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Aronchick, Mark A. to: Rules_Comments 08/24/2009 02:37 PM

Attached are comments to Federal Rules of Evidence 101 through 706 submitted by the Federal Rules of Evidence Committee of the American College of Trial Lawyers. If you have any questions, please do not hesitate to contact me at 215-496-7002.

09-EV-002

Thank you.
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Rules 101 to 706.pdf

Comments of the Committee on the Federal Rules of Evidence of the
American College of Trial Lawyers

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers is comprised of 26 Fellows of the College appointed by the leadership of the College. The mission of this Committee includes monitoring the operation of the Federal Rules of Evidence. The Committee members are located across the United States and practice in many different jurisdictions.

The leadership of the College asked our Committee to review the work of the restyling sub-committee of the Committee on the Federal Rules of Evidence of the United States Supreme Court and provide comments. During the past five months our Committee reviewed the proposals concerning Rules 101 through 706. Attached are comments reflecting our review. In conducting this review, we had available the proposals from the restyling sub-committee, the procedures and guidelines that the sub-committee followed, and many comments that the sub-committee already received. The members of our Committee were asked not only to review specific proposed rule changes themselves, but to circulate their assigned Rules to colleagues or to other attorneys with whom they practice and assemble any comments as well.

Our Committee members commented, time and again, on the excellent work of the restyling sub-committee. In some instances, we offer what we consider to be useful or helpful suggestions. We tried to limit our comments to style but it may be that, even then, we came very close to substance on occasion. These suggestions are offered pursuant to one of the charges of the American College of Trial Lawyers, to assist in the improvement of the administration of justice. We thank the restyling sub-committee for the opportunity to participate in this phase of its work.

Respectfully submitted,

Mark Aronchick
Chairman, Federal Rules of Evidence Committee
August 17, 2009

COMMENTS OF THE COMMITTEE ON THE FEDERAL RULES OF EVIDENCE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS CONCERNING PROPOSED RESTYLING OF THE FEDERAL RULES OF EVIDENCE

RULE 101

Agree with proposed restyling.

RULE 102

Agree with proposed restyling.

RULE 103

Although Rule 103 is not often the source of confusion, the proposed style changes are an improvement. The paragraph headings, in particular, are more precise and give a better indication of the purpose of the text. For example, Rule 103(a) changes "Effect of erroneous ruling" to the more descriptive "Preserving a Claim of Error." In several other cases, somewhat cryptic headings have been replaced with clearer headings. See, e.g., old (b) "record of offer and ruling" replaced by new (c) "Court's Statements About the rule; directing an Offer of Proof;" old (c) "Hearing of jury" replaced by new (d) "Preventing the Jury from hearing Inadmissible Evidence;" and old (d) "Plain error" replaced by new (e) "Taking Notice of Plain Error." The difference in lettering was necessitated by the addition of a heading ("(b) Not Needing to Renew an Objection or Offer of Proof") to what had been unlabeled, further adding to clarity.

It is better that the rule is stated in the affirmative rather than the negative (e.g., in 103(a) "Error may not be predicated upon a ruling that . . ." is replaced by "A party may claim error in a ruling to admit or exclude evidence only if . . ."). The entirety of 103(a) is reorganized as well, which makes the rule much more readable and thus understandable.

This readability manifests itself in a number of small ways. For example, the hyphenated clause in the last paragraph of 103(a) (now 103(b)) used to read "– either at or before trial –"now reads "– either before or at trial –". The change is a small one, but is stated in a more logical order in the new rule.

The new rule uses more precise language in a number of places, references to "a jury trial" in 103(d) in place of 103(c)'s "[i]n jury cases". Also the rule eliminates use of the archaic "thereon" in new 103(c) (old 103(b)).

RULE 104

Rule 104 also contains clearer headings. "Testimony by accused" in Rule 104(d) is replaced by "Testimony by a Defendant in a Criminal Case," which is freer from ambiguity. Similarly, "[q]uestions of admissibility generally" in 104(a) is replaced by the more accurate "[i]n General".

The Committee might consider adding some clarity to Rule 104(b), the rule of conditional relevancy. This is already a difficult rule to parse, and the revised rule does not help much. In particular, the phrase "fulfillment of a condition of fact" in the old rule is replaced by "fulfilling a factual condition," which is still opaque. Perhaps the phrase should instead be something simpler, like "whether one or more facts exist". Another suggestion is to change "evidence" the second time it appears in the paragraph to "proof" (to make clear that it is referring to the predicate facts not the contingent facts), change "it" to "evidence" to make the relation back clearer (particularly once the second "evidence" is changed to "proof"), and change "on" back to "upon" (as it was in the old rule) which is more precise. Thus changed, the rule would read:

> "When the relevancy of evidence depends on ~~fulfilling a factual condition~~whether one or more facts exist, the court may admit ~~it~~the evidence ~~on~~ upon, or subject to, the introduction of ~~evidence~~proof sufficient to support a finding that those ~~condition is fulfilled.~~facts exist."

RULE 105

Agree with proposed restyling.

RULE 106

Agree with proposed restyling.

RULE 201

We suggest rewriting subsection (a) as follows, attempting to remain within the spirit of the restyling rules: "This rule governs only judicial notice of adjudicative facts. It does not apply to judicial notice of legislative facts."

In subsection (b), perhaps change the word "because" to "if," i.e., "The court may judicially notice a fact that is not subject to reasonable dispute if it..." The rule does not intend to address the reasons ("becauses") for taking notice so much as the criteria for doing so (what has to be found or determined).

In subsection (c)(1), perhaps add some language – either that the court "may take judicial notice on its own initiative" or that the court "may take judicial notice on its own without a request from any party".

Another suggestion for subsection (d) is as follows: "If a timely request is made, a party is entitled to be heard on the propriety of taking judicial notice and on the nature of the fact to be noticed. If the court takes judicial notice of a fact before notifying a party that it will do so, the party is entitled to be heard on request after it is notified of the decision."

RULE 301

The following is a proposal that might get too close to changing the substance of the rules:

"In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of going forward with evidence to rebut the presumption. This rule does not shift the burden of persuasion from the party who originally bears it."

OR

"In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of going forward with evidence to rebut the presumption. This rule does not shift the risk of nonpersuasion from the party who originally bears it."

The problem here may be that the terms "burden of production" or "burden of going forward" on the one hand and "burden of persuasion" on the other as two separate aspects of the "burden of proof" is not really developed. On the other hand, these are important concepts which arise almost exclusively as to civil presumptions in Federal cases. Wyoming's version of the Federal rule, for example, actually imposes the entire burden of proof (production and persuasion) on the party against whom the presumption is directed, and thus the distinction in the Federal rule is an important one.

RULE 302

Agree with proposed restyling.

RULE 401

Agree with proposed restyling.

RULE 402

We considered whether the removal of the word "all" at the start of the existing rule was a substantive change but it seems to act only as an "intensifier" as the rule itself does not require admission of relevant evidence but provides that relevant evidence "is admissible" subject to certain exceptions. Removal of the word "all" thus appears to be stylistic only.

The exceptions include "other rules" prescribed by the Supreme Court "pursuant to statutory authority." This phrase has been removed in the proposed restyling. But see the comment under the heading "1974 Enactment" which suggests the phrase had been added to accommodate the view that Congress should not appear to acquiesce in the Court's judgment that it can promulgate Rules of Evidence under the existing Rules Enabling Act. We do not know whether this is still an issue but simply raise the question. Perhaps the phrase is no longer needed in light of subsequent statutes addressing rule making authority.

RULE 403

Agree with proposed restyling.

RULE 404

Agree with proposed restyling.

RULE 405

Agree with proposed restyling.

RULE 406

We recommend deleting the last sentence of the proposed Rule 406, as it seems superfluous. Corroboration or eyewitness testimony simply goes to the weight of the evidence, as would a number of other factors. The other changes made the rule much easier to understand, and we agree with them.

RULE 407

We would recommend inserting the word "subsequent" before the word "measures" in the first sentence, as it makes the sentence more easily understood. We agree with the other suggested changes to the Rule.

RULE 408

Agree with proposed restyling.

RULE 409

Agree with proposed restyling.

RULE 410

While we are attempting to focus on style, it may be that the following discussion gets too close to substance. But, in the spirit of trying to be helpful, please consider the following. The proposed rule uses three phrases subject to potential confusion: "Guilty plea," "[guilty plea] later withdrawn," and "about either of those pleas."

To understand the probable intent of those phrases, and the potential for confusion, it is important to understand the typical sequence of events in the criminal plea-bargaining process. Rule 410 applies only to negotiations with an attorney for the prosecuting authority, typically conducted by defendant's counsel. In the course of those negotiations, defense counsel may make arguments that the defendant did not commit certain of the offenses under investigation, or challenge the strength of the government's evidence on some aspects of the defendant's alleged conduct. Those negotiations may be a prelude to the defendant entering into a cooperation agreement, where the defendant agrees to testify on behalf of the government against others. Frequently criminal defendants may not admit the full scope of their criminal conduct to their own attorneys, and plea negotiations may take on a dynamic where defendant's counsel initially takes the position that his client did not commit certain conduct, but then is educated by the prosecutor about evidence supporting the government's theory of the case. Defendant's counsel may insist that his client will not cooperate unless certain conduct is not part of the plea agreement or charges to which the defendant agrees to plead guilty. As part of that cooperation, in government interviews the defendant may admit conduct that his counsel previously minimized or refused to admit during plea negotiations. At trial, the government attempts to portray cooperating witnesses as having "come clean" and admitted all of their criminal conduct. It would be very valuable for a criminal defendant's trial counsel to impeach a cooperator with evidence of his lawyer's arguments or statements in plea negotiations failing to acknowledge the full scope of the cooperator's criminal conduct. However, perhaps because they misunderstand Rule 410 as currently written, defense practitioners do not seek discovery of statements made by the cooperator's counsel during plea negotiations, and government prosecutors do not view statements by defense counsel during the course of plea negotiations as potential *Brady* material or *Giglio* inconsistent statements by the defendant/cooperating witness.

In many state systems, most plea agreements are oral, confirmed on the record before the trial court. In federal practice, most felony plea agreements are reduced to writing. Rule 410 apparently makes a policy choice that the defendant's oral agreement to plead guilty, or the defendant's signature on a plea agreement, is not sufficient to trigger admissibility against the defendant. Instead, the rule requires a" guilty plea" in order for the defendant's admission of guilty to be admissible against that defendant. Presumably, the rule contemplates that a "guilty plea" requires the defendant to appear in court and orally admit guilt to one or more counts in a pending charging document.

In federal practice, F.R.Crim.P. 11 provides a procedure where the defendant enters a guilty plea under oath, and the trial court conducts a hearing to determine whether to accept the plea as knowing and voluntary. F.R.Crim.P. 11(c)(3) provides that

the trial court may reject certain types of plea agreements, and may defer its decision about whether to reject the plea agreement. If the trial court later rejects a plea agreement, it must give the defendant the opportunity to withdraw the guilty plea. In federal practice, sentencing generally does not occur for months after the defendant enters a guilty plea, because the court must await the preparation of a presentence investigation in aid of sentencing. If the defendant is a cooperating witness, the delay between the entry of a guilty plea and sentencing can go on for years in extreme cases. State procedures require determinations that guilty pleas are knowing and voluntary, and often allow judges to reject plea agreements as well. State systems often proceed to sentencing the same day as the guilty plea in routine cases, but can also involve significant delays between entry of a guilty plea and sentencing. In both federal and state practice, defendants are allowed to withdraw their "guilty pleas" as a matter of right in some circumstances (such as when the judge rejects the proposed plea agreement, or before the judge "accepts" the plea). In a context where a defendant may enter a "guilty plea" in court pursuant to a plea agreement that a trial judge may later reject, the rule does not clarify whether a "conditional" guilty plea awaiting final acceptance by a judge satisfies the trigger for admissibility.

In addition, federal and state practice provide for "deferred prosecution" or "probation before judgment" arrangements, where a defendant may admit factual guilt, but may avoid a final entry of a guilty plea or conviction if the defendant satisfies certain conditions. Rule 410 does not clarify whether a "guilty plea" applies to deferred prosecutions or probation before judgment arrangements. From a policy point of view, when a defendant admits guilt as part of a negotiated deal in return for some benefit, either in the form of a plea agreement to be accepted by the trial court, or a deferred prosecution or probation before judgment, that admission of guilt should be just as admissible as a guilty plea accepted by the court as part of a judgment of conviction.

In the vast majority of criminal cases, defendants are judgment-proof against civil litigation brought by their victims. In the rare circumstances when a defendant has assets, the defendant's admission of guilt as part of the prosecution affords significant procedural advantages to the victims in subsequent civil litigation. In order to afford victims such procedural advantages, the rule should clarify that it applies to admissions of guilty in agreements with the prosecuting authority that do not result in guilty pleas, and should clarify that a defendant may not claim to have "withdrawn" a guilty plea except by right, by agreement with the prosecuting authority, or by court adjudication.

Accordingly, stylistic amendments to Rule 410 should consider clarifying what a "guilty plea" means.

Presumably to encourage plea negotiations and the resolution of criminal cases by compromise, Rule 410 makes a policy judgment that a guilty plea "later withdrawn" should not be admissible against the defendant. In federal practice, F.R.Crim.P. 11(d)(1) provides that a defendant may withdraw the guilty plea before the court accepts the plea "for any reason or no reason." State systems may also give defendants a "right" to withdraw guilty pleas. However, defendants often attempt to withdraw their guilty pleas even after the judge has accepted them as knowing and voluntary. Both federal and state practice allow defendants to withdraw already-accepted guilty pleas in limited

circumstances. For example, F.R.Crim.P. 11(d)(2) provides that after the court accepts the guilty plea, it can only be withdrawn "if the defendant can show a fair and just reason for requesting the withdrawal." Attempts by defendants to withdraw accepted guilty pleas can lead to protracted litigation, both in the trial court and on appeal. Rule 410 probably intends that a guilty plea "later withdrawn" means only a guilty plea withdrawn as a matter of right under the applicable procedure, or a guilty plea adjudicated as withdrawn by a court. However, the rule is not clear on this point.

Accordingly, stylistic amendments to Rule 410 should consider clarifying what a "[guilty plea] later withdrawn" means.

The proposed restyling to 410(a)(3) substitutes the phrase "about either of those pleas" for "any statement made in the course of any proceedings . . ." This stylistic change has the potential for substantively limiting the protection afforded by the rule. Even the old rule had a presumably unintended limitation, because it applied only to guilty plea hearings, such as a Rule 11 hearing in federal practice. From a policy point of view, there seems to be no basis for distinguishing between a Rule 11 proceeding and a statement by the defendant or his counsel in a scheduling conference that the defendant has reached a plea agreement and intends to plead guilty, when the defendant later withdraws that decision. In addition, a creative prosecutor could argue that a factual statement by a defendant during a plea colloquy with a judge was not "about" the plea agreement itself, and thus would be admissible even if the guilty plea was "later withdrawn." While it is understandable that the reporter might view the prior language referring to "any statement made in the course of any proceedings" as cumbersome, it had the benefit of being more comprehensive and clear.

Accordingly, the committee should consider rejecting the proposed restyling for 410(a)(3), and clarifying the scope of that section.

In the interest of attempting to clarify the rule, consider the following:

> **(a) Prohibited Uses.** In any civil or criminal proceeding, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:
>
> > **(1)** a guilty plea, or an agreement containing an admission of guilt to criminal conduct entered into with the prosecuting authority in order to resolve potential criminal charges without requiring entry of a guilty plea, if the guilty plea or written agreement was (a) withdrawn by right under relevant court procedure; (b) withdrawn by agreement with the prosecuting authority; or c) adjudicated as withdrawn;
> >
> > **(2)** a plea of nolo contendere;
> >
> > **(3)** any statement made during court proceedings regarding such pleas or agreements;

> **(4)** a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or an agreement containing an admission of guilt to criminal conduct entered into with the prosecuting authority in order to resolve potential criminal charges without requiring entry of a guilty plea, or if the discussions resulted in a guilty plea or such agreement that was (a) withdrawn by right under relevant court procedure; (b) withdrawn by agreement with the prosecuting authority; or c) adjudicated as withdrawn.

We have no proposed changes to the restyled section (b) of the rule.

RULE 411

Agree with proposed restyling.

RULE 412

412(b)(1)(B): ". . . if offered by the prosecutor or if offered by the defendant . . ."

Why not change to "if offered by the prosecutor or defendant . . ."

For that matter, since the prosecutor and defendant are the only parties, the Committee could reduce it to ". . . if offered . . ."

412(b)(2): ". . . danger of harm to <u>any</u> victim . . ."

This is not consistent with the earlier reference to "a victim's sexual behavior."

It would seem that even in a multi-victim case, it is only harm to the impeached victim that is to be considered. Thus, "<u>any</u> victim" should be changed to "<u>the</u> victim" or "<u>that</u> victim." This would be consistent with 412(c) reference to notice to "the victim."

RULE 413

The comments here may veer toward substance. However:

Rule 413(a) and 413(c). The problem is that neither (a) nor any other part of the rule gives any idea of what the evidence is relevant for. To prove predilection? If so, why not say so?

413(d)(1): This is obviously meant to include statutory sexual assault. However, the conduct covered by 109(A) requires "cross[ing] a state line." If the drafters intend to include state law violations – *i.e.* statutory rape and assault without crossing state lines – they might consider reviewing the language accordingly.

RULE 414-415

We agree with the restylings, with one exception. Subsection (a) of existing Rule 414 makes admissible ". . . evidence of the defendant's commission of . . ." any other act of child molestation in a criminal case (Rule 414). That language makes plain that timing of the other act or offense is irrelevant – a court may admit it regardless of whether it predated the offense for which the defendant is on trial, or occurred after the offense that is the subject of the trial. The restyled subsection (a) changes the language quoted above to ". . . evidence that the defendant committed . . ." any other act. We believe it possible that the new language may give rise to a defendant's argument that the language of the restyled rule, phrased in the past tense, limits the admissibility of "other acts" to those that occurred prior to the act for which the defendant is on trial. Accordingly, we suggest that the restyled Rule 414 should retain the language "defendant's commission of," instead of the restyled language "defendant committed."

RULE 501

We agree with the Comment that unless "civil case" is defined in the rules to mean "civil actions and proceedings" it is necessary to retain the phrase "civil actions and proceedings" in both Rules 501 and 601.

RULE 601

We agree with the Comment that unless "civil case" is defined in the rules to mean "civil actions and proceedings" it is necessary to retain the phrase "civil actions and proceedings" in both Rules 501 and 601.

We agree with the Comment to rule 601 that in line 4 "the witness's competency" should be changed to "the witness's testimony."

RULE 602

Agree with proposed restyling.

RULE 603

Agree with proposed restyling.

RULE 604

The competency/proficiency of the interpreter should be established, especially if the language interpreted is not mainstream. The change in the rule would allow that evaluation.

RULE 605

Agree with proposed restyling.

RULE 606

The changes succeed in making the rule clearer without changing the intended scope of the rule. As indicated by the commentary, there is a slight chance that the use of the word "incident" leaves open the possibility that it will be interpreted differently than the previous word "matter." We agree with the editor's decision that the gain in clarity is worth the small potential loss in consistent interpretation.

RULE 607

Agree with proposed restyling.

RULE 608

The following are proposals that might get too close to changing the substance of the rules:

1. Rule 608, the phrase "having a character for truthfulness or untruthfulness" seems somewhat awkward and confusing. Perhaps a portion of that phrase, namely "having a character for" could be deleted, and the sentence would read, "a witness's credibility may be attacked or supported by evidence in the form of an opinion about – or a reputation for – truthfulness or untruthfulness."

2. Rule 608(b) – as proposed, the rule would eliminate the current language that "in the discretion of the court," specific instances of conduct may be inquired into on cross-examination. Although the proposed change utilizes the language that the court "may" allow such cross-examination, there is some danger that by eliminating "in the discretion of the court" there may be some who will interpret that as a substantive change.

3. Rule 608(c) – We suggest that the rule's current reference to "an accused" should not be deleted. While "accused" is a subset of the term "witness", deleting reference to "an accused" from Rule 608(c) could be interpreted as a substantive change, i.e., that by eliminating reference to "an accused" then any criminal defendant who takes the stand may waive his rights against self-incrimination even if his testimony relates only to character for truthfulness or untruthfulness.

RULE 609

Rule 609(a)(1) – We agree with the view that the language "under the law under which the witness was convicted" should be retained and not deleted. Not only might its deletion be a substantive change, it does not seem "wildly improbable" that courts may disagree as to the application of the applicable state or federal law in the event that it is deleted.

Rule 610

Agree with proposed restyling.

Rule 611

With respect to Rule 611, we agree with the restyling of the title of the rule and the changes made to subsection (a). However, the restyling of subsection (b) may not result in increased clarity. The rule as previously drafted seems more direct and understandable than the restyled version. The specification that the court may exercise discretion to permit inquiry into additional matters on cross-examination is an appropriate comment from the rule makers. The same is true concerning the first sentence of subsection (c) of this rule. The restyling of the remainder of subsection (c) eliminates any potential confusion and is a proper restyling.

Rule 612

The following are proposals that might get too close to changing the substance of the rules:

(1) Given the goal of the Restyling Committee Note on Formatting Changes, which emphasizes clearer presentation and the breaking of rules down into their constituent parts, we tend to agree with one the previous comments to this proposal, which suggests that subdivision (b) should be broken down into two subdivisions: with subdivision (b) dealing exclusively with "Adverse Party's Options," and a new subdivision (c) dealing with "Deleting Unrelated Matter." There is a natural break (the sentence beginning with "If the producing party...") between these two discrete parts.

(2) We question whether the exception pertaining to 18 U.S.C. Sec. 3500 is out of place in the proposal. In the existing rule, the reference to Section 3500 is the first element of the rule, essentially signaling that if that Section applies, there's no need to read any further, as the rule is inapplicable. The proposal moves this reference to subdivision (b), which deals with "Adverse Party's Options; Deleting Unrelated Matter." But Section 3500 has little to do with an Adverse Party's Options (if Section 3500 applies, the adverse party has no options), and nothing to do with Deleting Unrelated Matter. Instead, it seems that the reference to Section 3500 best belongs in subdivision (a), which addresses the "General Application."

(3) We agree with the first comment, which proposes that lines 15-16 should retain the existing language regarding "matter unrelated to the testimony," as opposed to changing it to "unrelated matter," which could mean matter that is not related to the case (as opposed to matter that is not related to the narrower testimony). Professor Kimble indicates that the risk of this confusion is small. But the risk could be eliminated entirely by simply stating: "If the producing party claims that the writing includes matter unrelated to the testimony, the court must...." It adds a few more words, but leaves no room for confusion.

(4) We also see merit in the comment by Meyers that questions why the reference to "justice" is deleted in Line 21, but retained in Line 24. Professor Kimble explains the decision by indicating that the reference to "justice" in line 24 (and line 10) is more appropriate because "they deal with exceptions." But we are not clear why justice is more important when considering exceptions than it is in considering the norm. Why not apply a consistent rule, and either eliminate "justice" in Lines 24 and 10 (and replace it with some variation of "appropriate"), or leave the reference to "justice" in Line 21.

Rule 613

We question whether Lines 4 through 7 have made too many changes to the existing rule, without much (if any) improvement. For all of the changes, the proposed rule is almost as verbose as the existing rule (38 words versus 45 words), and while breaking the existing subdivision (a) into two sentences has some appeal, we are not convinced that it is an improvement. Here is an alternative proposal:

"(a) Showing or Disclosing the Statement. When questioning a witness about the witness's prior statement, the statement and its contents do not need to be shown or disclosed to the witness, but on request, the statement and its contents must be shown or disclosed to an adverse party."

Rule 614

Agree with proposed restyling.

Rule 615

Agree with proposed restyling.

Rule 701

Agree with proposed restyling.

Rule 702

The changes to Rule 702 are merely stylistic with one exception: the changes expressly require that the court determine the admissibility of the expert's opinion before the testimony is admissible, a requirement that is established beyond doubt in the case law.

Rule 703

Agree with proposed restyling.

Rule 704

Agree with proposed restyling.

Rule 705

Agree with proposed restyling.

Rule 706

Agree with proposed restyling.

General Comment

Some of the Rules use bullet points which are uncitable and unsearchable and, if one is dealing with page limits in briefs, add several lines to any quotation of the rule. Would the committee consider eliminating the use of bullet points in an effort to address these concerns?