A BRIEF INTRODUCTION TO THE NEW "RESTYLED" FEDERAL RULES OF CIVIL PROCEDURE

On December 1, 2007, the Federal Rules of Civil Procedure were all rewritten. Although the rewriting was called "The Style Project" and its drafters did not intend to make substantive changes to the rules, nonetheless some of these changes will likely have a substantive effect on federal practice.

Many of the changes were merely to modernize the language of the rules, to number them internally and to create new subheadings for easier navigation. However, there are some significant changes in wording. For example, all of the "shalls" were replaced within the rules. They have been changed to "must," "may" or "should," depending on context. "For good cause" replaces every phrase that discussed "cause," including "for valid cause," "for good cause shown," "for cause shown," "shows good cause" and "showing of good cause." Courts now "issue" not "make" or "enter" orders. "Attorney" replaces "counsel;" "alleged" replaces "aver," "considered" replaces "deemed", and "Crossclaim" replaces "cross-claim." There are no more "motions for enlargement of time" – now we have "extensions of time." The courts will no longer refer to parties as "indispensable" parties. The old "petition for removal" is now officially a "notice of removal." The word "Demurrer" is officially dead. So is the phrase "specific negative averment." It is now merely a "specific denial." The "infants" are gone – we just have "minors."

Some content within Rules has been relocated, some with new subparts of the same Rule and one to a new position within another rule. These relocations will complicate legal research, so it is important to identify the changes. These type of changes were made to Rules: 5, 6, 7, 8, 12, 16, 17, 22, 23.1, 25, 26, 30, 33, 37, 43, 50, 52, 53, 55, 56, 58, 60, 80, and 81.

In a few cases, the committee specifically includes what they called "style substance" changes, taking the opportunity to make some technical alterations to the rules. These changes affect Rules 4(k), 9(h), 11(a), 14(b), 16(c), 26(g), 30(b), 31(c), 40, 71.1(d) and 78(a).

There are new official forms accompanying the new rules and "unofficial forms" produced by the Administrative Office Forms Working group of judges and clerks which make the new forms easier to use. The "unofficial" forms are available for download at http://www.uscourts.gov/rules/cvforms2.htm.

There were several plainly substantive amendments and additions to the rules. Even the Advisory Committee recognized that some changes were substantive. Such "substantive" changes were made to FRCP 16, 26, 33, 34, 37 and 45. However, apart from these rules, other rules were changed in what this author and many commentators would consider a "substantive" rather than stylistic way.

For example, lawyers practicing in Federal Court should carefully compare the new FRCP 56 to the old FRCP 56. The new FRCP 56 does not require the court to grant summary judgment – it now reads that such motions "should" be granted. In addition, the partial summary judgment rule now has two separate subparts – one for "factual" motions and one for "liability" motions.

Other substantive changes not flagged by the Advisory Committee include a change to the relation back rule in FRCP 15, a change to the injunction rule, FRCP 65, and a change to FRCP 52. Under the new, FRCP 52, the Court is now free to <u>not</u> make any findings on motions, unless the rules otherwise require it.

In addition, a brand new rule, FRCP 5.2, relating to privacy protection was added. Under FRCP 5.2, for filings made with the Court, you need to now redact, unless the court orders otherwise, any electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number. There are exceptions to these requirements outlined in FRCP 5.2 and special rules apply to Social-Security Appeals and Immigration Cases covered by FRCP 5.2(c) or (d).

Although not part of the "Style Project," there is also a new Judicial Conference Policy on Safeguarding Personal Information in Electronic Transcripts which requires you to redact certain personal information in transcripts before submitting them to the court. The policy gives the parties 5 business days after the official transcript is filed to file a notice for request for redaction and then 20 days, or longer if the court allows, to do the redaction. You can get this policy from various sources online, including: mcsmith.blogs.com/eastern_district_of_texas/files/FJCAdvisory.pdf.

Because the new rules purport to be "stylistic" in nature, the effective date of the rules under FRCP 86(b) is the date of the last substantive change of the amendment to each rule. The Advisory committee essentially 'backdated" the rules to avoid any argument that the new language of the rules changed the meaning of the rules. This was an effort to get around the "supersession" clause to the Rules Enabling Act, which basically provides that a duly promulgated rule supersedes a conflicting statute previously enacted by Congress.

However, it is not clear that the effective date of a rule can be changed by fiat in this way. The supersession clause makes supersession turn on the date that a rule takes effect, not on the date that a rule says it should be deemed to take effect. And in a conflict between the federal rules and the Rules Enabling Act, the Rules Enabling Act prevails. The Advisory Committee issued a memo claiming that this is not a problem because non-substantive amendments have been treated as not altering the effective date of a rule for supersession purposes. It also pointed out that when legislatures recodify their rules, the act of recodificiation is typically treated by courts as having no substantive import.

That being said, most commentators believe that the Advisory Committee's "backdating" will not survive judicial scrutiny in the long run and that, where there is a conflict between the old rule and "restyled" rule, the Courts will not necessarily allow the language of the old rule to trump the text of the new rule. Courts may elect to follow the Advisory Committee and look to the old rule, or they might harmonize the old and new rules. Finally, they may look only to the text of the new rule for interpretive guidance. The bottom line is that until the Courts sort this question out, when the old and new rules are in conflict, you should take extra time to research whether there is any consensus on the meaning of the rule post December 1, 2007 and consider arguing that, under the supersession clause, the language of the new rule should control if it in your client's best interests.

This short article cannot substitute for a thorough review of the "Restyled Rules." Federal court practitioners should take extra time to review the new FRCPs before submitting documents to the Court and should take the time to review and update any forms to reflect the new language of the relevant FRCPs. You can obtain a pdf copy of the FRCPs effective December 1, 2007 online at http://www.uscourts.gov/rules/congress0407 htm.

Kathryn M. Pratt
Law Offices of Kathryn M. Pratt