

## **PROPOSED RULE AMENDMENTS OF SIGNIFICANT INTEREST**

The following summarizes the Rules Committees' positions on topics that raised significant interest. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is provided with this report.

### **Federal Rules of Civil Procedure**

#### **I. The restyled Federal Rules of Civil Procedure**

##### **A. Brief description**

The Advisory Committee on Civil Rules completed a comprehensive "style" revision of the Civil Rules. This revision is the third set in the overall project to restyle the Federal Rules of Appellate, Criminal, and Civil Procedure in order to clarify, simplify, and modernize the language of rules provisions without changing their substantive meaning.

The restyling was carried out in accordance with agreed-upon general drafting guidelines and principles. The Civil Rules Committee changed the formatting of rules to achieve clearer presentation by removing dense block paragraphs and lengthy sentences, replacing them with progressively indented paragraphs with headings. The Committee removed inconsistent, ambiguous, redundant, or archaic words and avoided the use of redundant "intensifiers" and cross-references. In order to minimize the effect on research, the rule numbers remain unchanged, and rule subdivisions were rearranged only where essential to achieve greater clarity and simplicity.

A very small number of minor technical amendments that arguably do change meaning were approved separately from the restyled rules, but are proposed to become effective at the same time. An example is adding "e-mail address" to the information that must be included in pleadings.

##### **B. Arguments in Favor**

- Attorneys have long complained that some provisions of the rules were expressed in language that was outdated or unnecessarily difficult to understand, or presented in a way that generated confusion.
- Most of the comments on the restyled rules received from the bench, bar, and public were favorable, with one or two exceptions.
- The improvement in simplification and clarity in the restyled rules can be

expected to reduce litigation over the meaning of rules provisions in the long run.

- Each and every style revision went through multiple layers of review – by prominent legal-writing scholars, by a subcommittee of the Standing Committee on Rules of Practice and Procedure, by subcommittees of the Civil Rules Committee, by the Civil Rules Committee, and ultimately by the Standing Committee. Following public comment – some of which undertook to identify possible inadvertent changes in substantive meaning – the restyled rules went through these multiple layers of review once again. The Committee has done everything it could to ensure that any inadvertent changes in substantive meaning will be *de minimis*.

C. Objections

- The restyled rules will generate “satellite litigation” about the meaning of newly-worded provisions whose interpretation is now settled under the old language. It is difficult to modify the style of a communication without changing its substance.
- These comprehensive revisions to the rules will increase the burdens of legal research by forcing practitioners to research both the new rules language and the old, sometimes identified by different subdivision designations.
- The restyled Civil Rules could be found to supersede any inconsistent statute enacted before their effective date under the supersession provision of the Rules Enabling Act, 28 U.S.C. § 2072(b). Priority in time between a Civil Rule and a conflicting statute is measured by the date when the Civil Rule “takes effect.” When the restyled Civil Rules become effective, under this theory, each of the restyled Civil Rules will acquire a new effective date and supersede all prior conflicting statutes.

D. Rules Committees’ Consideration

The Civil Rules Committee concluded that there was little risk that the restyled rules would work significant inadvertent changes in the substantive meaning of rules provisions. The Committee worked extensively to identify and avoid substantive changes. This potentiality was not a significant problem with the restyled Appellate and Criminal Rules, and there is no reason to expect a different experience with the restyled Civil Rules.

The Committee also concluded that there was no significant risk of wasteful “satellite litigation” as a result of the revisions. Again, although there has been some litigation over the meaning of particular restyled Criminal Rules, the extent of that litigation has not been significant. The Committee concluded, to the contrary, that because of the improvement in clarity and simplicity it

expects from the restyled Civil Rules, the restyled rules may well reduce – not increase – litigation over the meaning of rules provisions.

The Committee also was unconvinced that restyling would add great burdens to the task of legal research under the rules. The restyled Civil Rules do not renumber any rules, and avoid redesignating rule subdivisions wherever possible. The Committee was careful not to modify the designations of any subdivisions that are commonly used and cited, or modify often-used words and terms. The Committee expects no more than a transitory adjustment period during which some legal research into rules provisions may require an extra step.

The Committee carefully considered the concerns expressed by an academic that the restyled Civil Rules could have an unintended supersession effect. The Committee concluded that these concerns lack foundation. Rule 86(b) explicitly states that the style revisions do not effect the “take effect” date for purposes of supersession. Moreover, no “supersession” issue arose after the Appellate or Criminal Rules were restyled or after the Civil Rules were amended in 1987 to be gender neutral.

## **Federal Rules of Criminal Procedure**

### 1. Criminal Rule 11

#### A. Brief Description

Existing Criminal Rule 11(b)(1)(M) provides that the court must inform a criminal defendant, during the plea colloquy, of “the court’s obligation to apply the Sentencing Guidelines, and the court’s discretion to depart from those guidelines under some circumstances . . . .” The proposed amendment to Rule 11 would conform this provision to *United States v. Booker*, 543 U.S. 220 (2005), by revising the court’s advice to reflect the advisory nature of the Sentencing Guidelines. Under the proposed amendment the court must instead inform 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) . . . .”

#### B. Arguments in Favor

- The amendment would bring Rule 11 into conformity with the Supreme Court’s ruling in *Booker*.
- The amendment faithfully reflects the approach to determining a defendant’s sentence that has been followed by most courts after *Booker*.

Most courts do first calculate the applicable sentencing range under the Sentencing Guidelines.

C. Objections

- Requiring a court to first calculate the applicable guideline range gives greater prominence to the Sentencing Guidelines than is warranted under *Booker*, and insufficiently emphasizes the importance of the sentencing factors set forth in 18 U.S.C. § 3553(a).
- The amendment implies that the court must calculate the guideline range in each and every case. But in some circumstances it may be unnecessary to do so, such as when the guideline range is clearly trumped by an applicable mandatory minimum term.

D. Rules Committees' Consideration

The Criminal Rules Committee carefully considered the objections and concluded that the proposal did not overemphasize the importance of the sentencing guidelines calculation in the light of *Booker*, and did not misrepresent the court's function in considering the sentencing guidelines. The Committee concluded instead that the proposed language faithfully reflects how most courts approach sentencing following *Booker*, and, therefore, was accurate general advice to a defendant before entering a guilty plea.