O'MELVENY & MYERS LLP

BEIJING
BRUSSELS
CENTURY CITY
HONG KONG
LONDON
LOS ANGELES

1625 Eye Street, NW
Washington, D.C. 20006-4001

TELEPHONE (202) 383-5300
FACSIMILE (202) 383-5414
www.omm.com

NEWPORT BEACH
NEW YORK
SAN FRANCISCO
SHANGHAI
SILICON VALLEY
TOKYO

05-CV-015

December 15, 2005

OUR FILE NUMBER
600000-3

WRITER'S DIRECT DIAL
(202) 383-5370

WRITER'S E-MAIL ADDRESS
jbeisner@omm.com

VIA HAND DELIVERY

Peter McCabe, Esq.
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle NE
Washington, DC 20544

Re: ***Comments on Proposed Style Revisions to Federal Rules Of Civil Procedure***

Dear Mr. McCabe:

I am pleased to submit these brief comments on the preliminary draft of the proposed style revisions of the Federal Rules of Civil Procedure.

This submission is not intended to comment on the actual form of the revised rules. A number of distinguished professors and practitioners have addressed those matters in some volume and detail, and I am confident that the Committee will skillfully address various concerns that have been raised about the proposed stylistic revisions to the rules. Instead, my purpose is to react to some commentary I have seen questioning the wisdom and value of the style project itself.

I am frequently surprised that experienced attorneys interpret established statutes and rules in different ways. Just a few weeks ago, a heated debate arose among several of my colleagues about the proper interpretation of a Federal Rules of Civil Procedure provision that all of us have read and invoked numerous times.

The style project reflects an attempt to minimize those types of debates and to ensure that our federal judicial rules provide a clear roadmap to litigating in our federal courts – rather than construct a trap for the unwary. This is a very real concern because an attorney's failure to understand the civil rules could result in waiver of important legal rights. *Cf. Reno v. Walters*, 145 F.3d 1032, 1043 (9th Cir. 1998) (finding that "confusing" and "affirmatively misleading" legalistic language included in forms issued by the Immigration and Naturalization Service contributed to the government's violation of the plaintiff's due-process rights). Simplifying the

Rules of Civil Procedure will also increase attorney efficiency and even has the potential to reduce ever-escalating attorneys' fees. One study conducted in Australia found that on average, lawyers are able to arrive at a solution 30 percent faster when they consult plain versions of legislation versus traditionally styled legislation. *See* LAW REFORM COMM'N OF VICTORIA, PLAIN ENGLISH AND THE LAW 69-70 (1987).

I am particularly concerned that some commentators have expressed concern that the current style project is insufficiently ambitious – that the time has come to rewrite the rules for 21st Century legal practice and that clarifying out-of-date rules is not a worthy use of the Advisory Committee's time and will somehow confuse attorneys if and when the rules are revamped in their entirety. I believe that these concerns are ill-founded.

In the first place, I am not aware of any plan to call a "constitutional convention" to rewrite from scratch the substance of the rules governing how our civil judicial system works. But if such a plan did exist, I would seriously question its wisdom. Quite frankly, we are not seeing in our federal civil justice system the sort of widespread failures that might prompt a conclusion that a complete substantive overhaul of our civil rules is necessary. Although there is always room for improvement, the current core set of civil rules has served us well since its initial promulgation back in 1937. To be sure, some of those rules were – and continue to be – controversial. *See, e.g.,* Order of February 28, 1966, 383 U.S. 1031, 1035 (1966) ("[I]t is my belief that the bad results that can come from the adoption of these [class action rule] amendments predominate over any good that they can bring about.") (Black, J.). Still, the interests of litigants, practitioners, and jurists are best promoted by ***gradational*** (not wholesale) changes to the substance of the rules – isolated rules modifications made in response to observed patterns of procedural lapses or to the identification of opportunities to improve litigation processes. Indeed, although the relevant statutes certainly do not seem to prohibit the sort of top-to-bottom reconstruction of the rules contemplated by some comments, they suggest an assumption that any revisions to the initially adopted rules would be more isolated in nature based on continuous scrutiny of how the extant rules are operating. *See* 28 U.S.C. § 331 ("The [Judicial] Conference shall carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court . . . . Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.").

Second, this style project would not interfere in any way with more ambitious plans to change the rules substantively (assuming *arguendo* that such plans do – or should – exist). In reality, overhauling the federal rules to the extent apparently contemplated by some commentators would be a project that would take years (if not decades) to complete; even the relatively modest changes envisioned in this project have been in progress for more than two years. It makes no sense to force attorneys to litigate under potentially confusing rules for several years simply because a more ambitious project is being planned that could easily take many years to implement.

Third, any concern that the style project will require lawyers to relearn the rules (only to relearn them again if and when the envisioned overhaul occurs) is misplaced. By definition, the restyling project will not change the meaning or application of the current rules. Rather, the goal is to make those rules clearer. Thus, the restyled rules will reduce the time spent by attorneys trying to decipher their and their clients' procedural obligations and rights.

The restyling of the Federal Rules of Civil Procedure follows the restyling of the Federal Rules of Criminal Procedure and the Federal Rules of Appellate Procedure, and is consistent with a growing plain language movement that has spurred both private and public organizations across the country to clarify and simplify their rules, protocols, and policies. The premise of this movement is almost too obvious to restate – when you write something in plain language, it's more easily understood. *See* Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51, 62 (1995).

In recent years, numerous "plain language" initiatives have been undertaken in both the public and private sectors:

- In 1998, President Clinton issued an executive memorandum for agencies to put into plain language any rules or other materials meant for public use. *See* Memorandum on Plain Language in Government Writing, 34 WEEKLY COMP. PRES. DOC. 1010 (June 1, 1998).

- The Securities and Exchange Commission now requires issuers to write the front and back cover pages and the summary and risk factors sections of SEC prospectuses in plain language. *See* Plain English Disclosures, Exchange Act Release No. 39,593, [1993-2001 FSLR Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,003 (Jan. 28, 1998).

- The National Conference of Commissioners on Uniform State Laws has revised its legislative drafting rules to emphasize more user-friendly drafting. *See* DRAFTING RULES OF UNIFORM OR MODEL ACTS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW AND PROCEEDINGS (1983).

- Several state bar associations, including the bars of Michigan, California, Texas, and Missouri, have formed plain language committees.

- The Investment Company Institute and eight mutual funds have developed jointly a model prospectus that uses bullet points and plain language.

In sum, the restyling of the Federal Rules of Civil Procedure reflects a broadly-based, overdue realization by public and private entities that simpler is better. I commend the Committee for undertaking this project and voice appreciation to all who have contributed to the effort. I am certain that in years to come, that appreciation will be echoed by courts and

practitioners who will find the civil rules more accessible and by clients who will benefit from better representation.

Sincerely,

John Beisner