

MEMORANDUM

TO: ADVISORY COMMITTEE ON CIVIL RULES

FROM: THOMAS S. ZILLY, CHAIR
ADVISORY COMMITTEE ON BANKRUPTCY RULES

RE: RESTYLED CIVIL RULES

DATE: DECEMBER 15, 2005

05-CV- 016

The Advisory Committee on Bankruptcy Rules conducted a review of the restyled Federal Rules of Civil Procedure. Six subgroups of the Committee studied Rules 1-16, 17-25, 26-37, 38-53, 54-63, and 64-82, respectively. The primary purpose of the review was to determine whether the restyling of the Civil Rules, once effective, will require any amendments to the Bankruptcy Rules to conform to the changes made to the Civil Rules. The review also was intended to determine whether any of the stylistic changes might have any substantive impact on the Bankruptcy Rules either in Part VII of those Rules or otherwise.

The Advisory Committee on Bankruptcy Rules congratulates the Advisory Committee on Civil Rules and its consultants for the exceptional effort in the restyling project. The restyling significantly improves the Civil Rules both as to their clarity and readability. We thank the Civil Rules Committee for its contribution to the fair and efficient administration of justice in civil and bankruptcy cases.

Our initial review of the restyled Civil Rules suggests that approximately ten Bankruptcy Rules may need to be amended to conform to the changes in the Civil Rules, and we will be proposing those amendments to the Standing Committee in due course. As to the Civil Rules, our Committee offers the following comments and suggestions for your consideration. In no

instance did we find any change in the language of the rules that created specific problems for the application of these rules in bankruptcy cases and proceedings. We did, however, make several observations about the rules and offer them to you for your consideration.

Civil Rule 12

The restyling of this rule includes reconfiguring former subdivision (c) into subdivisions (c) and (d) with former subdivision (d) becoming new subdivision (i). This does the least damage to the structure of the subdivisions, but it still creates a problem for persons who are conducting research under this rule and Bankruptcy Rule 7012. We will be proposing a conforming amendment to Rule 7012, and in the Committee Note to that rule amendment we will refer specifically to the changed configuration of Civil Rule 12. We think that the Committee Note to restyled Civil Rule 12 should include a specific statement that subdivision (c) is being split into subdivisions (c) and (d) and that restyled subdivision (i) is former subdivision (d). The side by side form of the published restyled rules makes these changes abundantly clear, but in the future, only the final version of the rules will published. Those rules generally include the dated Committee Notes, and if the Note were to include a description that warns the reader of the changes in the subdivision numbering it may avoid confusion in the future.

Civil Rule 40

The proposed style amendment to Civil Rule 40 deletes from the options the court has for scheduling trials the alternative of "such other manner as the courts deem expedient." The two options that would be left appear to permit either (i) the court to set trial on its own, or (ii) a party to request a trial date "with notice to the other parties." This potentially might interfere with "self calendaring" systems, in which a party can select an available date, without prior notice to other

parties. The separate Style-Substance Track amendment to Civil Rule 40, however, may be intended to resolve the matter by deleting the language about parties making requests and providing notice. We bring this to the attention of the Advisory Committee only to make sure that the Committee intends the change to permit a court to operate self calendaring systems, if the court believes that such systems are desirable.

Civil Rule 43

The proposed restyling of Civil Rule 43 would, among other things, renumber existing Rules 43(d), (e), and (f) as (b), (c), and (d), respectively. This has the potential of creating confusion, particularly since the Advisory Committee Notes to Civil Rule 43 and Bankruptcy Rule 9014 would contain outdated references (for example, the 2002 Committee Note to Rule 9014 refers to Civil Rule 43(e), which would be changed to Rule 43(c)). Some of the confusion would be alleviated if the proposed Committee Note to Civil Rule 43 made express reference to the renumbering of the sections. A sentence to that effect could be added to the proposed Committee Note in a manner comparable to that suggested for restyled Civil Rule 12.

Civil Rule 45

The last sentence of restyled Civil Rule 45(b)(1) would require some prior notice to other parties "before [a subpoena] is served." We have two concerns about this proposed amendment. First, the requirement of service of notice of the subpoena on other parties "before" the subpoena is served on the person from whom documents are requested without any further guidance, may lead to confusion and potential litigation. For example, would service 30 seconds "before" suffice, or would service have to be sufficiently "before" so that opposing parties would have an opportunity to act before the subject of the subpoena is served? The consensus of our Committee

was that service on other parties should be "with" or "contemporaneously with" service on the subpoenaed party.

Second, our Committee was concerned that this amendment was more than merely "stylistic." Indeed, the proposed Committee Note suggests that its purpose is to resolve conflicting interpretations of the current rule. We have not conducted a review of the case law in the area. We simply note that the Committee Note seems to suggest that the style change is intended to resolve at least some degree of conflict among the courts.

Civil Rule 59

The Committee may wish to consider revising the title of the rule to "New Trial; Altering or Amending a Judgment" in order to reflect the full subject matter of the rule. Rule 59(e) includes both altering and amending judgments, and adding that reference in the title of the rule would make it consistent with the text of the subsection.

Civil Rule 64

Rule 64(a) refers to remedies that provide "for seizing a person or property to satisfy a potential judgment." We would suggest that this portion of the rule be revised slightly to state that every remedy is available that "provides for seizing a person or property to secure satisfaction of the potential judgment." The change would make clear that the seizure of the person is not to satisfy the potential judgment, but rather to secure the satisfaction of the judgment.

The Committee questioned whether it is necessary for Rule 64(e) to include the descriptions of subject matter of 28 U.S.C. § 2361 and 28 U.S.C. § 2284. Since these provisions contain nothing beyond the matters included in the Rule's description, a simple reference to the

particular sections seems sufficient.

Civil Rule 68

The second sentence of subdivision (c) of the rule begins with “It must be served ...” The use of “it” refers to the offer of judgment, but the preceding sentence in the subdivision includes other matters. The second sentence could avoid any ambiguity by stating that “The offer must be served ...”

Civil Rule 69

The restyled rule changes the word “directs” in subdivision (a)(1) to “orders”. In the bankruptcy rules, we use “directs” as a broader term that covers standing orders and local rules, so that stylistic choice may be significant if applied to our rules. The Global Drafting Issues table indicates that the Advisory Committee prefers the use of “orders” rather than “directs”, but we have some concern that it may leave open some question about the application of local rules or other directives by courts when the rule refers only to orders as compared to the language in the existing version of Rule 69(a)(1).