

**EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

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FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted proposed “style” amendments to Rules 101 through 1103, with a unanimous recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench and bar for comment in August 2009. Scheduled public hearings on the amendments were cancelled because no one asked to testify.

The comprehensive “style” revision of the Evidence Rules is intended to make the rules clearer and easier to read, without changing substantive meaning. Major bar organizations, including the American Bar Association and the American College of Trial Lawyers, provided substantial input, both before and after the proposals were formally published. Nineteen comments were submitted during the public comment period. Most of the comments received from the bench, bar, and public were favorable and included some very helpful suggestions that further improved the revisions.

The Evidence Rules “restyling” project follows the successful restyling of the Federal Rules of Appellate, Criminal, and Civil Procedure using uniform drafting guidelines prepared by a legal-writing scholar. Those restyling efforts began in the early 1990’s. The improvement in the rules resulting from the style revisions led the advisory committee to begin the restyling work on the Evidence Rules.

The advisory committee established the following principles for determining whether a proposed change was “substantive” and therefore beyond the proper ambit of the restyling project. A proposed change was “substantive” if: (1) under existing practice in any circuit, it could lead to a different result on a question of admissibility; (2) under existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made; (3) it changes the structure of a rule or method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule; or (4) it changes a “sacred phrase” — a phrase that has become so familiar in practice that to alter it would be unduly disruptive to practice and expectations (for example, “unfair prejudice” or “truth of the matter asserted”).

The advisory committee and the Committee established extensive procedures that required numerous levels of review to ensure that the style revisions were as clear as possible without changing any substantive meaning. The initial draft was prepared by the Committee’s style consultant, Professor R. Joseph Kimble. The advisory committee’s reporter, Professor Daniel J. Capra, reviewed each proposed amendment to ensure that no substantive change was made. If the changes raised any questions, the reporter and the advisory committee’s consultant, Professor Kenneth Broun, reviewed, researched, and revised the rule, providing a reliable basis for the many drafting decisions the project required. Early drafts were then reviewed by the Committee’s style subcommittee to analyze the implications of every proposed change. The advisory committee’s chair and reporter and the Committee’s style subcommittee refined subsequent revised drafts in a series of reiterative reviews. The revised draft was submitted to the advisory committee, which reviewed every rule carefully for possible inadvertent substantive changes. The process took three years, involved scores of conference calls, and produced more

than 350 documents.

The drafting approaches and style conventions used in the Style Project were the same as those used in the previous restylings of the Appellate, Civil, and Criminal Rules. As noted, the intent was to clarify, simplify, and modernize expression, without changing the substantive meaning of the Evidence Rules. To accomplish these objectives, the advisory committee used formatting changes to achieve clearer presentation, reduced the use of inconsistent and ambiguous words, minimized the use of redundant words and terms, removed words and terms that were outdated or archaic, and removed redundant cross-references.

Formatting changes to the dense, block paragraphs and lengthy sentences of the current rules made them much easier to read. The advisory committee broke the rules 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 make the rules clearer, even when the words are unchanged.

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Years of adding new rules and amending rules had led to inconsistent words and terms. Because different words are presumed to have different meanings, such inconsistencies resulted in confusion and unnecessary litigation. The restyled rules reduce inconsistency by using the same words to express the same meaning. Some variations in expression were carried forward, though, when the context made 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 potential for confusion is exacerbated by the fact that “shall” is no longer generally used in spoken or clearly written English. The restyled rules replace “shall” with “must,” “may,” or “should,” depending

on which one the context and established interpretation make correct in each rule.

The current rules have numerous “intensifiers,” expressions that might seem to add emphasis but instead state the obvious and create negative implications for other rules. For example, some past rules have used the words “the court may, in its discretion.” “May” means “has the discretion to”; “in its discretion” is a redundant intensifier. The absence of intensifiers in the restyled rules does not change their substantive meaning.

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions were rearranged in some rules to achieve greater clarity and simplicity. Words and terms that have acquired special status from years of interpretation were retained.

Each rule is accompanied by a Committee Note that explains: “The language of [the relevant rule] has been amended as part of the restyling of the Evidence 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. There is no intent to change any result in any ruling on evidence admissibility.” The Notes to some rules are more expansive in explaining a particular change.

The Committee unanimously concurred with the advisory committee’s recommendations.

Recommendation: That the Judicial Conference —

Approve the proposed amendments to Evidence Rules 101 through 1103 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.¹

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¹ After the proposed amendments were initially approved by the Judicial Conference and submitted to the Supreme Court for its consideration, the Judicial Conference approved of a change to the proposed amendment to Rule 408(a)(1)—changing the proposal from “a valuable consideration in order to compromise the claim” to the original language of “a valuable consideration in compromising or attempting to compromise the claim”—and to the proposed amendment to Rule 804(b)(4)(A)—to reinsert the word “adoption” in the phrase “relationship by blood, adoption, or marriage.”