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November 1, 2006

To: Honorable John G. Roberts
Chief Justice of the United States

From: Judge David F. Levi

Re: Summary of Proposed Amendments to the Federal Rules

The amendments to the Federal Rules of Practice and Procedure transmitted from the Judicial Conference are intended to have the following consequences.

E-GOVERNMENT ACT

Proposed new Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 and the proposed amendment to Appellate Rule 25 implement the privacy provisions of § 205 of the E-Government Act of 2002, governing public access to electronic filings in federal court. These proposals are derived from the privacy policy adopted by the Judicial Conference in September 2001, which 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. The only differences in the proposed rules are necessary to account for factors unique to each set of rules. Proposed new Civil Rule 5.2 specifically limits remote access to social security and immigration electronic case filings, given the prevalence of sensitive information in such cases and the volume of filings. Proposed new Criminal Rule 49.1 permits the partial redaction of an individual's home address and an exemption from redaction for certain forfeiture-related information. In addition, specific types of 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 new Bankruptcy Rule 9037 uses several different terms consistent with terms used in the Bankruptcy Code, and also requires disclosure of the full names of a debtor, even if a minor. Under proposed Appellate Rule 25(a)(5), the privacy rule that applied to the case below would govern the case on appeal.

BANKRUPTCY RULES

The proposed amendment to Rule 1014 states explicitly that a court on its own motion may dismiss or transfer a case that had been initially filed in an improper district. This is consistent with case law.

The proposed amendment to Rule 3007 prohibits a party in interest from including in an objection to a claim a request for relief that requires an adversary proceeding; allows a party to join a maximum of 100 claims in a single, omnibus objection; specifies the content and limits the nature of objections that may be joined in the single filing; and establishes minimum standards intended to protect the claimant's due process rights.

The proposed amendment to Rule 4001 requires a movant to provide a proposed order granting relief, together with notice to interested parties, when requesting authority to use cash collateral, to obtain credit, to obtain approval of agreements to provide adequate protection or modify or terminate the stay, or to grant a senior or equal lien on property. The amendment requires the movant to include within the motion a statement not to exceed five pages that concisely describes the material provisions of the relief requested.

Proposed new Rule 6003 limits the granting of relief by the court during the first 20 days after commencement of a case. The proposed rule is designed to alleviate the acute time pressures present at the start of a case so that full and careful consideration can be given to matters that may have a fundamental and long-lasting impact on the case.

The proposed amendment to Rule 6006 authorizes a movant to file an omnibus motion rejecting, or under specific circumstances assuming or assigning, a maximum of 100 executory contracts or unexpired leases. The amendment establishes minimum standards intended to ensure the protection of the claimant's due process rights.

The proposed amendment to Rule 7007.1 clarifies that a party must file its corporate ownership statement with the first paper filed with the court in an adversary proceeding.

Proposed new Rule 9005.1 makes Civil Rule 5.1, dealing with notice requirements in cases involving a constitutional challenge to a statute, applicable to bankruptcy proceedings.

CIVIL RULES

Restyling of the Civil Rules

The proposed amendments to Civil Rules 1 to 86 contain comprehensive style-only revisions to the Civil Rules. These include style-only revisions to the new rules and rules

amendments due to take effect on December 1, 2006 (i.e., new Rule 5.1, the electronic-discovery amendments, and the amendment to Rule 50). This is the third set in the project, begun in 1992, to make “style” revisions to the Federal Rules of Appellate, Criminal, and Civil Procedure to clarify, simplify, and modernize their expression without changing their substantive meaning. 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.”

Dense, block paragraphs and lengthy sentences of the current rules are broken 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 thus make the rules clearer, even when the words are unchanged.

The restyled rules reduce the use of inconsistent words and terms, which accumulated over seventy years of episodic rules revisions, that say the same thing in different ways. For example, the present rules use “for cause shown,” “upon cause shown,” “for good cause,” and “for good cause shown.” Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules use the same words to express the same meaning. Some variations in expression are carried forward when the context makes it appropriate to do so.

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 restyled rules replace “shall” with “must,” “may,” or “should,” depending on which is appropriate.

The restyled rules avoid the use of “intensifiers,” expressions that might seem to add emphasis but instead state the obvious and create negative implications for other rules. Intensifiers are common in the current 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 restyled rules remove outdated and archaic terms and concepts, such as the references to “at law or in equity” in Rule 1, to “demurrers, pleas, and exceptions” in Rule 7(c), and to “mesne process” in Rule 77(c). The restyled rules also remove a number of redundant cross-references.

To avoid research burdens for the bench and bar, no rule numbers are changed. Although some subdivisions have been rearranged within rules to achieve greater clarity and simplicity, 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

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terms (e.g., “failure to state a claim upon which relief can be granted”) that have acquired special status from years of interpretation are retained.

Restyled Rule 86 states explicitly that the restyling of the Civil Rules does not affect the pre-existing relationship between the Civil Rules and existing laws. This language is intended to foreclose any argument that the style amendments might supersede (by operation of the supersession provision of the Rules Enabling Act, 28 U.S.C. § 2072(b)) prior inconsistent statutes. Given that the intent of the restyling project was not to change substantive meaning, and given that supersession did not become a problem after the Criminal and Appellate Rules were “restyled,” or after the Civil Rules were amended in 1987 to be gender neutral, any concern about supersession would appear to lack foundation. Nonetheless, to be on the safe side, restyled Rule 86 makes clear the absence of any supersession effect of the restyled rules.

Style/Substance Amendments

The proposed style/substance amendments arose out of the restyling project. These are minor technical amendments that are uncontroversial and make clear improvements, but arguably do change substantive meaning and therefore cannot be characterized as mere restyling. These amendments are so minor that if not accomplished in connection with the restyling project, they would likely not be made at all.

The proposed amendment to Rule 4 deletes an unnecessary statutory citation.

The proposed amendment to Rule 9 deletes a redundant provision that cross-references Rule 15.

The proposed amendment to Rule 11 requires 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.

The proposed amendment to Rule 14 permits a plaintiff to bring in a third party when any claim is asserted against the plaintiff, if the rule allows a defendant to do so.

The proposed amendment to Rule 16 clarifies the authority of a court to require that a party or its representative be present or reasonably available for a pretrial conference not only by telephone, but by any other suitable communications device, with the court’s permission.

The proposed amendment to Rule 26 requires an attorney – or a party if the party is not represented by an attorney – signing a disclosure or discovery request to provide a telephone number and an e-mail address if there is one.

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The proposed amendment to Rule 30 allows a party to arrange transcription of a deposition regardless of the means of recording. It also adds “other entity” to the organization deposition provisions of Rule 30(b)(6).

The proposed amendment to Rule 31 requires a party who noticed a deposition to notify all other interested parties when it is completed.

The proposed amendment to Rule 40 eliminates unnecessary limitations on local rules governing scheduling of trials.

The proposed amendment to Rule 71.1 adds a provision for a notice of appearance by a defendant who does not file an answer and requires the telephone number and e-mail address of the plaintiff's attorney.

The proposed amendment to Rule 78 deletes provisions that have been superseded by Rule 16.

The Illustrative Forms

The proposed amendments to Illustrative Forms 1 through 35 (to become Forms 1 through 82) contain comprehensive style-only revisions to the Forms. The amendments would make the Forms consistent with the style conventions and principles followed in the restyled Civil Rules. The forms are reorganized and grouped by subject area. The pleading dates in the forms are eliminated and replaced by a uniform blank date. Explanatory Notes are also eliminated, because the forms are intended to stand on their own as simple and brief illustrations. No change is made to the substance of the Forms, or the choices of examples in them, even though the Forms have not been revised or updated for many years and some of the Forms may not be consistent with current practice.

CRIMINAL RULES

The proposed amendment to Rule 11 brings it into conformity with *United States v. Booker*, 543 U.S. 220 (2005). The amendment would require the sentencing court to advise the defendant of the court's “obligation to calculate the applicable sentencing guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a).” This captures the sentencing approach taken by most courts after *Booker* in most cases, and, therefore, is appropriate advice to a defendant who is contemplating a guilty plea.

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The proposed amendment to Rule 32 clarifies the court's authority, in the light of *Booker*, to instruct a probation officer to gather and include in the presentence report any information relevant to the factors in § 3553(a).

The proposed amendment to Rule 35 removes the restriction that the court may reduce the sentence of a cooperating defendant only if the reduced sentence accords with the Sentencing Guidelines and the Sentencing Commission's policy statements. The restriction is stricken as inconsistent with *Booker* because it treats the guidelines as mandatory.

The proposed amendment to Rule 45 clarifies that the party served has an additional three days to respond after service by mail, service by leaving with the clerk of court, or service by electronic or other means consented to by the party served. The amendment parallels the 2005 change to Civil Rule 6(e).

It is proposed to abrogate "Model Form 9," the Model Form for Use in 28 U.S.C. § 2254 Cases Involving a Rule 9 Issue (which is contained in the Appendix of Forms to the Rules Governing Section 2254 Cases in the United States Courts). Due to extensive amendments to Rule 9, Model Form 9 is out of date and no longer useful, containing references to subdivisions in Rule 9 that no longer exist, and including provisions that have been superseded by statute. Most courts have devised a local form and have expressed a desire to retain flexibility to adapt their forms to local conditions instead of following a national form.

(David F. Levi)

David F. Levi
Chair, Committee on Rules of Practice and
Procedure

cc: Honorable Carl E. Stewart, Chair, Advisory Committee on Appellate Rules
Honorable Thomas S. Zilly, Chair, Advisory Committee on Bankruptcy Rules
Honorable Lee H. Rosenthal, Chair, Advisory Committee on Civil Rules
Honorable Susan C. Bucklew, Chair, Advisory Committee on Criminal Rules