November 30, 2005 **05-CV- 009**

VIA E-MAIL AND FIRST CLASS MAIL

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re: Proposed Style Revision of the Federal Rules of Civil Procedure

Dear Mr. McCabe:

I respectfully submit the following comments regarding the February 2005 style revisions to the Federal Rules of Civil Procedure proposed by the Advisory Committee on Federal Rules of Civil Procedure.

Overview

The non-substantive problems associated with the Federal Rules of Civil Procedure are sufficiently great so as to warrant revision. Overall, the Advisory Committee has done a fine job in this regard, and the restyled rules as proposed, whatever their flaws, are superior to the Rules as they currently exist.

Nonetheless, a number of comments are submitted for the Committee's consideration. Many of these comments are based on my article, *Action Is an Action Is an Action Is an Action*, 77 WASH. L. REV. 65 (2002).

Major Comments

1. Consistency in terminology

It is important that a) the Rules use an appropriate term for each concept communicated, b) this same term be used consistently throughout the Rules (at the exclusion of all others) when communicating the same concept (i.e., one term per concept), and c) the use of such terms be avoided in all other contexts (i.e., one concept per term). These principles seem incontrovertible, and there seems to be little, if any, need for exceptions, even where current practice is to the contrary. (Indeed, does this project not anticipate departure from current practice?) With these thoughts in mind, the Committee might consider the following:

a. "may"/"might"/"can"

As used in the Restyled Rules, the term "may" primarily means "has permission to" (or, as stated in the Preliminary Draft of the Proposed Restyle Revision (at xiv), "has the discretion to"). In order to minimize ambiguity, this term should not also be used to express probability or likelihood; instead, "might" would be a better choice. *See, e.g.*, Restyled Rules 14(a)(1); 24(a)(2); 26(a)(1)(A), (2)(A), and (3)(A).

Similarly, there is at least one instance where "can" (meaning "is able to"), rather than "may," would appear to be a better choice, in that it more accurately reflects the concept communicated. *See* Restyled Rule 33(c) ("If the answer to an interrogatory may be determined . . . .").

b. "action"/"case"/other meanings of "action"

"Action" obviously is the preferred term for a civil judicial proceeding. *See, e.g.*, Restyled Rule 2. "Action" should be used wherever this concept is communicated. Other terms (most notably "case") should not be used, as there is no compelling reason for retaining its usage in this context, the Committee's contrary resolution notwithstanding (*see* Preliminary Draft at 205 (issue 3)). (This dual usage seems particularly troubling where both terms are used for this same purpose in the same provision. *See, e.g.*, Restyled Rules 26(g)(1)(B)(iii); 50(a)(2), (b).) Of course, where a different concept is being communicated, the use of "case" seems unobjectionable. *See, e.g.*, Restyled Rule 9(h)(3) ("admiralty case").

Similarly, a different word should be substituted wherever "action" is currently being used as a verb or in reference to particular steps ("actions") taken. *See, e.g.*, Restyled Rules 16(d); 23.1(b)(3); 26(c); 37(a)(5)(A)(i); 37(d)(1)(B); 53(f); 54(d)(1); 77(c)(2). Again, this seems particularly important with respect to those provisions in which "action" is currently being used in more than one sense. *See, e.g.*, Restyled Rules 16(d), 23.1(b); 26(c).

c. "court"/"judge"/"clerk"

For a number of reasons, it is probably better to refer to the decision-rendering "person" here institutionally ("court") rather than individually ("judge," "clerk," etc.), barring a sound reason to the contrary. *See, e.g.*, Restyled Rule 16(b) (and compare Restyled Rule 16(a)); Restyled Rule 23(f) (and compare Current Rule 23(f)).

d. "issue" as a verb

"Issue," when used as a noun, has a well-established meaning in the Rules. *See, e.g.*, Restyled Rule 56(c) ("genuine issue of material fact"). Accordingly, the use of "issue" as a verb should be avoided. Though the Committee's expressed preference for "issue" in this context over "enter" (which means something different under the Rules in any event) and "make" (which seems more vague) – *see* Preliminary Draft at 211 (issue (ironically enough) 24)) – is somewhat understandable, "render" (though a little archaic) would be a better choice. *See* (again) Restyled Rule 56(c).

e. "claim" as a verb

A similar objection arises as to the use of "claim" as a verb, a term which, as a noun, also has a well-established meaning (*see, e.g.*, Restyled Rule 12(b)(6)). Accordingly, unless the verb form of "claim" relates to this same context, another term ("assert"? "argue"?) should be used. *See, e.g.*, Restyled Rules 26(b)(5); 37(b)(2)(A)(i); 45(d)(2).

2. Meaning of "shall"

As the Committee states (at xviii), the word "shall," which is "notorious for its misuse and slipperiness in legal documents," has been banished (primarily in favor of "must"). Though it is difficult to argue that "shall" should not be replaced with a less ambiguous term, it is not at all clear that "shall," as used throughout the Current Rules, has any meaning other than "must." For this reason, translations of "shall" to "should" (which, given its lack of compulsion, seems to be a particularly inappropriate word in this context) or "may" should be changed to "must." *See, e.g.*, Restyled Rules 1; 15; 16(d); 25; 33(a)(1); 54(d)(1); 56. (The Committee's use of "should" in Restyled Rule 56 seems particularly suspect in light of the Supreme Court's more recent summary judgment decisions, including *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).)

3. Timing of Rule 12(b) motions to dismiss

Restyled Rule 12(b) provides that a motion asserting any of the seven defenses enumerated therein "must be made before pleading." But this is not true, for at least three of these defenses (those described in paragraphs (1), (6), and (7)) may be asserted, by motion, *after* the filing and service of an answer. *See* Restyled Rule 12(h)(2), (3). Restyled Rule 12(b) should be revised to correct this internal inconsistency, an inconsistency that has long haunted law students and practitioners alike.

4. Number of jurors

Though Current Rule 48 permits a verdict to be taken from a jury of less than six members upon stipulation of the parties, so long as at least six jurors are seated initially, the first sentence of Restyled Rule 48 (which provides that a jury "must have no fewer than 6 . . . members") creates ambiguity on this point. This problem might be solved by inserting the phrase, "At the start of the trial," at the beginning of that first sentence.

5. Scope of appellate court powers

Nothing in Current Rule 50(d) affirmatively permits an appellate court to decide whether the appellee is entitled to a new trial or whether the appellant is entitled to a judgment as a matter of law; to the contrary, the rule expressly disavows any opinion on the subject. For this reason, because these rules expressly govern only the procedure to be followed in the *district* courts (*see* Restyled Rule 1), and because a rulemaking body seemingly should be hesitant to codify some perceived ability, based only on pragmatism, on the part of appellate courts to decide issues not first decided by trial courts, the last sentence of Restyled Rule 50(e) should be deleted or rewritten along the lines of Current Rule 50(d).

6. Meaning of "state law"

The revision made to Current Rule 81(e) now reflected in Restyled Rule 81(d)(1) is arguably substantive and in any event remains underinclusive (and perhaps also somewhat overinclusive). It is recommended that this provision be deleted.

7. Scope of rules generally

Because the Rules undeniably affect *personal* jurisdiction (*see* Restyled Rule 4(k)), it is clear that the term "jurisdiction" as used in Restyled Rule 82 refers only to *subject-matter* jurisdiction. In order to minimize needless confusion on this point, it is suggested that the term "subject-matter" be inserted before the word "jurisdiction" in Restyled Rule 82.

Other Comments

1. Restyled Rule 4(i)(1)

In order to avoid possible ambiguity, the Committee might consider capitalizing the "a" in "attorney" and "assistant" as used in Restyled Rule 4(i)(1). *See also* Restyled Rule 12(a).

2. Restyled Rule 4.1(b)

In Restyled Rule 4.1(b), the Committee might consider replacing the word "decree" (or the phrase "decree or injunction") with the word "order" (or, in the alternative, changing this phrase to "decree, order, or injunction," ala Restyled Rule 54(a)). "Decree" seems somewhat archaic, and "injunction" seems somewhat redundant.

3. Restyled Rule 5(d)(2)(B)

It is somewhat unclear whether the phrase "the judge" as used in Current Rule 5(e) means something more than the particular judge assigned to the action in question, though even assuming that it does, it is doubtful that the phrase "a judge" adequately captures the intended meaning of this provision. Does "a judge" mean *any* judge? Any *federal* judge? Any *United States District Court* judge (from any district)? Restyled Rule 5(d)(2)(B) seems unclear on this point.

4. Restyled Rule 6(b), (d)

Restyled Rule 6(b) uses the phrase "may or must," whereas Rule 6(d) uses the phrase "must or may." Because the context is the same, it seems that the same phrase ("must or may"?) should be used.

5. Restyled Rule 26(b)(1)

As used in Restyled Rule 26(b)(1), the phrase "the scope of discovery is as follows" seems unnecessary, and probably could be deleted with no loss of clarity.

6. Restyled Rule 33(a)

The "Answers and Objections" heading found in Restyled Rule 33(a) (at least in the on-line version) seems mislabeled (i.e., should this be a subdivision, rather than a subparagraph?).

7. Restyled Rule 37(a)(3)(B)

In order to achieve consistency between Current Rule 37(a)(2)(B) and Restyled Rule 37(a)(3)(B) (and internal consistency within Restyled Rule 37(a)(3)(B)), it is recommended that the word "production" be deleted from Restyled Rule 37(a)(3)(B).

8. Restyled Rule 42(a)

The Committee might consider adding some language clarifying that, in connection with a consolidation ordered pursuant to Restyled Rule 42(a), the court need not do (1), (2), *and* (3) (i.e., it may do (1) and (2), or it may do (1) *or* (2)).

9. Restyled Rule 56(d)(2)

In light of Restyled Rule 56(d)(1), Restyled Rule 56(d)(2) is redundant and therefore unnecessary.

10. Restyled Rule 73

In light of Restyled Rules 1 and 2, the word "civil" as it appears before the word "action" (or "actions") in Restyled Rule 73 seems unnecessary.

11. Restyled Rule 86(2)(B)

Restyled Rule 86(2)(B) (which also does not seem to follow the usual numbering protocol) uses the word "opinion." This seems to be a poor choice, in that it might convey more discretion than is intended. It is recommended that Restyled Rule 86(2)(B) be revised to read: "the district court determines [or decides] that applying them . . . ."

Thank you very much for your consideration. If you or the Committee has any questions regarding these proposals, I can be reached at (904) 680-7745 (direct line) or at bshannon@fcsl.edu.

Respectfully submitted,

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