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TO: All Readers

FROM: Joseph Kimble, Style Consultant
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DATE: February 21, 2005

RE: GUIDING PRINCIPLES FOR RESTYLING THE CIVIL RULES

This memorandum is meant to introduce readers to the restyled Federal Rules of Civil Procedure. It briefly describes the process for producing the restyled rules and then highlights some of the main style considerations and constraints.

The Style Process

This project was a style project, and the Advisory Committee on Civil Rules took extraordinary steps to avoid making any substantive changes. Here is an outline of those steps.

First, the style consultants prepared an original working draft — the redraft of the current rules.

Second, the Committee's reporter, along with one of two other experts on civil procedure, reviewed the draft in detailed memorandums that identified possible changes in meaning.

Third, the style consultants revised the original draft in light of the experts' comments. This produced draft #2, which footnoted any outstanding issues.

Fourth, draft #2 was submitted to the Style Subcommittee of the Standing Committee on Rules, which itself included an academic expert on civil procedure. The Style Subcommittee reviewed the entire draft, including the outstanding issues. The Style Subcommittee resolved many of the issues but decided that some were better resolved by the Advisory Committee. The Style Subcommittee's work resulted in draft #3. The reporter footnoted draft #3 for review by the Advisory Committee.

Fifth, the Advisory Committee broke down into Subcommittees A and B, each of which reviewed half the rules. If a "significant minority" of Subcommittee A or B thought that certain wording created a substantive change, then the wording was not approved. One of two representatives of the ABA's Litigation Section submitted comments on the drafts, attended each Subcommittee meeting, and participated in the discussion. The work of the Subcommittees resulted in draft #4.

Sixth, the full Advisory Committee reviewed the work of the Subcommittees, concentrating on issues that the Subcommittees thought should be resolved by the full Committee. This resulted in draft #5, the final draft.

Seventh, the restyled rules were reviewed by the Standing Committee — and changed in response to its suggestions — as each set of rules was produced.

This process has taken two and a half years and produced more than 600 documents. Anyone who reviews this archive will realize how much time and care and expertise were involved in preparing the restyled rules. The Committee's watchword appears in every Committee Note: "These changes are intended to be stylistic only." Everything that applied before this style project applies after the project.

Style Matters

In General

At the outset, the Advisory Committee adopted these authoritative guides on drafting and style: for drafting, Bryan Garner's *Guidelines for Drafting and Editing Court Rules*; for usage and style, Garner's *Dictionary of Modern Legal Usage* (2d ed. 1995); for spelling, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003). These sources will explain many of the Committee's decisions — everything from starting sentences with *But* to the use of hyphens and dashes to the preference for verbs rather than abstract nouns (*serve*, not *effect service*; *sued*, not *brought suit*).

Of course, it's difficult to even begin to describe the myriad style questions that arose during the project. The Committee developed a chart (see Appendix A) of more than 50 so-called global, or recurring, issues (*allege* or *aver*? *issue an order* or *make an order*?). Then there were the individual style questions — the possible edits — that every sentence, clause, and phrase in the rules seemed to present. Start with the first sentence of the rules. Should it be *all suits of a civil nature*? No: *all civil actions.* Should it be *with the exceptions stated in Rule 81*? No: *except as stated in Rule 81*. And so on, sentence by sentence.

Readers should notice, as they compare the rules side by side, that the restyled rules are usually shorter and easier to read. Some of the restyled rules may look longer on the page only because of the formatting — the breakdown into subparts and lists. Take Rule 9(a). The current rule is 127 words of text; the restyled rule is 78 words.

This is not to say that the goal of the project was to cut words; that was a natural result of the effort to clarify and simplify. Here are just two short examples:

Rule 8(e)(2)	Restyled
When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.	If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

Rule 71	Restyled
When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if a party.	When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

The overarching style goals were to improve consistency and clarity and to draft the rules in a plainer, modern style. The Committee believes that those goals have been met, that the improvement is readily apparent, and that judges, lawyers, and law students will find the restyled rules much easier to use.

Formatting

Readers will immediately notice the difference in formatting. Look, for instance, at Rule 12(a) or 14(a). The restyled rules are better organized into subparts. They use more headings and subheadings to guide the readers. They use cascading, or hanging, left-side indents so that a rule's hierarchy is made graphic. They use more vertical lists. And the lists are always at the end of the sentence, never in midsentence the way they are in current Rules 27(a)(1), 37(d), and 45(c)(3)(B).

Consistency

Consistency was a difficult challenge. Consistency is the cardinal rule of drafting, but after more than 70 years of amendments, the current rules have become stylistically inconsistent. To take a trivial example, the rules use *attorney fees*, *attorney's fees*, and *attorneys' fees*. Another example: the rules use *for cause shown*, *upon cause shown*, *for good cause*, and *for good cause shown*. Another example: the rules use *costs, including reasonable attorney's fees*; *reasonable costs and attorney's fees*; *reasonable expenses, including attorney's fees*; and *reasonable expenses, including a reasonable attorney's fee*. As a last example, the rules refer in various ways to the parties' *consent* or *agreement* or *stipulation*, sometimes with the qualifier *written* or *in writing* — for a total of six possibilities.

These examples could be multiplied almost endlessly. And in every instance, the Committee had to decide whether any difference was intended — or even what that difference might be. Often, it was fairly obvious that the inconsistency had no significance. When in doubt, the Committee asked one of its experts on procedure to research the question. If the Committee was then able to conclude that no difference was intended, the Committee used a single term. If the Committee could not be sure, it did not conform the terms, to avoid changing substantive meaning.

Rule 56 is an especially important example of the benefits of consistency. The standard set out in 56(c) is, of course, *no genuine issue as to any material fact*. But then 56(d) uses several variations on *no genuine issue*: *without substantial controversy, actually and in good faith controverted, not in controversy*. Restyled 56(d)(1) fixes the inconsistency by staying with *not genuinely at issue*.

To further achieve consistency, the restyled rules try to present parallel material in a parallel way. Current Rule 4(i)(2)(A) starts by addressing service on a United States agency, corporation, officer, or employee, but it changes the order of those four in the last part of the same sentence. Current Rule 33(b) addresses the content of an answer to an interrogatory, then the time for serving it; 34(b) reverses that order when addressing a response to a request for inspection. Current Rule 71A(c)(3) talks about furnishing at least one copy for the defendants' use; 71A(f) talks about furnishing for the defendants' use at least one copy. Some rules refer to a *hearing or trial*; others refer to a *trial or hearing*. The Committee could not possibly catch all the inconsistencies, but it hunted for them.

Intensifiers

Another difficult challenge was presented by what the Committee came to call "intensifiers." These are expressions that might seem to add emphasis but that, as a matter of good drafting, should be avoided for one of several reasons: they state the obvious, their import is so hard to grasp that it has no practical value, or they create negative implications for other rules. Examples (without citations):

- *the court may, in its discretion*: *May* means "has the discretion to"; *in its discretion* is a pure intensifier.

- *if the court deems it advisable, the court may*: Presumably, the court would not choose to do something inadvisable, so the *if*-clause is merely an intensifier.

- *the court may, in proper cases*: On the same theory, *in proper cases* is an intensifier.

- *unless the order expressly directs otherwise*: An order cannot implicitly direct; it means only what it says. And using *expressly* suggests that this order is somehow different from all the other orders in the rules.

- *show affirmatively*: Likewise, this rule is not meant to be different from all the other rules that require a party or a document to merely *show*.

- *substantial justice*: *Substantial* seems to add nothing — or nothing appreciable.

- *reasonable written notice*: Using *reasonable* might imply that, in every other rule that requires notice, the notice does not have to be reasonable.

- *if, for any reason*: Here, too, *for any reason* adds nothing specific and might imply that the bare use of *if* in other rules means something else. Perhaps only some reasons are good in those other rules.

Again, the current rules contain many other examples. And again, the Committee considered each one individually to determine whether the intensifier had any practical significance.

Outdated and Repetitious Material

As you would expect, the Committee also tried to eliminate material that was outdated, redundant, or otherwise repetitious. Many of these decisions are reflected in the Committee Notes.

Some examples of outdated material or language in the current rules: the reference to *at law or in equity or in admiralty* in Rule 1; the reference to *demurrers, pleas, and exceptions* in Rule 7(c); the reference to *mesne process* in Rule 77(c); the limitation in Rule 80 to testimony that was *stenographically reported* (thus excluding other means of recording testimony); and the reference in Rule 81(f) to the now-abolished district director of internal revenue.

The current rules also contain a number of redundant — or self-evident — cross-references. Thus, Rule 7(b)(3) requires that motions "be signed in accordance with Rule 11." But Rule 11 applies by its own terms to "every pleading, written motion, and other paper." Rule 8(b) states that a general denial is "subject to the obligations set forth in Rule 11." Of course it is; all pleadings are subject to Rule 11. Rule 33(b)(5) states that a party submitting interrogatories "may move for an order under Rule 37(a)." But Rule 37(a) allows sanctions for any failure to make disclosure or to cooperate in discovery. So why include the cross-reference to Rule 37 in just one or two discovery rules? The trouble with redundant cross-references is that there is no logical end to them.

The Committee tried to avoid or minimize repetition in various other ways as well:

- By shortening a second reference to the same thing. Thus, current Rule 72(a) allows a magistrate judge to issue an order and then refers three times to *the magistrate judge's order*. Since there is no other order in sight, the restyled rule uses *the order* for the later references. The same principle applies to successive subparts: rather than seeming to start over with each one, we can generally trust the reader to read them together. Restyled Rule 4(d)(1) allows a plaintiff to *request that the defendant waive service of a summons*; in (d)(2), (3), and (4), we shorten to *the request* or *a waiver*. Restyled Rule 16(f)(1)(A) refers to *a scheduling or other pretrial conference*; in (B), we shorten to *the conference*.

- Similarly, by adopting shorter forms of reference. Rather than repeatedly referring to *the court from which the subpoena issued* in Rule 45, we use *the issuing court*. Rather than *the party who prevailed on that motion* in Rule 50(e), we use *the prevailing party*.

- By using a list that pulls repeated terms into the introduction to the list, where the term is used just once. Compare current and restyled Rule 45(a)(2).

- By merging two provisions that are essentially the same. Current Rules 26(g)(1) and (2) have three similar sentences about disclosure and discovery; the repetitious parts of those six sentences have been merged into two sentences in restyled 26(g)(1). Likewise, current Rules 37(a)(2)(A) and (B) have a similar sentence about certifying an effort to obtain disclosure or discovery; those two sentences have been combined into one in restyled 37(a)(1). Current Rule 50(b) uses lists that repeat two items verbatim; the restyled rule merges the repeated items into one list.

- By using more pronouns. After referring to *a copy of the summons and of the complaint* in Rule 4(i)(1)(A)(i), we use *a copy of each* in the subparts that immediately follow. After referring to certain *materials* in Rule 26(b)(3)(A)(ii), we refer to obtaining *their substantial equivalent* instead of *the substantial equivalent of the materials*.

- By avoiding the purest form of repetition — saying the same thing twice. Thus, current Rule 33(d) refers to *an examination . . . or inspection*. The Committee could see no appreciable difference between those terms. The prime example may be current Rule 36, which repeats in (a) and (b) that an admission is "for purposes of the pending action only."

Once again, these examples could be multiplied.

Syntactic Ambiguity

The Committee tried to eliminate the syntactic ambiguities that lie hidden in the current rules. Some examples:

- Rule 11(c)(1)(B): *the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.* What does *thereto* refer to?

- Rule 34(a): it's too long to quote, but the question is whether *in the possession, custody or control of the [responding] party* modifies *any designated documents*.

- Rule 45(c)(3)(B)(iii): is the material beginning with *the court may* supposed to modify all the items in the list or only item (iii)?

- Rule 46: *the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor.* What does *therefor* refer to?

- Rule 72(a): *any portion of the . . . order found to be clearly erroneous or contrary to law.* Does *clearly* modify *contrary to law*?

Other Kinds of Changes

Below is a short list of some of the other style principles that the Committee followed, trying to fix the more obvious deficiencies in the current rules:

- Reorganize jumbled provisions. For some examples, compare the current rules with restyled Rules 6(c), 8(b), 16(b), 23.1, 26(e), 30(b), 37(d), 44(a)(2), 45(c)(2)(B), and 70.

- Break up overlong sentences. Compare the current rules with restyled Rules 4(m), 6(b), 26(b)(3)(A), 26(b)(4)(B), 31(b), 34(a), 56(a), and 56(g). Of course, the added vertical lists in the restyled rules automatically break up their sentences into manageable pieces. No doubt some of the sentences are still too long, and even some of the vertical lists are more complicated than we might have liked (see Rule 4(f), for instance). But readers should notice a substantial overall improvement.

- Cut down on cross-references. The experts urge drafters to minimize cross-references, and the Committee tried to eliminate as many as it reasonably could. Current Rule 51, for instance, uses eight cross-references; the restyled rule uses two. Again, a good many — perhaps too many — cross-references still remain, but many are gone.

- Minimize *of*-phrases. Garner's *Guidelines* puts it exactly like that. Thus, not *statute of the United States*, but *federal statute*. Not *must include the names of all the parties*, but *must name all the parties*. Not *after the appearance of a defendant*, but *after any defendant appears*. Not *the avoidance of unnecessary proof*, but *avoiding unnecessary proof*. Not *order of the court*, but *court order*.

- For the same reason, use possessives. The current rules use possessives rather sparingly. The restyled rules use them liberally. Not *the law of the foreign country*, but *the foreign country's law*. Not *the pleadings of the defendants*, but *the defendants' pleadings*. Not *the claims of the opposing party*, but *the opposing party's claims.*

- Don't state the obvious. This is one more among the many ways to omit unnecessary words. Current Rule 5(e): *The filing of papers ~~with the court as required by these rules~~ shall be made by* (i.e., *A paper is filed by*). Current Rule 6(b): *When ~~by these rules or by a notice given thereunder or by order of court~~ an act is required or allowed to be done* (i.e., *When an act may or must be done*). Current Rule 26(b)(3) (after a sentence about a party's showing a need for materials): *In ordering discovery of such materials ~~when the required showing has been made~~*. Current Rule 30(b)(1): *shall give . . . notice . . . to every other party ~~to the action~~*. Current Rule 36(b): *Any admission ~~made by a party~~ under this rule*. Current Rule 56(a): *A party . . . may . . . move . . . for a summary judgment ~~in the party's favor~~*.

- Avoid legalese. No *pursuant to*. No *provided that*. No *such* when it means "a" or "the." No *hereof* or *therefor* or *wherein*. Consider this specimen, from current Rule 56(e): "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

- Banish *shall*. The restyled civil rules, like the restyled appellate and criminal rules, use *must* instead of *shall*. *Shall* is notorious for its misuse and slipperiness in legal documents. No surprise, then, that the Committee changed *shall* to *may* in several instances, to *should* in several other instances, and to the simple present tense when the rule involves no obligation or permission (*There <u>is</u> one form of action; this order <u>controls</u> the course of the action*).

The Limits of Change

Renumbering

The Committee did not change any rule numbers, even though some of the rules (4, 23, 26, 71.1) are probably too long and others might benefit from repositioning. This also means that the Committee did not convert any of the interposed rules (4.1, 7.1, 23.1, 23.2, 44.1, 65.1, and 71.1) to different numbers. Nor did it restore to active service the numbers of previously abrogated Rules 74, 75, and 76. At the rule level, the only change was from 71A to 71.1.

Any reordering was done at the subdivision level — (a), (b), (c) — or lower. (The comparison chart in Appendix B shows changes in subdivisions.) Even then, the Committee changed only when it was satisfied that the improved sequencing outweighed the possible short-term inconvenience. Throughout this project, the Committee had to balance two competing interests. On the one hand, the current designations are familiar,

and changing them will occasionally require users to make adjustments. On the other hand, this chance to set the rules in order — or better order — may not come along for another 70 years, and we should take the long view.

Consider just the first few changes on the comparison chart. Current Rule 5(e) is merged into restyled 5(d) because both subdivisions deal with filing. Current Rules 6(d) and (e) move up because current 6(c) is empty. Current Rule 8(d) moves to restyled 8(b)(6) because it fits more logically with other materials on denials; and the change is ameliorated because the rule keeps its heading even at the paragraph level, (b)(6). The last sentences of current Rules 12(b) and (c) — two long sentences — are merged into restyled 12(d) because they are almost identical; and this change, too, is ameliorated by moving current 12(d) to a new 12(i). On the whole, the Committee tried to make a modest number of sensible changes in the subparts only.

Dealing With Uncertainty

As already suggested, the Committee had to repeatedly deal with ambiguities, inconsistencies, gaps, and other uncertainties in the current rules. Start with Rule 1 again — just two sentences. Should it be *These rules govern the procedure in all civil actions* or *in all civil actions and proceedings*? Should we change *inexpensive* to *economical*? Then Rule 2. One expert thought we should get rid of it entirely. Nothing in Rule 3. Rule 4(a). Would it be substantive to change *a failure to appear and defend* to *a failure to defend*? Is there a difference between *a failure to appear* and *failing to appear*? And so on.

Almost always, the Committee was able to answer these questions and clarify the rule or tighten the language. Occasionally, though, an ambiguity was so intractable that the Committee was not comfortable with changing the language. One memorable example: the two similar uses of *heretofore* in current Rule 59(a). The uses refer to the reasons for which new trials or rehearings *have heretofore been granted* in federal courts. This is classically bad drafting. Up until when? When the rule was first drafted? When the rule is applied? After research and extended discussion, the Committee decided that it could not be sure, so that ambiguity — and one piece of legalese — had to be carried forward.

Sacred Phrases

This was the Committee's name for phrases that have become so familiar as to be unalterably fixed in cement. They are not exactly terms of art like *hearsay* and *bailment*. Terms of art typically are confined to a given field, consist in one or two words that are

difficult to replace with one or two other words, and convey a fairly precise and settled meaning. So-called sacred phrases do not meet these criteria.

At any rate, some of the examples below could have easily been improved without changing the meaning; in others, style improvements risked substantive change. But none were touched.

- Restyled Rule 8(b)(5): *knowledge or information sufficient to form a belief.*

- Restyled Rule 12(b)(6): *failure to state a claim upon which relief can be granted*.

- Rule 13(a)(1)(A): *arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.*

- Restyled Rule 19(b): *in equity and good conscience*.

- Restyled Rule 44(b): *no record or entry of a specified tenor*.

- Restyled Rule 56(c): *there is no genuine issue as to any material fact*.

So that's how the Committee went about restyling the civil rules. The Committee realizes that its work is not done — but it trusts that readers will see the value of all that has been done.