

Guiding Principles for Restyling the Federal Rules of Civil Procedure (Part 1)

I wrote this memorandum as drafting consultant on the project to restyle the civil rules. The memo accompanies the restyled rules, which were published for comment last February. They are available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf.

—JK

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 to the rules) 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:

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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)

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.

As Restyled

If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

Rule 71

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.

As Restyled

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. ♦

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