

# Clarity and the Federal Rules of Civil Procedure: A Lesson from the Style Project

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## I. Introduction

At the stroke of midnight on December 1, 2007, the Federal Rules of Civil Procedure both changed completely and did not change at all. As a result of the Style Project, a monumental undertaking of the Judicial Conference's Standing Committee on Rules of Practice and Procedure, a full stylistic revision replaced the existing text of the civil rules with the aim of "conveying unchanged meaning more clearly and more efficiently."<sup>1</sup> As a veteran teacher of both Civil Procedure and Legal Writing, I am by turns elated and angst-ridden about this change, but I remain in awe of those who have been so undaunted and diligent as to bring it about.

I am not an experienced drafter of rules, and this article does not attempt to extract a long list of specific drafting tips from the work of the Style Project, nor does it undertake a rule-by-rule critique of the restyling. The best drafting advice to emerge from the Style Project has already been memorialized by the consultants who participated in the effort,<sup>2</sup> and the best critique of the restyling will come from the combined experiences of the lawyers and judges who will navigate, interpret, and apply the new language in the years to come.<sup>3</sup>

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\* © Lisa Eichhorn 2008. Professor of Law, University of South Carolina. I would like to thank the University of South Carolina School of Law for funding my research on this project. I would also like to thank all of the Civil Procedure students I have taught over the last thirteen years at West Virginia University, the University of Denver, and the University of South Carolina for helping me refine my understanding of the Federal Rules of Civil Procedure.

<sup>1</sup> Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 Notre Dame L. Rev. 1761, 1762 (2004).

<sup>2</sup> See generally Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules* (Admin. Off. of the U.S. Courts 1996); Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure* (pts. 1-5), 86 Mich. B.J. 62 (Aug. 2007), 86 Mich. B.J. 48 (Sept. 2007), 86 Mich. B.J. 44 (Oct. 2007), 86 Mich. B.J. 46 (Nov. 2007), 86 Mich. B.J. 50 (Dec. 2007) [hereinafter Kimble, *Lessons in Drafting*]; Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure (Part 1)*, 84 Mich. B.J. 56 (Sept. 2005) [hereinafter Kimble, *Principles (Part 1)*]; Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure (Part 2)*, 84 Mich. B.J. 52 (Oct. 2005) [hereinafter Kimble, *Principles (Part 2)*].

<sup>3</sup> Civil procedure scholar Michael C. Dorf has observed that "[w]hether the re-styled Rules lead to greater clarity or greater confusion will ultimately depend on how much common sense the courts use in interpreting them." Michael C. Dorf, *Meet the New Federal Rules of Civil Procedure: Same*

Instead, this article treats the Style Project's revision of the civil rules as a case study to examine the place of plain language techniques in the legislative- and rule-drafting process. The after-the-fact, non-substantive nature of the Style Project's revision is extraordinary and will no doubt generate some complex interpretive problems. Nevertheless, comparisons of old and restyled rule language reveal that plain language techniques can play a beneficial role in the ordinary rule-drafting process. Such techniques, when intelligently and flexibly employed, need not hinder a rule's ability to convey complex content, to function effectively within an existing legal context, or to communicate to an appropriate audience. Time will tell if the Style Project has succeeded at every turn in the extraordinary task of preserving the precise meaning of the civil rules while clarifying the expression of that meaning. Meanwhile, the restyled rules already demonstrate that in more ordinary rule-drafting and rule-revising scenarios, where drafters must express new substantive meaning as clearly as possible, the style fostered by plain language techniques can convey detailed, sophisticated content effectively.

Part II of this Article supplies background information on the Style Project, explaining the work of its participants and the process by which the Project's revised civil rule language was approved. Part III of this Article then describes plain language drafting techniques and explains debates in the academic literature regarding the place of plain language principles in legislative and rule drafting. Part IV uses the restyled civil rules as a case study to examine the possibility of adapting plain language drafting techniques to the complexity, context, and audience of a code of procedural rules. Part V then offers some concluding thoughts.

## II. Background on the Style Project

### *A. The Role of the United States Judicial Conference in Federal Rulemaking*

The Style Project is an ongoing effort operating under the auspices of the United States Judicial Conference. The Judicial Conference is presided over by the Chief Justice of the United States, and its membership consists of the chief judges of each federal circuit, the chief judge of the Court of International Trade, and one elected district court judge from each circuit.<sup>4</sup> The body is charged by statute, among other duties, to "carry on a continuous study of the operation and effect of the general rules of practice and procedure" in the federal courts.<sup>5</sup> These rules include the Federal Rules of Appellate Procedure, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, the Federal Rules of

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as the *Old Rules*?, <http://writ.news.findlaw.com/dorf/20070718.html> (July 18, 2007).

<sup>4</sup> 28 U.S.C. § 331 (2000).

<sup>5</sup> *Id.*

Criminal Procedure, and the Federal Rules of Evidence.<sup>6</sup> With respect to these rules, the Judicial Conference recommends amendments and additions to the Supreme Court when such changes would “promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.”<sup>7</sup> If, before May 1st, the Supreme Court approves the new rules or amendments recommended by the Judicial Conference, the new rule language automatically takes effect unless Congress enacts legislation before December 1st of the same year to modify or reject the approved language or to defer its effective date.<sup>8</sup>

With respect to its study of court rules, the Judicial Conference operates through its Standing Committee on Rules of Practice and Procedure, commonly known as the Standing Committee.<sup>9</sup> This committee in turn coordinates the work of five advisory committees, each of which performs the groundwork of studying one of the five codes of federal rules and of recommending amendments when necessary to “maintain consistency and otherwise promote the interests of justice.”<sup>10</sup> Members of both the Standing Committee and of the five advisory committees include “federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice.”<sup>11</sup>

### ***B. The Genesis of the Style Project***

In 1992, Judge Robert E. Keeton, then-chair of the Standing Committee, envisioned an exhaustive revision of all codes of federal rules “to make them clearer and easier to understand.”<sup>12</sup> Indeed, Judge Keeton’s philosophy of rule drafting emphasizes clarity as a principal virtue:

Federal Rules of Practice and Procedure ought to be user-friendly. This is the prime characteristic of good rules of procedure. They should be easy to read and understand — as clear in content and meaning as it is possible to make them, and as crisp and readable as clarity permits.<sup>13</sup>

To implement this vision, Judge Keeton created a Style Subcommittee and

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<sup>6</sup> James C. Duff, *The Rulemaking Process: A Summary for the Bench and Bar*, “The Rules Committees,” <http://www.uscourts.gov/rules/proceduresum.htm> (Oct. 2007).

<sup>7</sup> 28 U.S.C. § 331.

<sup>8</sup> See 28 U.S.C. § 2074 (2000) (providing that new rules transmitted to Congress by the Supreme Court before May 1 become effective “no earlier than December 1” of the same year, so long as Congress does not “otherwise provide[] by law”).

<sup>9</sup> Duff, *supra* n. 6, at “The Rules Committees.”

<sup>10</sup> 28 U.S.C. § 2073(b) (2000).

<sup>11</sup> Duff, *supra* n. 6, at “The Rules Committees.”

<sup>12</sup> Memo. from Lee H. Rosenthal, Chair, Advisory Comm. on Fed. R. of Civ. Proc., to David F. Levi, Chair, Standing Comm. on R. of Prac. & Proc., *Report of the Civil Rules Advisory Committee* 21 (June 2, 2006) (available at <http://www.uscourts.gov/rules/Reports/CV06-2006.pdf>).

<sup>13</sup> Robert E. Keeton, *Preface*, in Garner, *supra* n. 2, at i.

recruited legal writing expert Bryan A. Garner as a consultant to assist in the Style Project, an ambitious undertaking that would eventually involve not only reviewing proposed rule amendments for stylistic effectiveness but also revising — one by one — the codes of federal rules so as to achieve stylistic consistency and optimal clarity without changing substantive meaning.<sup>14</sup> By 1994, Garner and the Style Subcommittee had developed draft revisions of the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure.<sup>15</sup> However, the civil rules revision process was put on hold shortly thereafter following membership changes on the Standing Committee and its Style Subcommittee.<sup>16</sup>

Meanwhile, the Style Project continued to focus on the Federal Rules of Appellate Procedure and began work on the Federal Rules of Criminal Procedure.<sup>17</sup> Revisions of both sets of rules were eventually approved by the Judicial Conference, which recommended the revisions to the Supreme Court.<sup>18</sup> Exercising its power under the Rules Enabling Act,<sup>19</sup> the Supreme Court approved the new appellate rules in April 1998<sup>20</sup> and the new criminal rules in April 2002.<sup>21</sup> Because Congress did not enact legislation to block the newly revised rules, the restyled appellate rules took effect on December 1, 1998,<sup>22</sup> and the restyled criminal rules took effect on December 1, 2002.<sup>23</sup>

### *C. Drafting the Restyled Civil Rules*

Eventually, the Standing Committee and the advisory committee on the Federal Rules of Civil Procedure returned to the task of restyling the civil rules.

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<sup>14</sup> *Id.* at iii-iv.

<sup>15</sup> *Id.* at iii.

<sup>16</sup> *Id.*

<sup>17</sup> See Memo. from James K. Logan, Chair, Advisory Comm. on App. Rules, to Alicemarie H. Stotler, Chair, and Members of the Standing Comm. on R. of Prac. & Proc., 2 (Dec. 12, 1995) (available at <http://www.uscourts.gov/rules/Reports/AP12-1995.pdf>) (describing the ongoing process of restyling the appellate rules); Memo. from W. Eugene Davis, Chair, Advisory Comm. on the Fed. R. of Crim. Proc., to Anthony J. Scirica, Chair, Standing Comm. on R. of Prac. & Proc., *Report of the Advisory Committee on Criminal Rules 2* (May 10, 2001) (available at <http://www.uscourts.gov/rules/Reports/CR05-2001.pdf>) (describing the ongoing process of restyling the criminal rules, which had begun in 1998).

<sup>18</sup> See Duff, *supra* n. 6, at “How the Rules Are Amended: Step 5. Judicial Conference Approval” (“The Judicial Conference normally considers proposed amendments to the rules at its September session each year. If approved by the Conference, the amendments are transmitted promptly to the Supreme Court.”).

<sup>19</sup> 28 U.S.C. § 2072 (2000) (granting the Supreme Court “the power to prescribe general rules of practice and procedure” applicable in the federal courts).

<sup>20</sup> U.S. S. Ct. Or., 523 U.S. 1147, 1147 (Apr. 24, 1998).

<sup>21</sup> U.S. S. Ct. Or., 535 U.S. 1157, 1157 (Apr. 29, 2002).

<sup>22</sup> See U.S. S. Ct. Or., 523 U.S. 1149, 1149 (Apr. 24, 1998) (noting effective date of adopted rule amendments).

<sup>23</sup> See U.S. S. Ct. Or., 535 U.S. 1159, 1159 (Apr. 29, 2002) (noting effective date of adopted rule amendments).

Consultant Joseph Kimble, a legal writing scholar, with assistance from consultant Joseph F. Spaniol, Jr., a retired clerk of the United States Supreme Court, created a new working draft of the civil rules, following drafting guidelines that had been generated and memorialized by Bryan Garner during the appellate rules project.<sup>24</sup> The proposed changes were then reviewed, respectively, by prominent civil procedure scholars, the Standing Committee's Style Subcommittee, and subcommittees of the civil rules advisory committee.<sup>25</sup> Each review by each of these groups was aimed at preserving the substantive meaning of the current rules while increasing the clarity of the text.<sup>26</sup> Each group's review resulted in the consultants' creation of a revised draft that was then passed along to the next group.<sup>27</sup>

The resulting version of the proposed rules then passed through the full civil rules advisory committee and the full Standing Committee.<sup>28</sup> The emerging draft was then published for public comment in February 2005.<sup>29</sup> After reviewing the approximately twenty-five comments submitted,<sup>30</sup> the Style Subcommittee, its academic consultants, and the entire advisory committee again revised and refined the proposed draft of the rules. At that point, the restyling process had taken two and one-half years and "produced more than 750 documents."<sup>31</sup> After the drafters studied feedback received during the public comment period and decided upon some further changes, the resulting draft of the restyling amendments again passed through the Standing Committee<sup>32</sup> and then went on to be approved by the full Judicial Conference.<sup>33</sup> The Supreme Court approved the full set of restyling amendments and transmitted them to Congress on April 30, 2007.<sup>34</sup> Because Congress did not step in and pass legislation to block them,

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<sup>24</sup> See Kimble, *Principles (Part 1)*, *supra* n. 2, at 56 (explaining the process and noting the drafters' reliance on Bryan A. Garner's style guide, Garner, *supra* n. 2).

<sup>25</sup> See *id.* (explaining the process of serial review and revision).

<sup>26</sup> *Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States* 20 (Sept. 2006) (available at <http://www.uscourts.gov/rules/Reports/ST09-2006.pdf>) [hereinafter *Standing Committee Report of Sept. 2006*].

<sup>27</sup> Kimble, *Principles (Part 1)*, *supra* n. 2, at 56.

<sup>28</sup> *Id.*

<sup>29</sup> *Standing Committee Report of Sept. 2006*, *supra* n. 26, at 21.

<sup>30</sup> The comment letters are available at <http://www.uscourts.gov/rules/CV%20Rules%202005.htm> (last accessed May 12, 2008).

<sup>31</sup> *Standing Committee Report of Sept. 2006*, *supra* n. 26, at 21.

<sup>32</sup> *Id.* at 25.

<sup>33</sup> Memo. from James C. Duff, Sec., Jud. Conf. of the U.S., to the C.J. of the U.S. and the Assoc. JJ. of the S. Ct., *Transmittal of Proposed Amendments to the Federal Rules of Civil Procedure* 1 (Dec. 21, 2006) (available at [http://www.uscourts.gov/rules/supct1106/Duff\\_CV\\_Memo.pdf](http://www.uscourts.gov/rules/supct1106/Duff_CV_Memo.pdf)).

<sup>34</sup> *Order of the Supreme Court* (Apr. 30, 2007) (available at 9 in <http://www.uscourts.gov/rules/supct1106/Trans-Orders.pdf>).

the amendments became effective on December 1, 2007.<sup>35</sup>

An advisory committee note to restyled Rule 1 explains that “[t]he language of Rule 1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.”<sup>36</sup> This note, with an appropriate change of rule number in its first sentence, appears after the restyled text of each rule.

### III. Plain Language and Rule Language

Drafters of the restyled civil rules relied in large part on techniques having their roots in the “plain English”<sup>37</sup> or “plain language”<sup>38</sup> movement. The use of such techniques in drafting code provisions presents particular challenges and is not without controversy. This Part therefore examines the principles of plain language and the questions raised by their use in legislative and rule drafting.

#### *A. History and Characteristics of Plain Language*

The early plain language movement focused on the need to make consumer contracts comprehensible to the ordinary citizens whose lives they would govern.<sup>39</sup> Early plain language advocates emphasized the need to test proposed text on representative readers and to strive for ease of understanding among members of the target group.<sup>40</sup> These advocates pushed for legislation mandating plain language in consumer-oriented leases, loan agreements, and other contracts, and were successful in many states.<sup>41</sup> Soon it became apparent that consumers were not the only ones who could benefit from more comprehensible texts, and

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<sup>35</sup> *Id.* at ¶ 3; *see also* 28 U.S.C. § 2074 (providing that new rules transmitted to Congress by the Supreme Court before May 1 become effective “no earlier than December 1” of the same year, so long as Congress does not “otherwise provide[] by law”).

<sup>36</sup> Fed. R. Civ. P. 1 advisory comm. n.

<sup>37</sup> *See* Wayne Schiess, *What Plain English Really Is*, 9 *Scribes J. Leg. Writing* 43, 48-51 (2003-04) (characterizing “plain English” as “an independent area of expertise” and listing the most widely known texts in the field).

<sup>38</sup> *See* Barbara Child, *Drafting Legal Documents: Materials and Problems* 63 (West Publ'g. Co. 1988) (noting that the labels “Plain English” and “Plain Language” are both used to refer to the same movement).

<sup>39</sup> *Id.* at 6; *see also* Peter Butt & Richard Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* 77-81 (Cambridge U. Press 2001) (presenting a brief history of the plain language movement in the United States).

<sup>40</sup> *See* Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 *Thomas M. Cooley L. Rev.* 1, 12 (1992) (listing the following advice among the four general guidelines of plain English: “Whenever possible, test consumer documents on a small group of typical users.”); *see also* Susan Krongold, *Writing Laws: Making Them Easier to Understand*, 24 *Ottawa L. Rev.* 495, 544-49 (1992) (explaining the need to test draft legislative documents on readers and describing four specific types of testing).

<sup>41</sup> *See* Kimble, *supra* n. 40, at 2 (citing numerous plain English statutes).

professionals in law, government, and business began paying closer attention to the drafting principles developed by the plain language movement.<sup>42</sup>

While no single expert or group is the definitive arbiter of plain language principles, texts espousing the benefits of “plain language”<sup>43</sup> or “plain English”<sup>44</sup> tend to focus upon similar guiding tenets. Most important is the proposition that a writer’s “main goal is to convey [his or her] ideas with the greatest possible clarity.”<sup>45</sup> To achieve clarity, a writer must focus on the reader’s needs and develop a sense of a reader’s likely reaction to a given piece of text.<sup>46</sup> Plain language guidelines propose many specific writing techniques aimed at increasing a reader’s likelihood of accurately comprehending a document.<sup>47</sup> Among these techniques are using logical organization and formatting;<sup>48</sup> dividing documents into sections;<sup>49</sup> keeping average sentence length relatively short;<sup>50</sup> using active

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<sup>42</sup> See *id.* at 2-3 (describing plain language initiatives around the world and noting that “[p]lain English is now a part of the culture of law, business, and government”); see also Bryan A. Garner, *A Dictionary of Modern Legal Usage* 664 (2d ed., Oxford U. Press 1995) (describing efforts to use and promote plain language, particularly in American and British legal communities, from the 1970s through the mid-1990s).

<sup>43</sup> See e.g. Joseph Kimble, *The Elements of Plain Language*, in Joseph Kimble, *Lifting the Fog of Legalese* 69, 69 (Carolina Academic Press 2006) [hereinafter Kimble, *Lifting the Fog of Legalese*]; see also Bryan A. Garner, *The Elements of Legal Style* 6-7 (Oxford U. Press 1991) (explaining that writers of “judicial opinions, advocacy, scholarly commentary, opinion letters, and other writing in and about law” should strive to use “plain language”).

<sup>44</sup> See generally e.g. Richard C. Wydick, *Plain English for Lawyers* (5th ed., Carolina Academic Press 2005); Robert J. Martineau, *Drafting Legislation and Rules in Plain English* (West 1991); Kimble, *supra* n. 40; see also Wayne Schiess, *Better Legal Writing: 15 Topics for Advanced Legal Writers* 131 (William S. Hein & Co. 2005) (noting that the author identifies himself in the camp of “Plain-English advocates” and professing the belief that “clear and plain legal writing brings respect, appreciation, and clients”).

<sup>45</sup> Kimble, *supra* n. 43, at 69.

<sup>46</sup> See Schiess, *supra* n. 44, at 9 (noting that a legal writer should strive for clarity and can achieve it best by “knowing the audience and trying to meet the audience’s needs at the audience’s level”); Kimble, *supra* n. 43, at 69 (“As the starting point and at every point, design and write the document in a way that best serves the reader.”); Garner, *supra* n. 43, at 7 (“What do we mean by ‘plain language’? I define it as the idiomatic and grammatical use of language that most effectively presents ideas to the reader.”).

<sup>47</sup> For lists of plain language techniques, see Garner, *supra* n. 42, at 663-64; Kimble, *supra* n. 43, at 72; Schiess, *supra* n. 44, at 131.

<sup>48</sup> See e.g. Joseph Kimble, *A Modest Wish List for Legal Writing*, in Kimble, *Lifting the Fog of Legalese*, *supra* n. 43, at 151, 151-54 (discussing page-formatting, paragraphing, and numbering); Thomas R. Haggard, *Legal Drafting: Process, Techniques, and Exercises* 423-42 (Thomson West 2003) (discussing typography and layout).

<sup>49</sup> See e.g. Kimble, *supra* n. 40, at 12; see also Haggard, *supra* n. 48, at 233 (recommending that, whenever they have discretion, document drafters should include “more rather than fewer” subcategories with headings).

<sup>50</sup> See e.g. Wydick, *supra* n. 44, at 36 (advising drafters to include “only one main thought” in most sentences and to keep “the average sentence length below 25 words”); Martineau, *supra* n. 44, at 94 (advising drafters, when possible, to “limit each sentence to a single idea or thought”);



voice when possible;<sup>51</sup> using concrete subjects and active verbs in sentences;<sup>52</sup> connecting modifying words to what they modify;<sup>53</sup> omitting unnecessary words;<sup>54</sup> and preferring familiar, everyday words.<sup>55</sup>

Naturally, the proponents of these techniques assume that the writer understands the legal concepts and complexities that he or she is writing about, and that this precise understanding will inform the drafting and editing process.<sup>56</sup> For example, the titles of the most popular legal writing textbooks indicate that style is of little value if it does not convey effective analysis based on careful legal reasoning.<sup>57</sup>

### ***B. Questions Surrounding the Use of Plain Language Techniques in Legislative Drafting***

While the plain language movement had its origins in the desire to make consumer contracts understandable to ordinary citizens,<sup>58</sup> plain language techniques have been adopted by authorities in the areas of both litigation-related

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Haggard, *supra* n. 48, at 337 (stating that “[a]n average sentence length of 26 words is an admirable objective for a drafted document”).

<sup>51</sup> See e.g. Wydick, *supra* n. 44, at 27; Martineau, *supra* n. 44, at 95; Garner, *supra* n. 43, at 41.

<sup>52</sup> See e.g. Wydick, *supra* n. 44, at 15-16 (urging drafters to prefer sentences focused on true actors and actions, such as “The court offered no reasons for denying punitive damages,” rather than less focused sentences such as “There were no reasons offered by the court for denying punitive damages.”).

<sup>53</sup> See e.g. Kimble, *supra* n. 40, at 13; Garner, *supra* n. 43, at 47-49; Wydick, *supra* n. 44, at 47.

<sup>54</sup> See e.g. Wydick, *supra* n. 44, at 7; Martineau, *supra* n. 44, at 85.

<sup>55</sup> See e.g. Wydick, *supra* n. 44, at 57; Schiess, *supra* n. 44, at 131; Garner, *supra* n. 42, at 663.

<sup>56</sup> See Garner, *supra* n. 43, at 4 (“Good legal style consists mostly in figuring out the substance precisely and accurately, then stating it clearly.”); Kimble, *supra* n. 40, at 17-18 (“We should treat precision and clarity as equally important. At the same time, we should look at the underlying substance, along with the language, to see if they can be simplified.”); Haggard, *supra* n. 48, at 15 (describing drafting as “one of the most intellectually demanding of all lawyering skills” and noting that drafting “requires a knowledge of the law, the ability to deal with abstract concepts, investigative instincts, an extraordinary degree of prescience, and organizational skills”); Schiess, *supra* n. 44, at 159 (telling would-be writers of memos, briefs, and opinions that “[i]t should go without saying that you must understand the issues and the authority”).

<sup>57</sup> See e.g. Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* (5th ed., Aspen Publishers 2005); Helene S. Shapo, Marilyn R. Walter & Elizabeth Fajans, *Writing and Analysis in the Law* (4th ed., Found. Press 2003); Linda H. Edwards, *Legal Writing and Analysis* (2d ed., Aspen Publishers 2007); Deborah A. Schmedemann & Christina L. Kunz, *Synthesis: Legal Reading, Reasoning, and Writing* (3d ed., Aspen Publishers 2007).

<sup>58</sup> See *supra* n. 39 and accompanying text.



legal writing<sup>59</sup> and legislative and transactional drafting.<sup>60</sup> While few dispute that most judges prefer briefs that dispense with legalese and synthesize legal authorities accurately in clear, readable prose,<sup>61</sup> some controversy surrounds the idea that plain language has a place in the drafting of rules and statutes. The controversy rests on several characteristics specific to legislation and rules: a high degree of substantive complexity, rich referential context, and an unusually broad potential audience.

### 1. Complexity

Legislation and rules must necessarily treat complex concepts. Because of this complexity, Jack Stark, a legislative drafter and critic of the plain language school, has asserted that plain language principles “cause more harm than good” in the context of legislative drafting.<sup>62</sup> Specifically, he contends that those who urge drafters to write in plain language base their advice on a flawed assumption that “the meaning of all passages of prose may be easily stated by a writer and easily understood by a reader” even though, in reality, the “meanings conveyed by statutes” are inherently “problematic.”<sup>63</sup> In a similar vein, another commentator has asserted that “[m]any problems that need legislative resolution are complex and difficult. To pretend that they are susceptible of ‘plain’ statement is as misleading as to assert that such problems are susceptible to

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<sup>59</sup> See e.g. Garner, *supra* n. 43, at 6 (noting that the stylistic advice contained therein is aimed at writers of “judicial opinions, advocacy, . . . and other writing in and about law,” but not at the drafters “of legislation or of wills and contracts”). The following are among many legal writing texts that focus primarily on memoranda and briefs and contain editing advice based on plain language techniques: Edwards, *supra* n. 57, at 270-79 (advising writers to prefer the active voice and to avoid legalese and long sentences); Neumann, *supra* n. 57, at 237-48 (setting forth a list of stylistic recommendations, including streamlining wordy phrases, streamlining unnecessarily long sentences, and avoiding unnecessary passive voice); Shapo, Walter & Fajans, *supra* n. 57, at 177 (telling writers to “[o]mit legalese. Put the action of the sentence into the verb. In general, use the active voice. Keep your language simple and straightforward.”).

<sup>60</sup> See generally Martineau, *supra* n. 44; see also Haggard, *supra* n. 48, at 5-6 (describing the importance of clarity in drafted documents and listing some plain language techniques); Child, *supra* n. 38, at 106 (“The ultimate goal of drafting documents in Plain English is to produce understanding and thus to prevent disputes.”).

<sup>61</sup> See Joseph Kimble, *Strike Three for Legalese*, in Kimble, *Lifting the Fog of Legalese*, *supra* n. 43, at 3, 7-8 (reporting survey results indicating that 85% of responding judges in Michigan, 86% of responding judges in Florida, and 82% of responding judges in Louisiana preferred text in plain language to text in more traditional language); Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 Loy. L.A. L. Rev. 301, 319 (1987) (reporting that a surveyed group of California appellate judges and their research attorneys rated appellate brief and petition excerpts in traditional legal language as poorer in content and less persuasive than plain language versions).

<sup>62</sup> Jack Stark, *The Art of the Statute* xii (Fred B. Rothman & Co. 1996).

<sup>63</sup> *Id.* at 1.

simple, easy solution.”<sup>64</sup>

In Stark’s opinion, an emphasis on clarity in drafting comes at the expense of the accurate expression of necessarily complex ideas. A drafter’s priority must be to strive for accuracy, which he defines as “congruence” between the statutory text and “the intent of the person who requested the legislation.”<sup>65</sup> According to Stark, a drafter who focuses too much on making statutory text concise and comprehensible risks losing sight of the complexity and nuance of the content to be included.<sup>66</sup> Indeed, if a drafter assumes that any idea can be easily stated and easily understood, he or she may adopt a “lackadaisical attitude” toward the quest for accuracy.<sup>67</sup>

Proponents of plain language drafting counter that clarity, when properly understood, actually goes hand in hand with accuracy and precision of meaning: “Plain language lays bare the ambiguities and uncertainties and conflicts that traditional style tends to hide.”<sup>68</sup> Indeed, Stark himself echoes plain language principles when he directs drafters to choose appropriate subjects and strong verbs in legislative sentences so as to capture accurately the complex intention underlying the requested provision.<sup>69</sup> In addition, when simple language is not

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<sup>64</sup> Frank P. Grad, *Legislative Drafting as Legal Problem Solving — Form Follows Function*, in *Drafting Documents in Plain Language* 481, 489 (PLI Com. L. & Prac. Course Handbook Series No. 203, 1979).

<sup>65</sup> Jack Stark, *Should the Main Goal of Statutory Drafting Be Accuracy or Clarity?*, 15 *Statute L. Rev.* 207, 209 (1994).

<sup>66</sup> As an example of an effective and accurate but rather abstruse piece of drafting, Stark points to a definition of “Motor fuel” from a Wisconsin statute: “‘Motor fuel’ means any liquid prepared, advertised, offered for sale or sold for use as, or commonly and commercially used as, a fuel in internal combustion engines, if that liquid has a flash point of less than 110 degrees Fahrenheit when tested in the Tagliabue closed cup.” *Id.* at 212. He notes that a clearer and shorter definition would be “‘Motor fuel’ means gasoline,” but that such a definition “is not nearly accurate enough” to perform its function of setting a specific standard. *Id.*

<sup>67</sup> *Id.* at 210.

<sup>68</sup> Joseph Kimble, *Answering the Critics of Plain Language*, 5 *Scribes J. Leg. Writing* 51, 55 (1994-95). Kimble has noted that the process of restyling the civil rules revealed numerous ambiguities in the existing text. Kimble, *Principles (Part 2)*, *supra* n. 2, at 55. Among them was the use of “heretofore” in Rule 59(a), which allows courts to grant new trials “for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.” Fed. R. Civ. P. 59(a) (repealed 2007) (superseded text available at 28 U.S.C. app. R. Civ. P. 59(a) (2000)). Kimble has labeled this sentence “classically bad drafting” because the use of “heretofore” is ambiguous. Kimble, *Principles (Part 2)*, *supra* n. 2, at 55. The word might refer to the time leading up to the original drafting of Rule 59, or the time leading up to the application of Rule 59 in the instant litigation. *Id.* Because the restylers had no way to resolve this ambiguity, they were forced to leave the “heretofore” in the restyled rule. *Id.* However, had the original drafters of Rule 59 tried to use plainer language in the first place — rather than a piece of legalese like “heretofore” — they could have avoided the ambiguity easily.

<sup>69</sup> See Stark, *supra* n. 62, at 65 (noting that “if a legislative sentence forbids, authorizes or requires, then it should name the person who is being forbidden, authorized or required — its subject should be that person”); *id.* at 69 (noting that “a legislative sentence is likely to be more effective if its main verb is strong”).

capable of expressing a complex idea precisely, plain language proponents note that the preferences for shorter words and sentences are merely guidelines, and that the inclusion of a longer sentence or a technical term may sometimes be necessary.<sup>70</sup>

Stark's criticism of plain language drafting in general apparently focuses on one plain language advocate who may go further than most in explaining the relation between clear writing and accurate understanding of substantive content.<sup>71</sup> In his drafting text, Robert J. Martineau asserts that drafters should begin by focusing on clarity of style, even before having fully analyzed the precise substance of the statutory or rule provision to be drafted:

[I]f the drafter is concerned initially with substance, postponing attention to style until the substance is agreed upon, the result will be legislation or a rule that is neither well thought out nor well expressed. . . . Substantive analysis and the writing process do not occur in consecutive order . . . . Instead, they occur concurrently, with the writing driving the analysis as much as the analysis drives the writing. The use of drafting principles from the first step in the process imposes a discipline on the analysis that produces not only language that is simpler and more easily understood but also a solution to the problem that is itself less complex and more easily understood. . . . [C]larity of expression is more likely to produce clarity of thought than the latter will produce the former.<sup>72</sup>

While even Stark agrees that "language and thought are intimately intertwined," and that writing and analysis therefore inform each other,<sup>73</sup> the notion that one can attain clarity of expression before having clarity of thought is questionable. A better formulation may be that by striving to conceptualize an idea in terms of specific actors, actions, and objects, a drafter is more likely to keep asking questions that will eventually result in clarity of thought from which clear expression will flow.

## 2. Context

Rules and statutes do not exist in a vacuum but instead form parts of complex, internally interlocking codes. In addition, courts frequently add

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<sup>70</sup> Kimble, *supra* n. 68, at 54; *see also* Schiess, *supra* n. 37, at 63 ("No plain-English advocate has ever asserted that brevity is important enough to override substance, accuracy, or clarity.").

<sup>71</sup> *See generally* Stark, *supra* n. 65 (criticizing the plain language school of drafting and citing only one drafting text, Robert C. Martineau's *Drafting Legislation and Rules in Plain English*, *supra* n. 44).

<sup>72</sup> Martineau, *supra* n. 44, at 6.

<sup>73</sup> Stark, *supra* n. 62, at 3; *see also id.* at 18 (noting that "[w]riting, and especially, organizing" a draft provision can reveal logical inconsistencies with respect to the initial request for the provision).

interpretive glosses to rule and statutory language that then invest the language with additional meaning. These two facts constrain any effort to clarify an existing code provision or to add a new provision in clearer language to a code. Indeed, “[t]he legislative language game is more artificial, more dependent on conventions and more difficult to play than most.”<sup>74</sup> As one commentator has noted, “to hope for significant improvements in the clarity of *legislative* drafting is a flight of fancy,” given the “constraints associated with drafting around the existing code,” among other factors.<sup>75</sup>

To substitute clearer terminology for existing code language is to risk changing the legal import of the existing provision. Given that the language in the code has already taken on a legal life of its own, a drafter may need to retain a particular word or phrase — even if not the clearest — “to invoke the relevant case law.”<sup>76</sup> Further, when drafting new substantive provisions, drafters must refer to concepts already addressed in the code with the same terminology if the new provisions are to interlock successfully with the existing code.<sup>77</sup>

Even where a plain language substitution or addition may be possible, law and language scholar James Boyd White has proposed that the added language will not retain its plain character for long, thanks to the inevitable glosses that courts will add.<sup>78</sup> As he has observed, “Somehow the legal rule seems always to be making a special or technical vocabulary, a language in which words mean something different from what they mean in plain English.”<sup>79</sup> Thus, even ordinary-seeming words in a code provision can, over time, become terms of art with specialized meanings. As a result, the plain language preference for simple terminology is to some degree at odds with the nature of statutory and rule language as a jumping-off point for specific judicial elaboration.

### 3. Audience

The task of legislative drafting has been characterized as “the art of defining and managing an audience, the central art of using language as power.”<sup>80</sup> Indeed, statutes and rules, by their nature, carry out a government’s power to forbid,

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<sup>74</sup> Stark, *supra* n. 65, at 212.

<sup>75</sup> Steven L. Schooner, *Communicating Governance: Will Plain English Drafting Improve Regulation?*, 70 Geo. Wash. L. Rev. 163, 165 (2002) (emphasis in original). Prof. Schooner, however, holds out much greater hope for the prospects of plain language principles as applied to federal agency regulations. *Id.* (“I suspect that regulation drafting, while also a convoluted and at times contentious process, is more susceptible to quality control, editing, and improvement, specifically in the context of clarity.”).

<sup>76</sup> Stark, *supra* n. 62, at 75 (noting “intent” and “malice” as examples of words used to invoke case law).

<sup>77</sup> See Martineau, *supra* n. 44, at 29 (noting that a commonly used canon of statutory construction holds that “[t]he same word used in different places has the same meaning”).

<sup>78</sup> James Boyd White, *The Legal Imagination* 227 (Little, Brown & Co. 1973).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 199.

require, or authorize individuals, groups, and public and private entities to engage in all manner of activities.<sup>81</sup> The audience for statutes and rules is therefore potentially broad;<sup>82</sup> if one subscribes to the idea that people governed by statutes and rules should be able to understand them,<sup>83</sup> then the audience could include

members of the public with little education. Even if one does not subscribe to the notion that everyone governed should be able to understand the governing rule, the audience for a statute or rule must include those who will eventually implement and enforce it, and this group could include police officers, lower-level government officials, or administrative agency staff.<sup>84</sup>

While even plain language advocates concede that it is impracticable to draft statutes and rules at a level accessible to laypersons of below-average education,<sup>85</sup> experts differ as to the ideal audience to aim for. Reed Dickerson, in a seminal drafting text, suggests that the target audience will vary depending on the statute: “A statute addressed primarily to government officials may need to be written differently from one addressed to a segment of the public, and a statute addressed to . . . the tobacco industry[] may need to be written differently from one addressed to the public at large.”<sup>86</sup> Another textbook author disagrees, noting that the legislative audience should always include not only the persons directly regulated by a provision but also the intended beneficiaries of the regulation; thus, a statute regulating the tobacco industry should also be comprehensible to “smokers and those affected by smoking.”<sup>87</sup> To limit the audience to tobacco industry executives and their lawyers “is to miss the essential nature of legislation and rules.”<sup>88</sup> Perhaps charting a middle course, a Canadian commentator posits that legislative language should be clear enough so that “a user who is familiar with the subject matter of a provision [could], after a reasonable expenditure of intellectual effort and within a reasonable time, be able to make sense of it.”<sup>89</sup>

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<sup>81</sup> See Stark, *supra* n. 62, at 9.

<sup>82</sup> Reed Dickerson, *The Fundamentals of Legal Drafting* 27 (2d ed., Little, Brown & Co. 1986); see also Haggard, *supra* n. 48, at 50-51 (noting the potential breadth of the legislative audience, as opposed to the relatively narrow audiences of private-law documents); Martineau, *supra* n. 44, at 90 (noting that legislation and rules “usually have vast and unknown audiences”).

<sup>83</sup> See Krongold, *supra* n. 40, at 501 (asserting that “[i]n a democracy people should be able to understand the laws they are expected to obey”).

<sup>84</sup> Haggard, *supra* n. 48, at 52.

<sup>85</sup> See Martineau, *supra* n. 44, at 90 (noting that aiming for comprehensibility among people with below-average education would unwisely “limit[] the drafter to language and concepts understandable by a child in grammar school”); Krongold, *supra* n. 40, at 552 (noting that “[c]omplex statutes cannot reach everybody”).

<sup>86</sup> Dickerson, *supra* n. 82, at 27.

<sup>87</sup> Martineau, *supra* n. 44, at 91.

<sup>88</sup> *Id.*

<sup>89</sup> Krongold, *supra* n. 40, at 552.

Complicating the entire notion of audience in the context of legislation and rules is the role of the court as the eventual interpreter in cases where questions of meaning cannot be settled among affected parties. Unlike most other texts, a statute “operates only by the cooperation of other minds, and . . . this cooperation is in no sense automatic, but a process of questioning and doubting.”<sup>90</sup> Persons whose relations are governed by statutes and rules will inevitably read the applicable provisions differently from time to time, stretching the texts’ possible meanings. If they reach an impasse, a judge will read the relevant provisions, and the judge, too, will engage in a process of questioning, testing, and doubting a series of possible interpretations. For this reason, one guide to legislative drafting offers the following advice:

[D]rafters probably will work at an optimum level if they conceive of drafting as a dialogue with a judge who has resolved to misread the statute that is being drafted. Imagine a judge’s voice in the back of your head making comments like “this is ambiguous, so I can consult the legislative history” and “besides the meaning that you probably intend for that term, it can mean something else, which leads to the result that I prefer.”<sup>91</sup>

Thus, the drafter of a statute or rule writes for an audience whose abilities, motives, and interpretive authority vary enormously. This fact infinitely complicates the basic plain language premise that the drafter should strive to serve the reader’s needs.

#### IV. Plain Language and Real Rules: The Restyled Civil Rules as a Case Study

The restyling of the Federal Rules of Civil Procedure presents a unique<sup>92</sup> case study of plain language principles as applied to a firmly established,<sup>93</sup> frequently interpreted,<sup>94</sup> and very far-reaching<sup>95</sup> code of rules. The lesson I draw

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<sup>90</sup> White, *supra* n. 78, at 216.

<sup>91</sup> Stark, *supra* n. 62, at 8. *But see* Bryan A. Garner, *Legal Writing in Plain English* 91 (U. Chi. Press 2001) (asserting that drafting for a hypothetical judge is a “wrongheaded” approach).

<sup>92</sup> While the Federal Rules of Appellate Procedure and the Federal Rules of Criminal Procedure have already been restyled, *see supra* nn. 17-23 and accompanying text, the chair of the advisory committee on the Federal Rules of Civil Procedure has noted that “the age, length, and complexity of the Civil Rules make [their] restyling even more valuable and important” than were the restylings of the criminal and appellate rules. Memo., *supra* n. 12, at 22.

<sup>93</sup> The original Rules of Civil Procedure for the District Courts became effective in 1938. Charles Alan Wright, *Law of Federal Courts* 428 (5th ed., West Publ. Co. 1994).

<sup>94</sup> For example, a Westlaw “citing references” search on Aug. 30, 2007, of Fed. R. Civ. P. 19 (“Joinder of Persons Needed for Just Adjudication”) — not the most frequently invoked rule but surely not the most obscure — revealed over 25,000 documents.

<sup>95</sup> The Federal Rules of Civil Procedure apply in United States District Courts, and in 2006,

from this case is that plain language principles have a definite place in the rule-drafting process and can be adapted by intelligent drafters to suit the complexity, context, and audience of a code of procedural rules. The charge to produce a stylistic revision that purports to preserve substantive meaning sets up a less-than-ideal drafting scenario, and the restyling of the civil rules will no doubt generate some complex interpretive problems as a result. Meanwhile, however, the restyled rules demonstrate that in more ordinary rule-drafting scenarios, where drafters may consider both style and substance, the style fostered by plain language techniques can allow a rule to convey complex content, to function effectively within an existing legal context, and to communicate effectively to an appropriate audience. Further, the drafting guidelines generated by the Style Project, by echoing plain language principles, will allow drafters of later amendments to the civil rules — who will have the luxury of considering both style and substance — to produce language that will be as clear and precise as possible and will thus not generate gratuitous interpretive issues.

### ***A. Dealing with Complex Content***

The Federal Rules of Civil Procedure may not be as complex in content as the federal tax code, but the rules do address their share of knotty issues such as whether a party may move the court to order an opponent to respond to discovery requests;<sup>96</sup> whether a person potentially subject to conflicting judgments may file an interpleader action;<sup>97</sup> and whether a party, in response to an interrogatory, must share information gathered in anticipation of litigation.<sup>98</sup>

#### **1. Managing Complex Content with Streamlined Organization and Subheadings**

Two ways in which the restyling amendments help readers understand complex content are by streamlining the organization of the substance of each rule and by including more subheadings. For example, Rule 37(a) describes a fairly complex scheme allowing parties to move for orders compelling opponents to respond to discovery requests and for orders compelling opponents to turn over information in accordance with the automatic disclosure provisions of Rule 26(a). A side-by-side comparison reveals how streamlined organization and inclusion of more, and more helpful, subheadings facilitate readability while not compromising the precision or completeness of the information conveyed. In addition, thanks to cutting some unnecessary words — why should “a deposition on oral examination” not become “an oral deposition”? — the restyled version is not only clearer, but shorter.

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over 250,000 civil cases were filed in these forums. Dept. of Justice, *Judicial Facts and Figures*, tbl. 4.1, <http://www.uscourts.gov/judicialfactsfigures/2006/Table401.pdf> (last accessed May 12, 2008).

<sup>96</sup> Fed. R. Civ. P. 37.

<sup>97</sup> Fed. R. Civ. P. 22.

<sup>98</sup> Fed. R. Civ. P. 26(b)(3).



Superseded Rule 37(a)(1)-(2) <sup>99</sup>	Restyled Rule 37(a)(1)-(3)
<p><b>(a) Motion for Order Compelling Disclosure or Discovery.</b> A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:</p> <p><b>(1) Appropriate Court.</b> An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.</p> <p><b>(2) Motion.</b></p> <p><b>(A)</b> If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.</p> <p><b>(B)</b> If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an</p>	<p><b>(a) Motion for an Order Compelling Disclosure or Discovery</b></p> <p><b>(1) <i>In General.</i></b> On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.</p> <p><b>(2) <i>Appropriate Court.</i></b> A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.</p> <p><b>(3) <i>Specific Motions</i></b></p> <p><b>(A) <i>To Compel Disclosure.</i></b> If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.</p> <p><b>(B) <i>To Compel a Discovery Response.</i></b> A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:</p> <p><b>(i)</b> a deponent fails to answer a question asked under Rule 30 or 31;</p> <p><b>(ii)</b> a corporation or other entity fails to make a designation under rule 30(b)(6) or 31(1)(4);</p> <p><b>(iii)</b> a party fails to answer an interrogatory submitted under Rule 33; or</p> <p><b>(iv)</b> a party fails to respond that</p>

<sup>99</sup> The text of the restyled rules quoted in this article is available at [http://www.uscourts.gov/rules/supct1106/CV\\_CLEAN\\_FINAL5-30-07.pdf](http://www.uscourts.gov/rules/supct1106/CV_CLEAN_FINAL5-30-07.pdf) (last accessed May 12, 2008). To keep the columns to a manageable length for this comparison, I did not use the cascading or hanging indentation used in the official text.

<b>Superseded Rule 37(a)(1)-(2)</b>	<b>Restyled Rule 37(a)(1)-(3)</b>
<p>order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.</p>	<p>inspection will be permitted — or fails to permit inspection — as requested under Rule 34.</p> <p><i>(C) Related to a Deposition.</i> When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.</p>

A particularly complex provision of the civil rules is Rule 22, which governs interpleader, a process that allows a party to bring into the action persons having claims against the party that could subject the party to double or multiple liability. For example, assume a liability insurer has a policyholder who allegedly caused an accident that injured many people. Assume also that the policy states that the insurer will pay no more than \$500,000 on claims arising from one accident. If the accident victims sue the insurer separately in separate courts, the insurer could be subject to several, inconsistent orders compelling it to pay the same \$500,000 to different victims at different times. To avoid this problem of multiple liability, the insurer could, as a plaintiff, institute an interpleader action under Rule 22, naming all the victims as defendants. The court would then decide upon a system for apportioning the \$500,000 among any victims who could prove their entitlement to recover under the policy.<sup>100</sup>

Again, a side-by-side comparison of the old and restyled rule language reveals that more logical organization of the rule's content, along with helpful subheadings, allows the reader to understand the restyled rule much more quickly and easily, even though the substantive meaning remains the same.

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<sup>100</sup> For further explanation of the interpleader process, see Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Civil Procedure* 804-08 (4th ed., Thomson West 2005).

<p><b>Superseded Rule 22</b><sup>101</sup></p> <p>(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.</p> <p>(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C. §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.</p>	<p><b>Restyled Rule 22</b></p> <p><b>(a) Grounds.</b></p> <p>(1) <i>By a Plaintiff.</i> Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:</p> <p>(A) the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or</p> <p>(B) the plaintiff denies liability in whole or in part to any or all of the claimants.</p> <p>(2) <i>By a Defendant.</i> A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.</p> <p><b>(b) Relation to Other Rules and Statutes.</b> This rule supplements — and does not limit — the joinder of parties allowed by Rule 20. The remedy it provides is in addition to — and does not supersede or limit — the remedy provided by 28 U.S.C. §§ 1335, 1397, and 2361. An action under those statutes must be conducted under these rules.</p>
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Indeed, thanks to the subheadings, the reader of the restyled rule can see immediately that both plaintiffs and defendants may use the interpleader device and that this joinder mechanism has some relation to other rules and statutes. And apart from the subheadings, the further division of the text into paragraphs (denoted by numerals) and subparagraphs (denoted by uppercase letters) clarifies

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<sup>101</sup> Superseded Rule 22, in addition to being less clear than it could be, is inconsistent with the rest of the superseded rules with respect to the way in which it labels its subdivisions. The other superseded rules, if split into subdivisions, use lowercase letters — not numbers — to indicate the subdivisions. The other superseded rules then use numbers and uppercase letters, respectively, to indicate paragraphs and subparagraphs.

the circumstances in which interpleader is permitted. As in Rule 37, the subheadings and divisions allow the reader to navigate long sentences with ease. Indeed, the second sentence of restyled Rule 22 weighs in at a relatively hefty fifty words, but it has the virtue of describing very precisely two specific circumstances that will not negate the availability of interpleader. Again, like the single sentence of Rule 37(a)(3)(B), this sentence represents a common-sense trade-off between sentence length and the need to express a complete, complex idea in one place. Both sentences illustrate that plain language guidelines — like the preference for shorter sentences<sup>102</sup> — can bend in the interest of expressing complicated content precisely and accurately.

## 2. Managing Complex Content with Clear Sentence Structure

Another way to increase the clarity of a complex rule is to replace gratuitously confusing sentence structure with more straightforward structure that emphasizes the point of the legal test or exception described. For example, Rule 26(b)(3), commonly known as the work product rule, generally prohibits parties from discovering trial preparation materials of their opponents, with a few limited exceptions. In the following side-by-side comparison, note how the first two sentences of the restyled rule quickly and simply set up the idea of an exception to the general discoverability of relevant information (“Ordinarily, a party may not discover”), while the first sentence of the old rule takes its time revealing that trial preparation materials are not generally discoverable. Indeed, the old rule does not signal to the reader that it is describing an exception (“only upon showing”) until its sixty-second word.

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<sup>102</sup> See *supra* n. 50 and accompanying text.

<b>Superseded Rule 26(b)(3)</b>	<b>Restyled Rule 26(b)(3)(A)</b>
<p><b>(3) Trial Preparation: Materials.</b> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(2) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.</p>	<p><b>(3) Trial Preparation: Materials.</b>  <b>(A) Documents and Tangible Things.</b>  Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:</p> <ul style="list-style-type: none"> <li><b>(i)</b> they are otherwise discoverable under rule 26(b)(1); and</li> <li><b>(ii)</b> the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.</li> </ul>

Also within Rule 26, the provision explaining the protection of non-testifying experts from discovery presents a similar example of the older rule language starting out in an unnecessarily confusing manner while the restyled language immediately tells readers that the protection involves a general rule with some exceptions. Again, the reader of the old rule must wade through more than half of a lengthy sentence before arriving at the word "only," which signals that the sentence has been describing an exception all along.

Superseded Rule 26(b)(4)(B)	Restyled Rule 26(b)(4)(B)
<p><b>(B)</b> A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.</p>	<p><b>(B)</b> <i>Expert Employed Only for Trial Preparation.</i> Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so:</p> <ul style="list-style-type: none"> <li><b>(i)</b> as provided by Rule 35(b); or</li> <li><b>(ii)</b> on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.</li> </ul>

The two comparisons above, regarding the work product protection and the non-testifying expert protection, also point to the importance of the plain language technique of focusing one's sentences on a subject, verb, and object that convey the real point to be communicated.<sup>103</sup> In the older versions of the two protections, the sentences have the following subjects, verbs, and objects: "party" "may obtain" "discovery" (superseded Rule 26(b)(3)); "party" "may . . . discover" "facts . . . or opinions" (superseded Rule 26(b)(4)(B)). In both cases, the reader is incorrectly led, at first, to believe that the provisions are generally *allowing* discovery of the information in question rather than generally *prohibiting* such discovery. In contrast, the corresponding restyled provisions begin with sentences having the following subjects, verbs, and objects: "party" "may not discover" "documents and tangible things" (restyled Rule 26(b)(3)); "party" "may not . . . discover" "facts . . . or opinions" (restyled Rule 26(b)(4)(B)). Thus, the most important grammatical parts of the restyled sentences convey the most important aspects of the provisions' substance.

### 3. Managing Complex Content by Eliminating Unnecessary Intensifiers

An additional technique that helps to clarify complex subject matter is the elimination of unnecessary words in the form of needless intensifiers. For example, superseded Rule 70 states that "the court may also in proper cases,"

<sup>103</sup> See *supra* n. 52 and accompanying text.

hold in contempt a party who has disobeyed an order.<sup>104</sup> The phrase “in proper cases” is an unnecessary intensifier; presumably, a court would not choose to adjudge a party in contempt in an improper case.<sup>105</sup> Even more potentially confusing are unneeded intensifiers that “create negative implications for other rules.”<sup>106</sup> For example, superseded Rule 56(e) provides that an affidavit submitted to support or oppose a summary judgment motion must “show affirmatively that the affiant is competent to testify to the matters stated therein.”<sup>107</sup> Here, the intensifier “affirmatively” adds nothing of substance to the verb “show” and – even worse – may incorrectly imply that this rule requires something more than other rules that merely require a person or document to “show” something.<sup>108</sup> By eliminating these and other unnecessary intensifiers, the restyling has not only made the rule text a bit more concise, but also prevented some possible misreadings.

The above techniques, as well as others,<sup>109</sup> were aimed at allowing the rules to retain their complex content while becoming much easier to read. Of course, easier reading is not produced by easy drafting. The restyling achieved this result only because dozens of drafting experts, civil procedure scholars, judges, and practitioners — in addition to those who submitted feedback during the public comment period — reviewed countless drafts and debated their complexities over a period of years.<sup>110</sup>

### ***B. Dealing with Existing Context***

The Standing Committee’s decision to conduct a wholesale revision of the entire code of civil rules pre-empted any difficulties related to fitting the restyling amendments into the context of existing civil rule language. Nevertheless, the entire code of civil rules had existed within a broader context of case law that had been interpreting the pre-restyling rule language for decades. In addition, and apart from the case law, lawyers had gained their own practical familiarity with the structure and language of the pre-restyling rules, creating yet another context.

Thus, despite the comprehensive nature of the restyling, the Style Project

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<sup>104</sup> Fed. R. Civ. P. 70 (repealed 2007) (superseded text available at 28 U.S.C. app. R. Civ. P. 70 (2000)).

<sup>105</sup> See Kimble, *Principles (Part 2)*, *supra* n. 2, at 52 (discussing “in proper cases” as an unneeded intensifier).

<sup>106</sup> *Id.*

<sup>107</sup> Fed. R. Civ. P. 56(e) (repealed 2007) (superseded text available at 28 U.S.C. app. R. Civ. P. 56(e) (2000)).

<sup>108</sup> See Kimble, *Principles (Part 2)*, *supra* n. 2, at 52 (discussing the “affirmatively” in “show affirmatively” as an unneeded intensifier).

<sup>109</sup> See Kimble, *Principles (Part 1)*, *supra* n. 2, at 57 (discussing the Style Project’s efforts to use consistent terms to refer to identical concepts); Kimble, *Principles (Part 2)*, *supra* n. 2, at 53-54 (discussing the Style Project’s elimination of syntactic ambiguity from rule language).

<sup>110</sup> See *supra* nn. 24-35 and accompanying text.



drafters were faced with some of the same contextual constraints that challenge rule and legislative drafters working on less extraordinary projects. In some instances, the Style Project drafters had to sacrifice a degree of clarity and yield to overriding contextual constraints. In others, however, use of plainer language could both clarify precise rule content and allow the rules to work effectively in context.

As to several issues, the drafters decided that although a change might increase clarity, it would also cause substantial inconvenience in the context of practice and was therefore not worth making. For example, the restyling has retained all the original rule numbers, with the exception of changing Rule 71A to Rule 71.1 (so as to coincide with the numbering of other interposed rules).<sup>111</sup> Even if some of the rules “are probably too long and others might benefit from repositioning,”<sup>112</sup> a change of rule numbers would have made research extremely difficult, as the researcher would have to know the former number of any restyled rule at issue. Renumbering would also be an invitation to human error in the drafting of briefs and opinions and in the revision of standing orders and local rules, because so many experienced judges and lawyers have come automatically to associate particular topics with particular rule numbers over the years.

In addition to rule numbers, certain phrases in the civil rules have become entrenched in the minds of practitioners and have accumulated volumes of (sometimes inconsistent) judicial interpretation. Examples include “knowledge or information sufficient to form a belief” (restyled Rule 8(b)(5)); “failure to state a claim upon which relief can be granted” (restyled Rule 12(b)(6)); and “no genuine issue as to any material fact” (restyled Rule 56(c)).<sup>113</sup> To replace such “sacred phrases” with simpler language risked causing confusion in practice or even changing the substantive meaning, given judicial interpretations of these terms.<sup>114</sup> Therefore, in these and similar instances, the restyled rules retain the convoluted wording.

In a related vein, the restyled rules retain true terms of art, which noted scholar David Mellinkoff has defined as “technical word[s]” with “specific meaning[s].”<sup>115</sup> In the civil rules, retained terms of art include “interpleader” (Rule 22), “discovery” (Rule 26), and “counterclaim” (Rule 13), among others. True terms of art differ from sacred phrases primarily in that true terms of art would be difficult to replace with clearer but concise phrases.

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<sup>111</sup> Kimble, *Principles (Part 2)*, *supra* n. 2, at 54-55. The other interposed rules are 4.1, 5.1, 5.2, 7.1, 23.1, 23.2, 44.1, and 65.1.

<sup>112</sup> *Id.* at 54.

<sup>113</sup> *Id.* at 55.

<sup>114</sup> *Id.*; see also Cooper, *supra* n. 1, at 1765 (“No two words are precise synonyms. . . . That’s why it’s not fully possible to realize the Style Project’s ambition to substitute new words for old . . .”).

<sup>115</sup> David Mellinkoff, *The Language of the Law* 16 (Little, Brown & Co. 1963).

On the other hand, while the Style Project did not change terms of art, sacred phrases, or rule numbers, the restyling did at times reorganize and redesignate information within individual rules. As the earlier side-by-side comparisons illustrated, arranging a rule's content more logically and then highlighting the more logical order with subheadings can greatly enhance clarity without changing meaning. Nevertheless, in each case where the Style Project considered making such a change, it had to balance the potential inconvenience caused by the new sub-designations<sup>116</sup> against that gain. In the side-by-side comparisons above, the drafters decided that the gain outweighed the inconvenience and thus took advantage of a "chance to set the rules in order — or better order — [that] may not come along for another 70 years."<sup>117</sup>

In addition, the Style Project found it could rid the civil rules of jargon and needless verbiage without affecting the rules' ability to operate in context. For example, the drafters saw no reason not to replace "a deposition upon oral examination" (superseded Rule 37(a)(2)(B)) with "an oral deposition" (restyled Rule 37(a)(3)(C)). Similar thinking changed "jurisdiction over the subject matter" (superseded Rule 12(b)(1)) to "subject-matter jurisdiction" (restyled Rule 12(b)(1)) and "jurisdiction over the person" (superseded Rule 12(b)(2)) to "personal jurisdiction" (restyled Rule 12(b)(2)). Perhaps more dramatically, superseded Rule 8(f)'s command that courts construe the civil rules so as to do "substantial justice" became a command to construe the rules so as — simply — to do "justice" (restyled Rule 8(e)).

I must confess that as a teacher of Civil Procedure, I have become so used to the term "substantial justice," not only in the civil rules<sup>118</sup> but also in *International Shoe v. Washington*,<sup>119</sup> that I had assumed the phrase had become a true term of art, enmeshed in a context of decades of interpretive case law. I therefore initially winced when I saw that the restyling had tampered with the phrase in Rules 8 and 61. Plain language experts, however, have since shown me the light, explaining that true terms of art — technical terms with precise and agreed-upon

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<sup>116</sup> Memo. from Stephen B. Burbank & Gregory P. Joseph to Comm. on R. of Prac. & Proc., *Restyled Federal Rules of Civil Procedure* 3 (Oct. 24, 2005) (available at <http://www.uscourts.gov/rules/CV%20Comments%202005/05-CV-022.pdf>) (noting that the risk of erroneous references to a rule increases as that rule becomes "more highly articulated" with designated subdivisions, paragraphs, and subparagraphs).

<sup>117</sup> Kimble, *Principles (Part 2)*, *supra* n. 2, at 55.

<sup>118</sup> See Fed. R. Civ. P. 8(f) (repealed 2007) (superseded text available at 28 U.S.C. app. R. Civ. P. 8(f) (2000)) (providing that the civil rules shall be construed so as to do "substantial justice"); Fed. R. Civ. P. 61 (repealed 2007) (superseded text available at 28 U.S.C. app. R. Civ. P. 61 (2000)) (explaining that errors are not grounds for disturbing a verdict, judgment, or order unless failure to take such action is "inconsistent with substantial justice").

<sup>119</sup> *International Shoe v. Washington*, 326 U.S. 310, 316 (1945) (noting that due process requires, if a defendant is not present in the forum state, that the defendant have "certain minimum contacts" with that state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' ") (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

meanings — are relatively rare<sup>120</sup> and are not to be confused with vague, wordy jargon and other “scars left by the law’s verbal elephantiasis.”<sup>121</sup> Indeed, I have failed to find a case that, for purposes of Rule 8, has even attempted to distinguish between an action that does substantial justice and one that does, merely, justice. Sometimes a supposed context of precise, interpretive authority is simply a mirage.

### C. Dealing with Audience

The drafters of the Federal Rules of Civil Procedure have always presumed that the rules’ audience has at least some legal training;<sup>122</sup> since their inception, the civil rules have used terms such as action, claim, and dismissal without specifically defining them.<sup>123</sup> This presumption is a reasonable one; although a party’s prospects for prevailing in the federal courts may depend largely on procedural issues, lay litigants — at least those who can secure legal representation — generally have less need to understand the civil rules than they might have to understand more substantive statutes and regulatory provisions affecting their lives. In addition, the inclusion of explanations sufficient to allow laypersons to understand concepts like judgment on the pleadings,<sup>124</sup> intervention,<sup>125</sup> and genuine issues of material fact<sup>126</sup> would convert a workable code of rules into an unwieldy textbook on civil procedure.

The Style Project drafters have also assumed that their audience has a general familiarity with litigation practice, and this assumption of some sophistication on the part of the reader pre-empts at least some of the difficulties that otherwise inhere in attempts to draft statutory and rule provisions with both precision and clarity.<sup>127</sup> In addition, the Style Project drafters, like their predecessors, have reasonably presumed that the intended audience understands the function of a code of rules; the rules are not meant primarily to foster “rapid comprehension” on the first reading<sup>128</sup> but rather to authorize, require, or forbid

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<sup>120</sup> Joseph Kimble, *How to Mangle Court Rules and Jury Instructions*, in Kimble, *Lifting the Fog of Legalese*, *supra* n. 43, at 105, 113; *see also* Garner, *supra* n. 43, at 184 (estimating that “common terms of art . . . number fewer than fifty” and citing “*plaintiff*,” “*mandamus*,” and “*mens rea*” as examples).

<sup>121</sup> Garner, *supra* n. 43, at 185.

<sup>122</sup> *See* Bradley Scott Shannon, *Action Is an Action Is an Action Is an Action*, 77 Wash. L. Rev. 65, 88 (2002) (noting that “virtually all of the terms employed by the [pre-restyling] Rules presume some general knowledge of modern American civil legal practice”).

<sup>123</sup> *Id.* at 88 n. 88.

<sup>124</sup> Fed. R. Civ. P. 12(c) (repealed 2007) (superseded text available at 28 U.S.C. app. R. Civ. P. 12(c) (2000)).

<sup>125</sup> Fed. R. Civ. P. 24 (repealed 2007) (superseded text available at 28 U.S.C. app. R. Civ. P. 24 (2000)).

<sup>126</sup> Fed. R. Civ. P. 56(c) (repealed 2007) (superseded text available at 28 U.S.C. app. R. Civ. P. 56(c) (2000)).

<sup>127</sup> *See supra* Part III.B.3.

<sup>128</sup> Stark, *supra* n. 65, at 208 (erroneously assuming that plain language advocates favor

parties, courts, and others to engage in activities so that the authorizations, requirements, or prohibitions will promote “the just, speedy, and inexpensive determination” of civil actions in the federal courts.<sup>129</sup> Thus, readers of the civil rules understand that those rules, like statutes, may require repeated reading and careful study.<sup>130</sup> As a result, the Style Project drafters could insert a greater degree of complex terminology into the restyled rules than might be advisable in other types of plain language documents aimed at other audiences.

Lastly, the Style Project’s inclusion of judges as reviewers during the drafting process<sup>131</sup> will likely minimize the chance that a critical member of the audience — a judge applying the rule in an actual case — will either misunderstand a rule or construe it in a manner unintended by the drafters. Indeed, the extensive review process used in the Style Project, along with the solicitation of public comment, echoes the plain language movement’s target-group testing of consumer-related documents, even though a code of rules governing federal civil litigation is a world apart from a consumer contract in terms of complexity.

In sum, the restyling of the civil rules presented fewer audience-related challenges than might a complex statutory or regulatory provision that would need to be comprehensible to laypersons. To the extent that the restyling did present some audience-related challenges, however, the Style Project’s elaborate draft-and-review process, coupled with the usual publication of the proposed amendments for public comment, allowed the drafters an extensive and realistic sense of audience response to the proposed text.

#### ***D. Inherent Difficulties in After-the-Fact, Non-Substantive, Stylistic Revision***

The Style Project’s revisions of the appellate, criminal, and civil rules have been extraordinary in the sense that their stated purpose has been to increase clarity without changing substantive meaning.<sup>132</sup> This goal placed the Style Project drafters in a particularly challenging situation. Unlike most drafters of

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statutory text that fosters “rapid comprehension” on the first reading, even if the text does not accurately carry out the intended legislative purpose).

<sup>129</sup> See Fed. R. Civ. P. 1 (repealed 2007) (superseded text available at 28 U.S.C. app. R. Civ. P. 1 (2000)).

<sup>130</sup> See Krongold, *supra* n. 40, at 509 (explaining that the hallmark of effective plain language text “is that it can be understood the first time it is read. That is not a fair test for statute law. . . . To understand a statute, a reader must be willing to spend time with it, reading it slowly, not just once, but several times.”). But see Cooper, *supra* n. 1, at 1769 (noting that in practice, “quick consultations” of the civil rules occur frequently, and lawyers and courts may sometimes be forced to act or decide “after reading on the run”).

<sup>131</sup> Members of the Standing Committee, the advisory committee on civil rules, and the Judicial Conference included judges, see *supra* nn. 4-11 and accompanying text, and all of these bodies reviewed draft restylings at least once. See *supra* nn. 25-33 and accompanying text.

<sup>132</sup> See *supra* nn. 1, 14-23, and accompanying text.

rules and legislation, who are able to communicate with the client who has requested a new provision so as to better understand the client's intent, the Style Project participants were left to puzzle over the intentions underlying decades-old rule language characterized by inconsistent use of terminology,<sup>133</sup> syntactic ambiguity,<sup>134</sup> and at least one failed attempt to incorporate contemporaneous statutory language.<sup>135</sup>

Given these circumstances, one common reaction to the Style Project's goal of reproducing original meaning in clearer language is to assert that the goal is, in fact, unattainable.<sup>136</sup> Indeed, it likely *is* impossible to both clarify expression and perfectly preserve meaning throughout a complex code of over eighty rules, as the reporter for the advisory committee on the civil rules has admitted.<sup>137</sup> As a result, the Style Project participants sometimes had to sacrifice clarity for the sake of preserving existing meaning and, at other times, had to arrive at some educated inferences as to existing meaning so as to state that meaning more clearly.

For example, where existing rule language was facially ambiguous and the Style Project team was unable through research to resolve the ambiguity, the restyled rules carry forward the unfortunately ambiguous language.<sup>138</sup> At other times, original rule language was susceptible to two interpretations, but one interpretation seemed the more logical by such a substantial margin that the Style Project drafters made a choice to resolve the ambiguity, acting on an educated, and likely correct, guess as to the original intent.<sup>139</sup> In the first scenario, the clarity

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<sup>133</sup> See Kimble, *Principles (Part 1)*, *supra* n. 2, at 57. As an example of differing phrases that refer to identical ideas in the superseded rules, Kimble notes that the superseded rules at various places used "*for cause shown, upon cause shown, for good cause, and for good cause shown,*" apparently interchangeably. *Id.* (italics added in Kimble).

<sup>134</sup> See Kimble, *Principles (Part 2)*, *supra* n. 2, at 53-54. As one example of syntactic ambiguity, Kimble notes that the text of superseded Rule 72(a) referred to "*any portion of the . . . order found to be clearly erroneous or contrary to law.*" *Id.* at 54 (quoting Fed. R. Civ. P. 72(a) (repealed 2007) (superseded text available at 28 U.S.C. app. R. Civ. P. 72(a) (2000)) (italics added in Kimble). He then asks, "Does *clearly* modify *contrary to law*?" *Id.* (italics in original).

<sup>135</sup> See Edward A. Hartnett, *Against (Mere) Restyling*, 82 Notre Dame L. Rev. 155, 164 (2006) (noting that "the Advisory Committee's research undertaken in response to concerns with Rule 65(d) reveal[ed] that the original Advisory Committee inadvertently omitted a comma when adapting statutory language for inclusion in the Federal Rules").

<sup>136</sup> See Cooper, *supra* n. 1, at 1763.

<sup>137</sup> *Id.* at 1769 ("Yes, meanings will change. But that is no reason to surrender the project.")

<sup>138</sup> *Id.* at 1766. For a specific example of such an intractable ambiguity, see *supra* n. 68.

<sup>139</sup> *Id.* at 1765. For example, superseded Rule 5(a) required service of "every order required by its terms to be served, every pleading . . . , every paper relating to discovery required to be served upon a party . . . , every written motion . . . , and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper." Fed. R. Civ. P. 5(a) (repealed 2007) (superseded text available at 28 U.S.C. app. R. Civ. P. 5(a) (2000)) (discussed in Cooper, *supra* n. 1, at 1765). This sentence is ambiguous in its use of "similar paper"; the term could designate documents similar to orders, pleadings, discovery papers, and motions, or it could

originally envisioned by Judge Keeton<sup>140</sup> is simply impossible to achieve. In the second scenario, clarity is achieved, but with a slight risk of straying from originally intended meaning.

Some experts who have studied the restyled rules see the risk of changed meaning as more than slight, and the resulting costs as potentially significant. For example, Prof. Edward A. Hartnett has asserted that the restyled language at times changes original meaning — or at least makes specific arguments more or less persuasive than they would have been before the restyling.<sup>141</sup> When arguable conflicts between the meaning of old and restyled language arise, some judges will ignore the advisory committee note that the changes are “stylistic only” and instead implement the apparent plain meaning of the restyled text; other judges will heed the note and search for the intended meaning in the old rule language.<sup>142</sup> In either case, the restyling’s purpose of clarifying but not changing the meaning of the rules so as to minimize litigation will have been thwarted.<sup>143</sup> In addition, to the extent that judges rely on the plain meaning of the restyled language and reach outcomes different than they might have under the old language, the restyling will have effectively changed the meaning of the rules, even though the restyling amendments were reviewed and approved as mere stylistic changes and not as substantive ones.<sup>144</sup> Other potential “transaction

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designate documents similar to written notices, appearances, demands, offers of judgment, and designations of records on appeal. Cooper, *supra* n. 1, at 1765. The Style Project drafters eventually decided that the latter option made more sense and was likely originally intended, and the restyled rule effects this decision. *Id.*

<sup>140</sup> See text accompanying *supra* n. 12.

<sup>141</sup> See Hartnett, *supra* n. 135, at 165-67. As an example, Hartnett points to the ability of a defending party to make an offer of judgment under Rule 68. *Id.* at 165-66. The superseded rule language spoke of “an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer.” Fed. R. Civ. P. 68 (repealed 2007) (superseded text available at 28 U.S.C. app. R. Civ. P. 68 (2000)) (quoted in Hartnett, *supra* n. 135, at 165). The restyled rule speaks more simply of “an offer to allow judgment on specified terms.” Fed. R. Civ. P. 68(a) (quoted in Hartnett, *supra* n. 135, at 165). Hartnett contends that the “change from ‘judgment . . . for the money or property or to the effect specified in the offer’ to ‘judgment on specified terms’ . . . make[s] it more difficult to contend that the rule does not apply to offers to accept a particular equitable decree,” as some have suggested in the past. Hartnett, *supra* n. 135, at 166.

<sup>142</sup> See Hartnett, *supra* n. 135, at 169.

<sup>143</sup> See *id.* at 178 (noting “a real risk that the restyled rules will engender litigation”); *Standing Committee Report of Sept. 2006*, *supra* n. 26, at 21 (describing some feedback received during the public comment period that pointed to the possibility of “satellite litigation” generated by inadvertent substantive changes brought about by the restyled language); see also Dorf, *supra* n. 3 (noting the potential that “[l]awyers will continue to argue over what the old version of the Rules means, and . . . also argue over how much, if any, weight to give to the new version of the Rules”).

<sup>144</sup> Hartnett, *supra* n. 135, at 170 (“Neither the Advisory Committee, the Standing Committee, nor the Judicial Conference evaluated [the restyled rules] from the perspective of determining whether or not they are good rules of civil procedure.”).



costs”<sup>145</sup> of the switch to the restyled language include some uncertainty regarding the new rules’ supersession of existing statutes<sup>146</sup> as well as the need to redraft local rules and standing orders to comport with new rule language.<sup>147</sup>

The Standing Committee has taken the position that the transaction costs — including the costs stemming from any inadvertent changes in meaning — are likely insignificant “in light of the extensive work to identify and avoid substantive changes, the fact that the meaning of the rules is inevitably dynamic, and the likelihood that [increased clarity will] reduce rather than foment ‘satellite litigation.’”<sup>148</sup> Indeed, satellite litigation has not been a significant problem with respect to the restylings of the appellate and criminal rules.<sup>149</sup> The chair of the civil rules advisory committee has also noted that without the restyling, “the rules would have become progressively more difficult to understand and use” because each new substantive amendment would have had to mesh with the old language, which was often far from clear.<sup>150</sup> Perhaps Civil Procedure scholar Michael C. Dorf has the best perspective on the balance of costs and benefits resulting from the restyling. He reminds readers that venerated Harvard Law School Dean Roscoe Pound denounced the “‘sporting theory of law,’ which views litigation as a game, losing sight of the important purposes that law serves.”<sup>151</sup> Prof. Dorf then observes that

[t]he re-styled Rules aim for, and for the most part achieve,

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<sup>145</sup> Memo., *supra* n. 116, at 2.

<sup>146</sup> *Id.* at 4-5 (noting that when the restyled rules go into effect, they could unintentionally change the relationship of the federal civil rules to the Federal Rules of Evidence, the Clean Water Act, the Private Securities Litigation Reform Act of 1995, and the Class Action Fairness Act); Hartnett, *supra* n. 135, at 171-78 (explaining the supersession issue in detail and arguing that an advisory committee note stating that the restyling amendments are not intended to effect supersession will not cure the problem). *But see* Memo., *supra* n. 12, at 20 (explaining that restyled Rule 86(b), which states that the restyling is not intended to disrupt existing relations between the rules and other law, should pre-empt any supersession arguments).

<sup>147</sup> Memo., *supra* n. 116, at 4-5.

<sup>148</sup> *Standing Committee Report of Sept. 2006*, *supra* n. 26, at 21; *see also* Cooper, *supra* n. 1, at 1769 (asserting that judicial decisions under the restyled language “that depart from the results that would have been reached under [the old] rule language are more likely to be improvements than mistakes”). Further, if the restyling caused any inadvertent substantive changes to the civil rules, the advisory committee is free at any time to correct them.

<sup>149</sup> Ltr. from W. Eugene Davis, Cir. J., U.S. Ct. of Appeals for the Fifth Cir., to Peter G. McCabe, Sec., Comm. on R. of Prac. & Proc., 1 (Nov. 23, 2005) (available at <http://www.uscourts.gov/rules/CV%20Comments%202005/05-CV-007.pdf>) (stating that the writer initially opposed the restyling of the criminal rules but changed his mind after finding that resulting satellite litigation was minimal, and reporting that the chair of the appellate rules advisory committee has found that litigation related to the appellate restyling has also been minimal). *But see* Hartnett, *supra* n. 135, at 178-79 (explaining that the success of the criminal and appellate restylings do not necessarily indicate that the civil rules restyling will be similarly free of problems).

<sup>150</sup> Memo., *supra* n. 12, at 22.

<sup>151</sup> Dorf, *supra* n. 3.



plain, easy-to-understand English. Whether they nonetheless lead to an increase in the very sort of mischief they seek to avoid will now depend on whether the federal courts also permit Pound's spirit to guide their interpretation of the new Rules.<sup>152</sup>

Notably, the potential transaction costs discussed above stem not from the Style Project's reliance on plain language techniques, but rather from the project's elusive goal of changing expression without changing meaning. Similar concerns regarding supersession and satellite litigation would have arisen had the project — while professing not to change meaning — replaced the old rule language with a newer version in Middle English, or iambic pentameter, or text-message-style abbreviations. Fortunately, these specific concerns need not plague more ordinary rule-drafting projects, in which drafters have the intent to change or add to substantive meaning and may do so in as clear a style as the content, the legal context, and the needs of the audience will permit. And as demonstrated in the earlier side-by-side comparisons of old and restyled civil rule language, plain language techniques can greatly aid drafters in communicating complex ideas within an existing legal context to demanding audiences.

### *E. What the Future Holds*

Having seized a unique opportunity to clarify the entire code of civil rules, the Style Project drafters have not only made today's rules easier to comprehend but have also paved the way for clearer drafting of future substantive rule amendments. Rather than becoming "progressively more difficult to understand,"<sup>153</sup> the civil rules are likely to retain the clarity of the restyled language because substantive amendments will no longer have to mesh with the convoluted sentence structure and ineffective word choice of the pre-restyling language. In addition, the Style Project has generated, as a by-product, some excellent guidance on plain language techniques.<sup>154</sup> This guidance can aid drafters not only of future federal rule amendments but also any of rule or statutory provision. The dissemination of this guidance throughout the American legal community may prove as valuable as the actual restyling of the civil rules themselves.

## IV. Conclusion

The Style Project has taken on the mind-bending task of clarifying the language of the Federal Rules of Civil Procedure without changing their meaning. Plain language drafting techniques have allowed the restyling to accomplish the first part of this charge; the restyled rules are decidedly clearer, thanks to more

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<sup>152</sup> *Id.*

<sup>153</sup> See *supra* n. 150 and accompanying text.

<sup>154</sup> See generally Garner, *supra* n. 2; Kimble, *Principles (Part 1)*, *supra* n. 2; Kimble, *Principles (Part 2)*, *supra* n. 2; Kimble, *Lessons in Drafting*, *supra* n. 2.

effective organization, sentence structure, and word choice, among other changes. Whether the Style Project has satisfied the second part of the charge — not changing original meaning — will depend in large part on whether courts, in interpreting the new language, apply common sense and the spirit of the advisory committee note following each restyled rule.<sup>155</sup> Whether the courts do so or not, the restyling, as a case study, demonstrates that plain language techniques can allow drafters to meet the sophisticated demands that complex content, legal context, and a varied audience place upon a code of procedural rules.

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<sup>155</sup> See *supra* n. 36 and accompanying text.