floyd v. U.S. Postal Serv.*, 6th Cir.1997, 105 F.3d 274, 278 (no clear statement, but Appellate Rule 24 and the PLRA "are not reconcilable" — recall that after Appellate Rule 24 was renewed by the 1998 Style amendments, the court concluded that the supersession was reversed, *Callihan v. Schneider*, 6th Cir.1999, 178 F.3d 800).

Not surprisingly, many of the cases dealing with seeming conflicts between a court rule and a statute invoke the "implied repeal" approach to reconciling seemingly inconsistent statutes. In rejecting an argument that Civil Rule 54(d) establishes authority to award costs beyond those authorized by statute, the Supreme Court invoked the familiar axiom that "[r]epeals by implication are not favored."[13] Lower courts offer the same advice.[14]

These general approaches leave open fascinating questions whether general "implied repeal" approaches should extend to potential conflicts between court rules and statutes. The delicate relationships established by the Enabling Act delegation from Congress to the Supreme Court surely require independent analysis before settling on an overall approach.[15] Because the outcome for the Style Project is so clear, a bare sketch should suffice here.

The first difference from an assertion of a conflict between two statutes is that the court rules flow from a particularly constrained source of authority. The rule must be a "general rule[] of

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[13] *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 1987, 482 U.S. 437, 442, 107 S.Ct. 2494, 2497-2498.

[14] *U.S. v. Wilson*, 5th Cir.2002, 306 F.3d 231, 237: The court generally disfavors implicit amendment or repeal of statutes, but where there is irreconcilable conflict, "'the later act to the extent of the conflict constitutes an implied repeal of the earlier one.' * * * We thus view a Federal Rule of Appellate Procedure the same way that we do a federal statute."

Jackson v. Stinnett, 5th Cir.1996, 102 F.3d 132, 135: "The second limit on Congress's power to amend the Rules is the general disfavor with which we view implicit amendment or repeal of statutes."

"Repeals by implication are not favored by the courts." *Floyd v. U.S. Postal Serv.*, 6th Cir.1997, 105 F.3d 274, 278.

"Although repeals by implication are not favored, we do not believe that Congress must explicitly state that a procedural rule is superseded in order to 'clearly express' that proposition." The Multiemployer Pension Plan Amendments providing for prompt payment of withdrawal assessments establish a system that supersedes the stay by supersedeas bond provisions of Civil Rule 62(d).

[15] Three articles provide helpful perspectives. A fascinating exchange is provided by Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 281 and Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 1012. A more recent article, delving deeply into supersession analysis, is Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 2002, 51 Emory L.J. 677.

practice and procedure" or "evidence," and it must not "abridge, enlarge or modify any substantive right." Even a rule that in most applications is a valid general rule of procedure may fail to supersede a particular statute because it would affect a substantive right established by the statute.[16]

The limits on the Enabling Act's delegation relate to a more complex set of questions. The relationships between subsequent Congresses (and for that matter within a single Congress) are a continuum of the same legislative powers. In the Enabling Act Congress expressed a special respect for the distinctive capacities and procedures the judiciary can bring to bear in developing rules of procedure. In return, the judiciary must show special respect for statutes. The question whether a later statute supersedes a court rule is not quite the same as the question whether a later court rule supersedes a statute. Judge Easterbrook, for example, has rejected reliance on the general disfavor of repeals by implication:

> The Rules of Civil Procedure * * * cannot "repeal" any statute; the Constitution does not give the Judicial Branch any power to repeal laws enacted by the Legislative Branch. But Congress itself may decide that procedural rules in statutes should be treated as fallbacks, to apply only when the rules are silent. And it has done just this, * * * in what has come to be called the supersession clause of the Rules Enabling Act * * *[17]

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[16] A clear example is *Durant v. Husband*, 3d Cir.1994, 28 F.2d 12, 15. The Virgin Islands Tort Claims Act waives sovereign immunity, but the waiver is conditional. One condition is that no judgment by default can be entered against the government. "To the extent that the Virgin Islands waiver of sovereign immunity is flatly conditioned on the non-availability of a default judgment, the matter is one of substance and not procedure. Applying Rule 55(e) to permit default judgments against the Virgin Islands government in the present case would significantly 'enlarge' the substantive rights conferred on claimants under section 3411(a) of the Tort Claims Act."

The same thought was expressed in *U.S. v. Microsoft Corp., D.C.Cir.*1999, 165 F.3d 952, 959-960. The court concluded that there is no conflict between the discovery protective-order provisions of Rule 26(c)(5) and the Publicity in Taking Evidence Act of 1913. But it observed that a statute is superseded by a later conflicting court rule "unless such supersession would 'abridge, enlarge or modify [a] substantive right.'"

[17] *Northern Border Pipeline Co. v. 64.111 Acres of Land*, 7th Cir.2003, 344 F.3d 693, 694.

A similar view may be implied in *U.S. v. Kim*, 9th Cir.2002, 298 F.3d 746, 748-749. After finding that the appeal-time provisions of Appellate Rule 4(b) are inconsistent with and supersede the provision in 18 U.S.C. § 3731, Judge Noonan concluded: "The Rule trumps the statute. No conflict exists because § 2072 has abolished it." Here too reliance is placed on one Act of Congress to supersede another — albeit the superseding statute, § 2072, may have been enacted first and

A somewhat similar thought was expressed in characterizing implied repeal as arising not from conflict between the court rule and a later statute but from conflict between the Enabling Act and the statute that conflicted with an earlier rule.[18]

As a further complication, there is some lingering uneasiness about the Enabling Act structure that enables a rule prescribed by the Supreme Court to supersede an earlier statute without any affirmative act by Congress. This delegation is more than a delegation of Congressional authority because it excludes the President from the process — there is no bill enacted by House and Senate and presented to the President.

These considerations suggest at least two observations. Although a conflict once found is resolved by the later-in-time rule, the distinctions between legislating and rulemaking may require different approaches in determining whether there is a conflict. The courts have special responsibility for, and control over, the meaning of court rules. Even when rule and statute clearly affect only procedure — when the statute does not establish a specific substantive right that must not be abridged, enlarged, or modified — the courts may, by construction, subordinate a later rule to an earlier statute more readily than they would subordinate a later statute to an earlier rule.

For present purposes, it is more important to consider the respect the Enabling Act process should show for statutes as court rules are developed and amended. The authority to supersede a statute should be exercised with great care. The best cases for supersession will involve matters that are clearly and purely procedural. Supersession may be further supported when confronting a statute embodying antiquated concepts of procedure, or when there is a need to establish uniform procedure in face of a welter of disparate statutory procedures, or when experience shows a clearly better way

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negates future legislation only through the mediating direction of an Enabling Act rule.

[18] *Jackson v.Stinnett*, 5th Cir.1996, 102 F.3d 132, 135-136: "To the extent that the Rules Enabling Act (as expressed in [Appellate] Rule 24(a)) actually conflicts with the PLRA, we hold that the statute repeals the Rule."

of doing things.

The responsibility to respect statutes carries with it authority to expressly disclaim supersession. An intent not to supersede controls.[19] If there is any apparent reason to defer to a known statute, or to a concern that there may be unknown or future statutes, disclaimer can be accomplished by qualifying a general rule by such terms as "unless a statute provides otherwise." But such terms are not always possible. The Style Project demonstrates the need to implement a no-supersession intent by other means. The Supreme Court must be able to improve the drafting of the Civil Rules, as it has done for the Appellate Rules and the Criminal Rules, without changing their meaning and without affecting existing supersession consequences.[20] That is the intent of the Project. The difficult task that remains is to identify the best means of implementing that intent. Part IV provides beginning sketches but should not deter efforts to develop more creative solutions.

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[19] "[T]he first inquiry should be to determine the intent of the Court and Congress in the particular case and to harmonize to avoid an irreconcilable clash of Court and congressional authority if possible." Genetin, 51 Emory L.J. 677, 732, note 16 above.

[20] A parallel to the Style Projects may be found in 1987, when 58 Civil Rules and four Supplemental Rules were amended to make them gender-neutral. The 1987 Committee Notes say blandly: "The amendments are technical. No substantive change is intended." There is no indication that anyone thought that those amendments created new effective dates for supersession purposes.