

MEMORANDUM

05-CV-022

To: Committee on Rules of Practice and Procedure
From: Stephen B. Burbank & Gregory P. Joseph
Date: October 24, 2005
Subject: Restyled Federal Rules of Civil Procedure

We are pleased to submit, on behalf of a group of eleven law professors and ten practitioners (the "Restyling Project"), comments on the preliminary draft of the proposed style revision of the Federal Rules of Civil Procedure and the proposed amendments in the "Style-Substance Track," both of which were published for comment in February 2005. Our comments on the proposed style revision are presented in two formats, one in which they follow the Committee Notes to the individual rules, and another in which they are presented as a stand-alone document. Our comments on the proposed amendments in the "Style-Substance Track" are presented only in the former format.

The Restyling Project grew out of our concern that the effort required to provide useful comments on the proposed style revision would be so time-consuming that, even with the long comment period, few if any individuals would undertake to do the necessary work, and that if organizations made the necessary investment of time, they might approach the endeavor from a particular perspective. At the same time, the need for informed comment seemed to us critical in connection with a project of such immense potential importance to and impact on the course of civil litigation. We did not undertake the Restyling Project as an effort to support the proposed style revision, nor to undermine it, but rather carefully to evaluate it.

After discussions with a number of colleagues in practice and the academy, and after consultation with Judge Levi and Judge Rosenthal, we divided the restyled rules into nine groups, roughly corresponding to the table of rules, with the proposed amendments in the "Style-Substance Track" constituting a tenth group. For each group we recruited one academic (and for one group two academics) and one lawyer in practice to serve as a team to review the restyled rules/proposed amendments. We recruited people on the basis of their demonstrated knowledge and experience, intelligence and common sense, not of any knowledge as to their attitudes or likely attitudes toward the restyling effort. We were able to enlist people of distinction; only one person whom we approached was unable to participate.

As to the charge given to the teams — the criteria to guide their work — we decided to keep it simple. The main risk presented by the restyling effort, one of which we know the

rulemakers have been acutely aware, is that it will yield unintended changes in the meaning of the rules (which most refer to as “unintended substantive changes”). We asked the teams to review the restyled rules from that perspective, to see whether the rulemakers have been successful in doing what they set out to do — namely, to restyle the Federal Rules without changing their meaning, with particular attention to the transaction costs that ambiguity regarding a change in meaning might engender. Thus, the goal we set for the Restyling Project was to identify proposed changes that unquestionably would change the meaning of a rule, as well as those as to which there is a reasonable argument that meaning would be changed. In addition, although we discouraged second-guessing proposed changes from a purely stylistic perspective, we decided that, if a proposed change was particularly hard to read or would be hard to cite, including by reason of elaborate subdivision, that itself could engender unnecessary transaction costs and was fair ground for comment.

Our view that the major costs of the restyling are likely to be transaction costs — those that would ensue if a practitioner or trial judge read a restyled rule in a way that differed from the current interpretation and conducted litigation, or made rulings, accordingly — informed our decision not to burden the reviewing teams with any of the working papers of those engaged in the actual work, even if those papers were otherwise available. We thus sought to avoid the possible anchoring effect that the working papers might have on the members of the Restyling Project. Another reason inclining us to that choice was the additional burden that becoming conversant with such papers would impose on the reviewing teams. Accordingly, we asked members of the Restyling Project to read only Professor Kimble's memorandum included with the rules published for comment and Professor Cooper's article in the *NOTRE DAME LAW REVIEW*, believing that these documents furnish an adequate statement of the goals of the restyling effort and of the criteria that have guided those involved in the work.

We recognize that this decision may result in comments/questions that may have been asked and, in the Committee's view, satisfactorily answered in the course of the restyling effort. But the fact that the Restyling Project participants expressed concern raises the question whether a problem lingers. In all events, that would be, or so it seems to us, a minor cost in comparison with the potential gain of comments by those approaching the project with fresh eyes and with minds unburdened by debates that may be far removed from what the average practitioner or judge will see. Moreover, it is our hope that the process we used in developing the final comments of the Restyling Project, described below, has reduced the number of “asked and answered” comments, although we are sure that it has not wholly eliminated them.

In June, following the distribution of the restyled rules (with Professor Kimble's memorandum) and of Professor Cooper's article, and after each team had the opportunity to engage in a preliminary review of its group of rules, we held a conference call to discuss possible refinements in the criteria to guide the work, the proper treatment of recurring

issues, and matters of administration. Thereafter, over the summer, we corresponded with team members about additional questions arising, sharing that correspondence with the Restyling Project as a whole when such questions seemed of overarching significance. In September each team submitted a draft of comments on the group of rules assigned to it. We edited those comments, eliminating those which seemed to us either not within the limited remit of the Restyling Project or misdirected, reducing the length of many others, and imposing a uniform format. We then distributed the edited comments to all participants and, in mid-October, held a second conference call, the major purpose of which was to discuss what Professor Cooper has called “the big picture question,” to wit, whether the restyling effort augurs greater benefits than costs. Both prior to and during that conference call, we encouraged teams to raise again comments that they thought appropriate but that we had eliminated in editing, and the final comments include a number of such reconsidered items. Thus, although all members of the Restyling Project had considerable opportunity to shape the final document, and this memorandum reflects the work of the whole, we do not claim that each member agrees with every comment or with every statement in this memorandum.

Although a review of the Restyling Project's comments will reveal a number of recurring issues, and although we have endeavored to respond to those issues uniformly, it may be helpful here to bring up those that seem to arise most frequently and/or to be most important, and to address them somewhat more fully than is appropriate in comments on a particular restyled rule.

We applaud the quest to make the Federal Rules of Civil Procedure more accessible to all who use them and recognize the value that subdivisions can have for that purpose. Moreover, we know that the restyling effort has been sensitive to the problem of trying to wean users from numbers that have been burned in their memories (e.g., 12(b)(6)). It is not clear, however, that adequate attention has been paid to the potential costs, particularly in an age of electronic research, of elaborate articulation and subdivision, costs that include both the effort involved in citing with precision and the consequences of the greater number of errors in citation that are predictable the more highly articulated a rule becomes. We raise this concern in connection with Restyled Rules 12(a)(1)(A), 12(h)(1)(B), 15(c)(1)(C), 16(b)(3)(B), 17(a)&(c), 19(b)(2), 23(c)(2)(B), 23(d)(1)(B), 36(a)(5)-(6), and 64(b). It applies more broadly, however, and we encourage the rulemakers to reexamine the question generally.

We also applaud the quest to purge the Federal Rules of archaisms and to make them concise. These quests, however, also can defeat other, more important, purposes of (or constraints on) the restyling effort. Thus, the effort to eliminate apparently unnecessary words may lead to a deletion that changes meaning, as for example in Restyled Rule 49(a)(2), where “give to the jury such explanation and instruction” has yielded to “instruct”.¹ In

¹ We here follow a punctuation convention adopted in our comments, placing quotation marks

addition, some instances of adherence to a style convention designed to reduce words may lead to unintended changes in meaning — *e.g.*, the use of “litigation costs” instead of “cost of litigation” in Restyled Rules 11(b)(1) and 26(g)(1)(B)(ii). In still other instances, the problem is not so much a change of meaning as the specter of unnecessary transaction costs, as where “written stipulation” has become “stipulation”. See Restyled Rules 29, 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), 36(a)(3), and 59(c). Compare Restyled Rule 39(a)(1) (“file a stipulation”).²

There is bound to be some disagreement about the use of “must” as opposed to “shall”, “should” or “may”. This is covered in the Kimble memorandum and the Cooper article. One potential problem area identified by the Restyling Project involves changes from “shall” to “must” when that might be thought to deprive the judge of discretion that the existing language, at least as interpreted, confers. *See, e.g.*, Restyled Rules 65(c), 69(a)(1). The converse problem is also noted, see Restyled Rule 54(d)(1), as are the problems of using “must” when “should” is called for, see Restyled Rule 54(a), and “may” when “must” is called for. *See* Restyled Rules 10(a), 25(a)(1). *Cf.* Restyled Rule 15(c)(1)(heading).

We also encountered a number of problems involving the relationship between the restyled rules and statutes. Perhaps the least troublesome concern the restyling of existing rules that were originally written with the aim of closely tracking a federal statute. We believe that the costs of severing the linguistic cord would outweigh the benefits and thus suggest retention of the statutory terms in Restyled Rules 72-73. More serious problems are presented in connection with the restyling of existing rules that were fashioned at a time when the extent of the authority to make prospective evidence law by court rules was unclear and before the enactment by Congress of the Federal Rules of Evidence in 1975. Given the decision not to restyle the Evidence Rules and the problem of supersession that exists because most of those rules are statutory, we suggest that Restyled Rules 61 and 80 be placed in the “Style-Substance Track” or referred to the Evidence Rules Committee.

The most difficult problems we confronted involving the relationship between the restyled rules and statutes arise from the Enabling Act’s supersession clause. Apart from possible changes to the Evidence Rules discussed above, we have identified supersession problems in connection with Restyled Rules 65(c), 68(a) and 68(d), but it is clear that they are more extensive. Thus, for instance, a number of courts have refused to apply existing Rule 68 in actions under the Clean Water Act. *See, e.g.*, North Carolina Shellfish Growers

before a period or comma when quoting from a rule or restyled rule.

² As an example from the “Style/Substance Track” package, it is proposed to change Rule 8’s “a demand for the relief sought, which may include relief in the alternative or different types of relief” to “demand for the relief sought, which may include alternative forms or different types of relief”. The original formulation was written to provide authority for a pleading like that in Form 10. The proposed change would eliminate that authority.

Assoc. v. Holly Ridge Associates, 278 F. Supp.2d 654 (E.D. N.C. 2003). Although the stated rationales for that result have differed, the decisions could be justified on the ground that the act postdated the rule. Once Restyled Rule 68 were effective, that rationale would no longer be available. Similarly, there are a number of inconsistencies between the Private Securities Litigation Reform Act of 1995 and the existing rules, the resolution of which turns on the last-in-time rule. The same may be true of the Class Action Fairness Act of 2005.

There is no obvious solution to this problem. It appears that the original rulemakers addressed it by stating in Committee Notes an intent not to affect certain statutes, as they did, for instance, in the Committee Note to Rule 65. That seems to us to have been wishful thinking in 1938 and to be even more obviously so today when such materials are not universally used in interpretation. The safest way to insure that restyled rules did not supersede statutes simply by reason of being later-in-time would be to secure legislation so providing, but we can understand why the rulemakers might be reluctant to seek such legislation. We doubt that the Enabling Act confers power on the Court directly to change the terms of its rulemaking charter—to supersede the supersession clause—by providing by rule that the restyled rules do not supersede statutes with which they are in conflict. Perhaps the same result can be achieved by including in the restyled rules an amendment to Rule 81 providing that the rules shall not be interpreted to be inconsistent with any statute to the extent that such inconsistency would arise solely as a result of the amendments effective on _____. We are not confident about the legitimacy of that approach, however, and we are in any event concerned about the archaeological expeditions that it might require, and the transaction costs it might entail, for litigants and courts trying to determine whether supersession occurred as a result of conflict between statutes and pre-restyled rules.

We have taken two approaches to restyled rules that in our view would effect changes in meaning. In some instances our response has simply been to suggest retention of the language in the existing rule. In other instances we have recommended putting the proposed changes in the “Style-Substance Track.” There are quite a number of the latter recommendations. See Restyled Rules 7(a)(7), 11(b)(1), 15(c)(1)(C), 23(d), 26(g)(1)(B)(ii), 30(f)(1), 31(b)(3), 61, 65(a), 65(c), 65(d) (twice), 68(a), 68(c), and 78(a). We think it likely that some of these changes in meaning are sufficiently significant that even treatment in the “Style-Substance Track” would exceed the limited purposes of that track and thus that the proposed changes are not appropriate for either track at this time. Moreover, we note with considerable concern the number of problems of this type that we have identified in connection with the restyling of Rules 65 and 68, concern that is the greater because those rules are also the focus of our concerns about supersession.

Finally, it is appropriate here briefly to summarize the views expressed by the members of the Restyling Project concerning the “big picture question.” There were, to be sure, a number of members who favored continuing the effort. They noted that the restyling of other sets of rules appears to have been successful and voiced their agreement with the

basic rationale for the enterprise. They acknowledged that there will inevitably be some unintended changes in meaning but thought that, particularly with the improvements that should follow from these comments, the advantages outweigh the disadvantages. Those advantages include the greater accessibility of the restyled rules, particularly to younger and less experienced practitioners, and the mandatory continuing legal education that would necessarily follow the promulgation of the restyled rules.

A greater number of participants were either mildly or strongly negative. A commonly expressed view was that the work of the Restyling Project has revealed some serious problems and that, however careful that work has been, there must be many more problems that have not yet been identified. In addition, some members doubt that the benefits of restyled rules will be substantial, and they are convinced that such benefits will pale in comparison with the transaction costs, not just those engendered by uncertainty about a change in meaning, but those generated by the need to learn the new rules (and pay for the new treatises), together with the additional transaction costs that will follow when local rules and standing orders are changed to conform to the restyled rules. Finally, there was concern that restyling might retard or make more difficult the more important task of determining whether we have an appropriate set of rules for litigation in the twenty-first century. Some members were of the view that this substantive enterprise should take priority, that it could include restyling as a component, and that the bar would not tolerate having to relearn the rules more than once in a generation.

As the organizers of the Restyling Project, we regret to say that we share the views of those opposed to the continuation of the restyling work. We acknowledge the potential benefits, but we believe that they will be dwarfed by the likely costs. Moreover, and speaking solely on our own behalf, although much attention has been paid to transaction costs, we are equally if not more disturbed by some of the problems unearthed in this work that have negative implications for access to court (*e.g.*, Rule 68) and/or for the protection of individual rights (*e.g.*, Rule 65), as we are by the prospect that the Restyling Project has missed other similar problems.

We look forward to meeting with you on November 18.

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