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Restyling the Civil Rules: Clarity Without Change

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INTRODUCTION

Devoted fans and casual users of the Federal Rules of Civil Procedure will feel mixed emotions on contemplating the Style Project that aims to rewrite every rule from Rule 1 to the end. Well they might.

The Style Project's purpose is simply stated. The Civil Rules, created in an inspired fit of creativity, have been amended repeatedly over the years. Experience has shown that even inspired initial drafting could not avoid all misadventures and that amendments drafted by successive generations wielding different drafting tools do not always fit well. The present rules can be reworked to say more clearly what they mean now. That is the goal of the Style Project: to translate present text into clear language that does not change the meaning.

This simple statement demonstrates cause for both cheer and fear. The impulses that encourage cheer are not all noble, nor are the impulses that engender fear all ignoble. Cheer is good when it rejoices at the prospect that the Civil Rules will become more accessi-

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Professor Shapiro's first year as a teacher at Harvard Law School was my last year as a student there, 1963–1964. Whatever his teaching responsibilities were, I did not have the pleasure of being his classroom student. But another student and I took a Law Review Note on the labor law consequences of relocating manufacturing facilities to nonunion areas to him for a "faculty read." He was helpful and gracious, and improved the product. Since then I have known him first through his inspired writing and then through participation in group deliberations, most notably advisory committees for American Law Institute projects. There is no legal-intellectual exercise more stimulating than an ALI advisers meeting, and of them none can match those in which Professor Shapiro participates. He is one of the small number whom we all should aspire to emulate, even if not to match.

I have the great good fortune to serve as Reporter for the United States Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure. These comments on the Style Project grow out of that experience. They do not reflect in any way the views of the Advisory Committee or the Standing Committee on Rules of Practice and Procedure, to which it reports.

ble, conveying unchanged meaning more clearly and more efficiently. Cheer is not so good when it springs from hope that change can be manipulated to partisan advantage in ways that never were intended. Fear is unworthy when it mourns loss of the opportunity to twist ambiguous or opaque language or loss of the advantages that inhere in mastering the arcane. Fear commands greater respect when it cautions that great care must be taken to reduce the inevitable missteps that either change present meaning or encourage costly but failing arguments for changed meaning.

These notes focus primarily on the grounds for caution, hoping to stimulate all Civil Rules constituents to engage actively in reviewing the restyled rules when they are published for comment.[1] Every rule—perhaps even Rule 2[2]—has its constituency. Unrelenting examination by everyday users will contribute greatly to the Style Project's success. Even simple proposals are improved time and again by public comment, and complex proposals may be transformed or abandoned altogether. Ferreting out unintended changes will require diligent and devoted work by hundreds, perhaps even thousands, of volunteer participants.

The grounds for optimism also may stimulate comments of a kind all too rare in the general run of public comment and testimony on proposed rules amendments. For the most part, few comments are made by observers who agree that a proposed amendment is sound. Why bother to tell the Advisory Committee and Standing Committee that they have gotten it right for the reasons they give? But approving comments are in fact valuable. Confirmation of committee judgments by others, speaking from diverse backgrounds and experiences, places other comments in better perspective. Yet there is little need to explore the grounds for optimism here. The Appellate Rules and Criminal Rules have been restyled successfully.[3] The Civil Rules project is supported not only by the success of those projects but by the lessons learned in bringing them to successful conclusions. The legions of experts involved in the Style Project believe in the Project's inevitable success and bolster their belief by attending carefully to the many cautions.

The Style Project has progressed to a point that supports identification of many general questions that have been faced and tentatively

1 The present goal is to publish the restyled rules in one set, perhaps as soon as February 2005.

2 "There shall be one form of action to be known as 'civil action.'" FED. R. CIV. P. 2.

3 The restyled Appellate Rules took effect on December 1, 1998. The restyled Criminal Rules took effect on December 1, 2002.

answered. But the answers remain tentative. This survey is offered in the hope of advancing the understanding of those who will comment on the restyled rules as they are published. Understanding may bring fresh insights that require reconsideration of postulates that have framed the current drafts. Surely it will bring better focused suggestions for specific improvements.

If there is any logic to order the questions, it is implicit in the reactions of those who confront the Style Project for the first time. The first set of reactions put the challenge directly: it is not possible to accomplish the intended purpose. Any meaningful improvement of style will change meaning. The second set of reactions pose narrower questions that, narrow as they may be, stir surprisingly vehement emotions.

I. CAN IT BE DONE?

The central challenge is easy to make and not easy to meet. At one fundamental level, it turns the very premise of the Style Project against itself. Improved clarity changes meaning. Even if the change brings meaning-in-application closer to original intent, the result still is change. And it is impossible to pretend that the only change is to reach the same result faster, with less costly dispute. Actual outcomes will change. The challenge is expressed almost universally when practicing lawyers hear of the Style Project. Lawyers tend to express direct, pragmatic objections. More conceptual objections, expressed in colder academic language, run parallel.

Satisfactory responses to these challenges may be postponed for an expanded statement of the challenges.

A. The Pragmatic Lawyer Challenge

Almost universally, practicing lawyers react to descriptions of the Style Project with vehement negatives. These reactions can be discounted as familiar expressions of the conservative instincts that commonly set the bar against procedural change. The discount rate, however, may not be high. On some future December 1, the profession will confront an entire set of newly expressed rules. For some time, it will be common to remember that the new rules are intended to bear the same meanings as the rules they replace. Confronting the uncertainties that emerge from the new rules, resort will be had to the old familiar rules on the theory that the meaning has not changed. When the former meaning was unclear or disputed, comparisons of the texts will at times generate new confusions. And many a lawyer, knowing full well what is intended, will seek adversary advantage by

contending for different meanings supported by different texts. That will be the initial phase. As time passes, more and more questions will be addressed by considering only the new rule texts. Language that clearly expresses earlier meaning will be pushed and pulled to find new meanings. Often—perhaps almost always—the meanings intended by the stylists will prevail. But the costs of transitory uncertainty will be paid for many years.

This pragmatic challenge would suggest that a style project should be carried out slowly, stretched out over the many years that would be required to reconsider not only the style but also the meaning of each rule. Incremental consideration would ensure full understanding of each rule as it is scrutinized, achieving the best expression that can emerge only from resolution of all apparent substantive questions. The individuals and bar groups who comment on proposed changes would be able to focus attention and provide help far greater than can be achieved when confronted with a complete set of restyled rules in a single package. Incremental implementation would enable lawyers and judges to focus on discrete areas as they arise, without need to continually recheck every familiar procedural question to learn whether ingrained understandings have been displaced by clear expression of a different understanding.

The thought of stretching the Style Project out over many years was rejected on grounds as pragmatic as the doubts that spurred the thought. Sheer Advisory Committee fatigue was one concern. It is possible to maintain energetic engagement over a period of a few years, but a longer project would gradually lose its claim to undivided attention as other business came to the forefront. Changing Advisory Committee membership is another concern. Uniform conventions must be adopted and adhered to, but they must first be fought out. Written expression is too personal, and personal convictions too passionate, to admit of unanimous opinion. New members will resist the convention compromises, and at times might subvert them. Periodic packages commingling style and substantive changes, moreover, would lose the focus that will be forced by adoption of a complete package. No matter how many committee notes conclude with the observation that changes other than those described are sylistic only, still greater room would be allowed for the adversary impulse to wring meaning out of every new word or comma.

B. Structure, Punctuation, and Words

The pragmatic challenge is made easier when it focuses on the means adopted to increase clarity. One method is simply to break a

long provision into constituent parts—a single paragraph is divided into subparagraphs, and so on. If there is no change in words or punctuation, the argument of "pure clarity" is fairly persuasive. But punctuation changes are risky. And word changes are quite another story.

Punctuation difficulties frequently arise from commas. Different drafters over the years have used—and not used—commas in different ways. One illustration will do: present Rule 5(a) requires service of "[e]very 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."[4] "Similar paper"? Similar to what? To orders that must be served, papers relating to discovery, and so on? Or only to the final group—"written notice, appearance, demand," and so on? The Style Project, by introducing paragraphs and subparagraphs, makes an unambiguous choice. "Similar paper" is connected only to the group that begins with "written notice." The choice seems right. But it is a choice, an interpretation of the present rule that might be debated. Multiplying these choices throughout the rules must inevitably require some close calls.

Word changes are still more uncertain. Never mind what the dictionary may say. No two words are precise synonyms. That's why we have so many. That's why rules drafters insist that we resist the literary aspiration to express the same thought in different words when it reappears. Only monotonous consistency is safe. That's why it is not possible to fully realize the Style Project's ambition to substitute new words for old, expressing present meaning more clearly but without change.

C. Intractable Ambiguity

Better expression of unchanged meaning, intrinsically difficult, becomes impossible when present meaning is obscure. A scribe who does not know what the rule means now cannot make a clear statement without risking change. This problem could be approached by undertaking exhaustive research, but there are enough of these problems to exhaust even a substantial number of dedicated researchers. And there is no assurance that exhaustive research will resolve the ambiguity. Present Rule 32(a), for example, begins by invoking "the rules of evidence" and then, in paragraph (1), immediately

4 FED. R. CIV. P. 5(a).

switches to "the Federal Rules of Evidence."[5] Does the first phrase refer only to the Federal Rules of Evidence? May a federal court, for that matter, apply rules of evidence that cannot somehow be anchored in a Federal Rule of Evidence? Should a Style Project expend great effort in seeking the advice of evidence experts?

Present Rule 4(h)(1) provides another example. Service on a corporation can be made by serving an "agent authorized . . . by *law* to receive service of process and, if the agent is one authorized by *statute* . . . and the statute so requires, by also mailing a copy to the defendant."[6] Is there a difference between authorization by law and authorization by statute? How might the difference be better expressed?

As these choices multiply, the solution often has been to carry present language forward without change. The only alternative would be multiple projects, parallel to the Style Project, to determine the best meaning, whether or not it is the present meaning. And that alternative, dragging out over generations of Advisory Committee and Standing Committee members, could easily defeat the entire project.

Ambiguity nowhere presents a more pervasive problem than arises from "shall." "Shall" permeates the rules. The lengthy committee discussions of its universal problems are summarized separately below.

D. An Isolated Island of Good Drafting May Lose the Common Language

Another challenge may be largely fanciful. For better or worse, lawyers and courts are condemned to struggle continually with bad drafting. Focusing only on positive enactments, some bad drafting is deliberate. Unable to resolve a conflict, contending forces negotiate a deliberately ambiguous resolution to focus future battles in other arenas. Other bad drafting results from failure to understand the problem addressed or to foresee future developments. Yet another cause arises from the inability of even the best drafter, choosing words that perfectly express the thought in mind, to understand how those words may bear on thoughts not yet thought. And, alas, some drafters may not rise to the top levels of skill and experience.

In this sea of indifferent drafting, elegant drafting stands apart. It seems fair to ask whether the precise language used in a small world may become insular. It does not matter whether it is the fine drafting language that drifts away from common usage, or common usage that drifts. Communication requires common ground. Lawyers and

5 FED. R. CIV. P. 32(a).

6 FED. R. CIV. P. 4(h)(1) (emphasis added).

judges accustomed to wading through inelegant drafting may be unwilling to believe the evidence of their intellects, unable to resist arguments that confuse and depart because they work with so many texts that invite confusion and departure. This possible concern, however, is troubling only if clear expression generates greater confusion than unclear expression. Although possible, that prospect seems unlikely.

Greater risks arise from the prospect that professional drafters may turn inward so completely as to lose touch with the effect their words have on others. Present Rule 8(b) offers a simple example. It says that a denial "shall fairly meet the substance of the averment[ ] denied."[7] Style Draft Rule 8(b)(2) directs that a denial "fairly respond" to the substance.[8] "Respond" is a nice, clear, modern word. It also claims a pedigree in the present rules—Rule 15(a), for example, refers to a "responsive pleading."[9] "Meet" has an antique ring to it. But it also carries a stronger force than "respond." It suggests direct, head-on confrontation in a way that "respond" does not. Over time, substitution of "respond" may subtly weaken whatever force there may be in this rather wishful pleading direction.

E. Pragmatic Possibilities

The assertion that the Style Project cannot succeed without changing the meaning of some rules, even several rules, need not defeat the project. One justification may be that the overall gains will yield greater benefit than the occasional changes. This cost-benefit balance cannot be predicted with confidence. Even a decade or two of applying restyled rules may yield no more than impressionistic and anecdotal evidence. Optimism seems appropriate, but pessimists cannot be swayed by the simple charms of optimism. Deeper justifications, however, can be found to support the Style Project. An enigmatic summary may introduce the discussion. All of the present meanings of all of the Civil Rules are simply way-stations along the road from original intent to better understanding. Meanings will change if there is no Style Project at all. The Style Project would be a disaster if—against all odds—it actually should succeed in freezing the "present meaning" of every rule. What good it can do will be to channel the inevitable changes into more desirable directions.

The Civil Rules have an evolutionary quality that infuses them with common law elements. Much of this quality is deliberate. Time

7 FED. R. CIV. P. 8(b).

8 STANDING COMM. ON RULES OF PRACTICE & PROCEDURE, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (STYLE 277), at 23 (2003).

9 FED. R. CIV. P. 15(a).

and again, the rules rely on district court discretion. Discretion may be exercised in ways that defy any pattern, responding to diverse circumstances with diverse answers that could not be captured in more directing language, even if reason appeared to eliminate occasional wayward applications. And if present "meaning" could be captured in words, the effort might cripple desirable adaptations as still different circumstances appear. A Style Project can do no more in these areas than to ensure that the rule does not misdirect discretion. Present rule language and new style language alike will yield the same results as judges respond sensibly to the problems that confront them. The style effort risks little harm and may eliminate language quirks that occasionally interfere with wise discretion.

Common law evolution of procedure is not limited to inventive exercise of discretion deliberately conferred. Intended meaning may be superseded as practice shows a better way. This phenomenon will reduce at least two risks that inhere in the attempt to restate original intended meaning. The risk more commonly noted is that the style drafters will misunderstand original meaning. That risk implies an unflattering view of present drafting, but in itself supports the argument for redrafting. A less polite and less often expressed intended-meaning risk is that courts can improve on the original meaning, and should not be bound to it by language that brooks no escape. This risk implies an unflattering view of original intent. However often each risk will be realized by the style drafters, common law evolution will frequently come to the rescue. Just as courts read the present rules to mean what they should mean, so will courts read the restyled rules.

One example illuminates the healing abilities of the common law interpretation process. As amended in 1970, what has come to be designated as Rule 33(c) offers this singularly useless advice: "An interrogatory otherwise proper is not *necessarily* objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact."[10] "Necessarily" could have been interjected in this sentence only to indicate that the interrogatory may be objectionable merely for this reason, but then again it may not be objectionable merely for this reason. It all depends, and we will not tell you what it depends on. You, the lawyers and judges, must figure that out on your own. But, just to make sure that you are sufficiently troubled, we will provide advice in the Committee Note that the interrogatory "is not" objectionable.[11] No "necessarily" about

10 FED. R. CIV. P. 33(c).

11 *Id.* 33(b) advisory committee's note (1970 amend.).

it. Further inquiry would reveal that the Committee Note was written to support a draft rule that said that the interrogatory is not objectionable.[12] "Necessarily" was intruded after the original drafting, without explanation or guidance. Confronted with this sorry spectacle, the current Style Project proposal is to delete "necessarily." The justification for this change invokes a useful guide through the style maze. A rule may be made to say what it has come to mean in practice, no matter how at odds practice may be with the apparent meaning of present text. In practice, "necessarily" is ignored.[13] So it can be deleted from the style rule.

Concerns that restyling may reduce desirable evolution may be further assuaged by reflecting that much evolution occurs without close consultation of rules texts. It may be that most applications of the Civil Rules are made from vague memory, without constant renewal by consulting the actual text. But quick consultations occur with great frequency as well. Clear text expression need not impede the creative responses to living problems that emerge from this process. Clarity indeed may improve understanding and application where they count most, in myriad acts and decisions made from residual impressions or after reading on the run. And clarity also will help in the less frequent situations that call for and can support careful reading.

With or without a Style Project, the rules will continue to take on new meanings as courts confront circumstances not contemplated by "original intent" and at times—for better or occasionally for worse—will depart from original intent. A Style Project that refrains from deliberate tinkering, that seeks only to express present meaning as clearly as possible, will advance this goal. Applications that depart from the results that would have been reached under present language are more likely to be improvements than mistakes. Yes, meanings will change. But that is no reason to surrender the project.

II. How Should It Be Done?

Commitment to restyle the rules without deliberate changes in meaning entails commitment to act with great care. Beyond that fundamental approach, however, many choices remain open. Often the

12 *See* Comm. on Rules of Practice & Procedure, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts Relating to Deposition and Discovery 61 (1967).

13 *See* Standing Comm. on Rules of Practice of Procedure, Style Draft of Rules 26 Through 37 and 45, Federal Rules of Civil Procedure (Style 458), at 38–39 (2003).

choices should be made with an eye to acceptance of the restyled rules package when it takes effect. Some measure of elegance may properly be sacrificed to carry forward rules features that are familiar and comfortable. Yet some measure of discomfort should be tolerated. Although painful, forced confrontation with new expressions of old principles will bring new and better understandings. A number of the more general choices to be made are described here to illustrate myriad more specific issues that demand unremitting attention as the Style Project proceeds.

A. Structure

The structure of the whole Civil Rules package is at times eccentric. Summary judgment is a pretrial device, but it appears as Rule 56 in the chapter dealing with judgments.[14] It might make better sense to locate it after the discovery rules and before the trial rules. Rule 16, for that matter, occupies an odd place between the pleading rules and the party- and claim-joinder rules. The counterclaim, crossclaim, and third-party claim rules[15] seem to fit better between Rule 18 and Rule 19 than in their present place. Aesthetic improvements might be made by rethinking the basic structure.

One advantage of restructuring would be that we would be free to adopt, at least for the time being, a set of whole-number designations. No more Rule 4.1, 23.2, or 71A. We would no longer need to jump from Rule 73 to Rule 77.

These proposals almost inevitably will be—and so far have been—defeated by the familiarity of Rule 56, Rule 13(a), and so on. The conservative inertia that has slowed procedural reform applies to the small as well as the large. Although the bar managed to survive renumbering of some of the discovery rules by the 1970 amendments, it will cling to Rule 9(b) to identify the standard for pleading fraud with particularity,[16] to Rule 12(b)(6) to identify a motion to dismiss for failure to state a claim upon which relief can be granted,[17] and so on. As compared to the daring of those who developed the 1970 discovery amendments, moreover, the march of research techniques provides a further argument for retaining familiar designations. The most enthusiastic opponents of change will argue that no present designation can change, not ever, because that will complicate computer searches.

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14 FED. R. CIV. P. 56.

15 *See* FED. R. CIV. P. 16.

16 *See* FED. R. CIV. P. 9(b).

17 *See* FED. R. CIV. P. 12(b)(6).

A much smaller-scale version of the structure question arises when good style would rearrange subdivisions within a rule, or perhaps combine two or more subdivisions. The computer-search champions may not forestall such rearrangements of rules whose subparts have not developed entrenched reflexes. Rearrangement in turn poses a still smaller question: if we combine subdivision (b) with subdivision (c), do we continue to describe subdivision (d) as "(d)," showing (c) as "abrogated," or do we re-letter (d) as new (c)?

Structure is further involved in one of the basic techniques to improve present style. Rule 14(a), perhaps more than any other rule, illustrates the gains that can be made by the simple device of breaking a single long subdivision into paragraphs, subparagraphs, and items. Each successive subdivision can be inset to further enhance clarity:

Rule 14.
(a) Subdivision.
(1) Paragraph.
(A) Subparagraph.
(i) Item.

Occasionally a rule might be easier to follow if we had further designations—if after the subparagraph (A) we could have one more sequence of numbers and letters. But there are several arguments against adding further designations. One is conformity to other sets of rules. Another is the need to find words to describe them: sub-subparagraph is unattractive, and the alternatives may be worse. The inset technique may be another. It facilitates clarity, in part because it increases the volume of "white space" on the page. But at some point insetting may restrain the further proliferation of subparts. The temptation to break an item down into still smaller subparts is tempered by the very short lines that result.

B. Sacred Phrases

Some phrases in the present rules govern common problems, have become embedded in professional lore, and generate volumes of interpretations. Many of these phrases have acquired nearly sacred status, in part because of the nearly mystical qualities used to invoke functional principles that are not easily expressed in authoritative language. These sacred phrases should carry forward in the restyled rules. "Transaction or occurrence" will still be used to define the relationships that make a counterclaim compulsory under Rule 13(a).[18] It would be dangerous to yield to the temptation to adopt the "logical

18 FED. R. CIV. P. 13(a).

relationship" test that many courts use to explain the authoritative text in frustration with the elusiveness of the official phrase.[19] One challenge will be to ensure that all of the phrases that have taken on such settled elaborations are preserved.

Retaining sacred phrases raises the question whether the Style Project must pursue uniform expression by reexamining the variations that encumber the familiar phrases. "Transaction or occurrence" persists from Rule 13 into Rule 14 up to 14(c), where it becomes "transaction, occurrence, or series of transactions or occurrences."[20] In Rule 15(c)(2) it becomes "conduct, transaction, or occurrence."[21] By Rule 20 it expands back to "transaction, occurrence, or series of transactions or occurrences."[22] But Rule 20 adds something new: parties may be joined if a right to relief is asserted "in respect of" as well as "arising out of" the transaction.[23] What subtle distinctions may be implied by these variations? Perhaps this is the point: each of these phrases is used because the drafters do not know precisely what they intend and seek to rely on common-sense development over time. They do know, however, that it is quite unlikely that the same tests should be used for compulsory counterclaims, (permissive) crossclaims, third-party impleader, relation back of pleading amendments, or permissive party joinder. So they hop, somewhat peculiarly, from one phrase to another as a means of signaling the need for distinctive approaches. It would be a mistake to settle on one common phrase for each of these rules.

C. Definitions

Definitions presented recurring difficulties in the Criminal Rules style project. As later rules were styled, the Crimimal Rules Committee was driven to consider again and again the definitions adopted in earlier rules. There are more definitions in the Civil Rules than many of us realize. Rule 3 defines what it means to "commence" an action.[24] The Rule 5(e) tag line is "Filing with the Court Defined,"[25] but the rule does not really define filing—it directs how filing is to be accomplished.[26] At the same time, it does define an electronic "pa-

19 *See* 6 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1410, at 61–65 (2d ed. 1990) (discussing case usage of the logical relationship test).

20 FED. R. CIV. P. 14(c).

21 FED. R. CIV. P. 15(c)(2).

22 FED. R. CIV. P. 20(a).

23 *Id.*

24 *See* FED. R. CIV. P. 3.

25 FED. R. CIV. P. 5(e).

26 *See id.*

per" as "written paper."[27] Rule 7 defines what is a "pleading."[28] Buried in Rule 28(a) is a definition of "officer" for purposes of Rules 30, 31, and 32.[29] The Rule 54(a) definition of "judgment" presents questions so horrendous that the Committee quickly abandoned any attempt even to think about them in the recent revision of Rule 58.[30] The District of Columbia is made a "state" by Rule 81(e), "if appropriate."[31] Rule 81(f) sets out a curiously limited definition of "officer" of the United States (including, at least on its face, a beginning that includes reference to an "agency," followed by a definition only of "officer").[32] Other definitions may lurk in the rules. We may be stuck with the ones we have, except to the extent that substantive amendments may be made in parallel with the Style Project. But the present rules suggest reasons to be wary of adding new definitions.

D. "Legacy" Provisions

As astonishing as it was, the achievement represented by adoption of the Civil Rules was rooted in the past. The rules continue to reject a history that in 1938 still threatened to become the future. The rules have flourished, and the history is increasingly forgotten. The Style Project must consider the opportunity to abandon provisions that expressly abolish long-gone procedures, supersede vanished distinctions, and rely on expressions that are familiar to lawyers but seem quaint or deliberately obscuring to others.

1. Old Practices Abolished

The Civil Rules have abolished many earlier procedural devices. The generic question is whether it is necessary to continue to abolish these devices forever. Specific answers may vary.

Rule 7(c) is an example: "(c) Demurrers, Pleas, etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used."[33] We could spend some time debating whether devices are "abolished" by a rule that says only that they shall not be used. But why not abandon this subdivision entirely? Even if someone decides to describe an act as a demurrer rather than a Rule 12(b)(6) motion to dismiss, a 12(c) motion to strike an insufficient defense, a Rule

27 *Id.*
28 FED. R. CIV. P. 7(a).
29 FED. R. CIV. P. 28(a).
30 *See* CIVIL RULES ADVISORY COMM., DRAFT MINUTES, APR. 2000, at 15–20.
31 FED. R. CIV. P. 81(e).
32 FED. R. CIV. P. 81(f).
33 FED. R. CIV. P. 7(c).

50(a) motion for judgment as a matter of law, or whatever, the court is likely to understand and respond appropriately.

A more familiar example is Rule 60(b), but it may be more complex. The final sentence says: "Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."[34] This rule does abolish something. We may wonder whether there is much risk that a modern lawyer will think to reinvent these archaic procedures. Perhaps there is—the criminal law crowd continues to have questions about the persistence of *coram nobis* relief.[35] However that may be, the last part of the sentence is a specific direction: relief from a judgment must be sought by motion or by independent action. We may need to keep that. (And perhaps to note that an appeal—surely neither a motion as prescribed in these rules nor an independent action—is not what we mean by "relief from a judgment"?)

A less familiar example is Rule 81(b), which abolishes the writs of *scire facias* and mandamus.[36] Most lawyers would need a dictionary to learn what *scire facias* might be,[37] and it would require more than the usual measure of adversary gall to attempt its resurrection as an independent procedural device. Congress, on the other hand, has revived mandamus; Rule 81(b) has been superseded in part by 28 U.S.C. § 1361 (2000).[38] This Rule 81(b) paragraph seems safely deleted.

2. Old Distinctions Superseded

Less direct means may be used to supersede old practices. Rule 1 is a fine example: "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as

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34 FED. R. CIV. P. 60(b).

35 *See* 3 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 592, at 685 (3d ed. 2004). A demonstration that *audita querela* has survived formal abolition is provided by *Ejelonu v. INS*, 355 F.3d 539, 544–48 (6th Cir. 2004).

36 FED. R. CIV. P. 81(b).

37 *Scire facias* "denotes the judicial writ (which contained these words) founded upon a matter of record requiring the person against whom it is issued to show cause either why the record should not be annulled or vacated, or why a dormant judgment against that person should not be revived." BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 783 (2d ed. 1995).

38 "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (2000).

cases at law or in equity or in admiralty . . . ."[39] "Suits"? "Of a civil nature"? "Cases" at law or in equity or in admiralty? The merger of law and equity was accomplished in 1938; admiralty was brought into the fold in 1966. Is there a risk that the merger will dissolve without continued support in Rule 1? Whether or not we continue express merger, can "civil action" be substituted for "suits" and "cases"? This seemingly modest question illustrates the variety of sources that might be consulted and the array of answers they might suggest. A very quick look at the subject-matter jurisdiction statutes that begin at 28 U.S.C. § 1330 shows that "civil action" is the most common expression.[40] But § 1333 refers to "any civil case of admiralty or maritime jurisdiction";[41] § 1334(a) refers to "cases" under title 11;[42] § 1334(b) refers to "civil proceedings arising under title 11";[43] § 1337 refers to "any civil action or proceeding";[44] § 1345, covering the United States as plaintiff, refers to "all civil actions, suits or proceedings";[45] § 1346(a)(2)—the Little Tucker Act—refers to "[a]ny other civil action or claim against the United States";[46] § 1351 refers to "all civil actions and proceedings" against consuls, etc.;[47] § 1352 refers to "any action on a bond";[48] § 1354 to "actions between citizens of the same state";[49] § 1355 to "any action or proceeding";[50] § 1356 to "any seizure";[51] § 1358 to "all proceedings to condemn real estate";[52] and § 1361 to "any action in the nature of mandamus."[53] New Rule 7.1(a) refers to an "action or proceeding." Perhaps that is the phrase that should appear in Rule 1. But even that phrase will leave the question whether some district court events are excluded from direct application of the Civil Rules because they are not actions or proceedings.[54]

39 FED. R. CIV. P. 1.

40 *See* 28 U.S.C. §§ 1330–1368 (detailing jurisdiction of U.S. District Courts).

41 *Id.* § 1333.

42 *Id.* § 1334(a).

43 *Id.* § 1334(b).

44 *Id.* § 1337(a).

45 *Id.* § 1345.

46 *Id.* § 1346(a)(2).

47 *Id.* § 1351.

48 *Id.* § 1352.

49 *Id.* § 1353.

50 *Id.* § 1355.

51 *Id.* § 1356.

52 *Id.* § 1358.

53 *Id.* § 1361.

54 *SEC v. McCarthy*, 322 F.3d 650, 655 (9th Cir. 2003), ruled that an "application" by the SEC to enforce an SEC order that in turn enforced National Association of Securities Dealers' sanction orders is not a "suit[ ] of a civil nature" governed by the Civil Rules. The opinion promptly switched to asking whether the proceeding is an

3. Familiar Terms and Concepts

The present rules embrace many terms long embedded in legal discourse. Rule 4(*l*) provides for "proof of service."[55] Even a lawyer who does not know how to prove service knows the phrase to research. The rule could as easily say that service must be proved to the court. But why abandon a familiar and well understood term, substituting a phrase that may generate arguments that a different process is contemplated? There may be times when we should not abandon a well understood term simply because it seems somehow archaic.

Familiarity goes beyond language to concept. Justice Jackson put it well: "It is true that the literal language of the Rules would admit of an interpretation that would sustain the district court's order. . . . But all such procedural measures have a background of custom and practice which was assumed by those who wrote and should be by those who apply them."[56] As time moves on, however, the shared background of custom and practice may fade away. Reading a rule today, we may fail to understand the intended meaning, and in rewriting seemingly clear language effect a change. An illustration is the provision in Rule 19(a) that a necessary party plaintiff "may be made a defendant, or, in a proper case, an involuntary plaintiff."[57] It is easy to pick this illustration because it is familiar—courts have generally preserved the understanding that the "proper case" is much more restricted than the words might indicate.[58] The more meaningful illustrations will be those that we overlook because the original understanding has been lost. The ignorant assumption of a new meaning and its expression in contemporary style may be an improvement, but it still will be a change.

E. Ambiguities

First-time participants in style discussions are invariably surprised to discover ambiguities lurking in familiar rules that seemed to be well

"action." *Id.* at 656. Section 21(e) of the Securities Exchange Act, 15 U.S.C. § 78u(e) (2000), establishes district court jurisdiction, on "application" by the SEC, to order compliance with the rules of a registered securities association. An application is a summary proceeding, not an action. "Even words with remarkably similar definitions can still convey a unique or distinct meaning or flavor from words that are similar or even synonymous in nature because of their differing tone or usage within a sentence." *McCarthy*, 322 F.3d at 656.

55 FED. R. CIV. P. 4(*l*).

56 Hickman v. Taylor, 329 U.S. 495, 518 (1947) (Jackson, J., concurring).

57 FED. R. CIV. P. 19(a).

58 *See* 7 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 1605–1606, at 69–84 (3d ed. 2001).

understood. The general problem has been described in addressing the reasons to accept the prospect that the Style Project will, at times, change the meaning of a present rule.[59] More specific problems may be illustrated in two sets. The first involves the ubiquitous use of "shall" as a word of command. The second involves the habit of qualifying words of direction or command by references to discretion, justice, and other lofty principles.

1. Shall

Bryan Garner devotes more than three double-column pages to "Words of Command," saying "these verbs are a horrific muddle" and excoriating "shall" as "[t]he primary problem."[60] His preferred solution is to use "must" to mean "is required to."[61] The Style Project has adopted this solution, adhering to the lead set by the Appellate Rules and the Criminal Rules. Official adoption has not stilled dissent. "Shall" is used with monotonous regularity throughout the rules. Often it is safely translated as "must," but time and again, translation is made difficult by the very ambiguity that brings "shall" into disrepute. The arguments have grown increasingly sophisticated. It is useful to consider the views expressed during more than an hour of vigorous discussion at the October 2003 meeting of the Civil Rules Advisory Committee.[62]

Succinct summary may adequately capture the discussion. "Shall" has become a word of "soft command." It has imperative overtones, but often preserves some measure of discretion. As compared to "must," "shall" does not seem as likely to confer rights on litigants. It is not possible to unravel its ambiguities to reconstruct a clear present meaning or original intent in all applications. Indeed the original drafters of one rule or another amendment may deliberately have relied on the ambiguity of "shall." The determination to adopt "must" to mean "is required to" closes off the opportunity to carry ambiguity forward by carrying forward present rule language. There is a real risk that meaning will be changed in choosing whether to substitute "must," "may," or "should" for "shall." This risk may occur even when it is clear that "shall" was originally intended to mean "must." Actual practice may have added some measure of discretion. The dilution of

59 *See supra* Part I.C.

60 GARNER, *supra* note 37, at 939–42. After identifying eight meanings within the range of subtle shadings, Garner recognizes that any strong word of command will foster litigation so long as the consequences of disobedience are open to argument.

61 *See id.*

62 *See* CIVIL RULES ADVISORY COMM., DRAFT MINUTES, OCT. 2003.

the original command may reflect that practice has shown a better way: discretion is more useful, even more important, than the drafters understood.

Rule 37(b)(2) provides one example among many. It provides a long and formidable list of sanctions a court may impose for disobeying a discovery order. Then it concludes:

> In lieu of any of the foregoing orders or in addition thereto, the court *shall* require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.[63]

Should "shall" become "must"? The 1970 committee notes reflect an intent to prompt more frequent use of expense sanctions.[64] But there is broad discretionary authority to deny expenses on finding substantial justification or unjustness. Many judges and lawyers believe that the intent in 1970, whatever it was, has not led to widespread use of expense sanctions. If "shall" is converted to "must," will the result be more frequent imposition of expense sanctions? Is that a good thing, despite widespread reluctance? And if that brings practice closer to original intent, is it proper to use the Style Project to change meaning in practice for this purpose?

2. Words to Measure Discretion

The rules often seek to guide or confine discretion by adding words that seem to measure the discretion. A few random samples

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63 FED. R. CIV. P. 37(b)(2) (emphasis added).

64 *See* FED. R. CIV. P. 37 advisory committee's note (1970 amend.). Most of the discussion is directed to Rule 37(a)(4). The former rule called for an expense sanction if the losing party acted without substantial justification. The amendment called for the sanction unless the losing party's behavior was substantially justified. The Committee explained that the former provision "may appear adequate, but in fact it has been little used. . . . It appears that the courts do not utilize the most important available sanction to deter abusive resort to the judiciary." FED. R. CIV. P. 37(a)(4). The final paragraph states that "expenses should ordinarily be awarded," but that "a necessary flexibility is maintained. . . . The amendment does not significantly narrow the discretion of the court, but rather presses the court to address itself to abusive practices." *Id.* Turning to 37(b)(2), the note observes that the rule

> places the burden on the disobedient party to avoid expenses by showing that his failure is justified or that special circumstances make an award of expenses unjust. Allocating the burden in this way conforms to the changed provisions as to expenses in Rule 37(a), and is particularly appropriate when a court order is disobeyed.

FED. R. CIV. P. 37(b) advisory committee's note.

include Rule 6(b): "the court for cause shown may at any time in its discretion" enlarge time limits;[65] Rule 13(f): the court may grant leave to set up an omitted counterclaim "when justice requires";[66] Rule 15(d): the court may permit a supplemental pleading "upon such terms as are just";[67] Rule 37(b)(2): the court "may make such orders . . . as are just" when a party disobeys a discovery order.[68] Other rules confer discretion without the embellishments. Rule 23(f) says that a court of appeals "may in its discretion" permit appeal from an order granting or denying class-action certification;[69] Rule 49(a) says that a court "may require a jury to return only a special verdict";[70] and Rule 49(b) says that the court "may submit" interrogatories with a general verdict.[71]

The style question is whether to invoke discretion simply by saying that a court "may" do something, without attempting to invoke justice, "cause," "discretion," or like terms. Exclusive reliance on "may" makes sense only if language cannot be used to express the many subtle gradations of discretion that abound in procedure. The argument is that the breadth and depth of district court discretion should be worked out in practice by the courts of appeals, without attempting to give clues in rules texts. But it may not be an accident that court of appeals discretion under Rule 23(f) was deliberately left without bounds.[72] The choice whether to use a Rule 49 verdict is similarly confided to unlimited district court discretion; it is difficult to imagine circumstances in which refusal to use a Rule 49 verdict is in itself reversible error.[73] "May" in these rules means full discretion. The other rules used as examples, moreover, confer narrower discretion. Although degrees of discretion are not easily expressed, nor for that matter clearly foreseen, some hints can be given by exacting cause, by invoking justice, or by employing similar terms.

To complicate matters, the Style Project must choose expressions of discretion in the context of rewriting present rules. If the goal is only to express present meaning, it is risky to rely on "may" alone to

65 FED. R. CIV. P. 6(b).

66 FED. R. CIV. P. 13(f).

67 FED. R. CIV. P. 15(d).

68 FED. R. CIV. P. 37(b)(2).

69 FED. R. CIV. P. 23(f).

70 FED. R. CIV. P. 49(a).

71 FED. R. CIV. P. 49(b).

72 The 1998 committee note states that appeal "is permitted in the sole discretion of the court of appeals. . . . The court of appeals is given unfettered discretion . . . ." FED. R. CIV. P. 23(f) advisory committee's note (1998 amend.).

73 *See* 9A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2505, at 161 (2d ed. 1994).

describe every matter of discretion. References will be made constantly to earlier decisions describing the boundaries of discretion and, through the decisions, to the present rules. Whatever might be the best choice in writing an entirely new and independent set of rules, caution may be the wise course in restyling the present rules.

F. Substantive Change

Oft-repeated meticulous review of every word in every rule is an essential part of the Style Project. This process inevitably brings to mind old dissatisfactions and generates new doubts. The Style Project, however, has been framed to resist all temptations. Deliberate substantive changes, even slight changes, must be addressed by other means.

The proposal to amend Rule 27(a)(2) published in August 2003[74] is a good illustration. Rule 27(a)(2) now provides that notice of the hearing on a petition to perpetuate testimony must be served "in the manner provided in Rule 4(d) for service of summons and complaint."[75] Rule 4 has been revised and Rule 4(d) now provides for waiver of service.[76] Other changes to Rule 4 make it impossible to reconstruct precisely the effect of the reference to former Rule 4(d). Although the arguments for referring to all of Rule 4 seem persuasive, the change will expand the former meaning. The amendment was pulled out of the Style Project and published as a substantive change.

The best means to address the substantive questions that emerge from the Style Project remain to be resolved. Although the project commands a substantial share of Advisory Committee time and resources, independent projects continue to be pursued.[77] The tentative approach to substantive proposals emerging from the Style Project is to accumulate them in a separate portfolio. As the style pro-

74 STANDING COMM. ON RULES OF PRACTICE & PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 82–84 (2003).

75 FED. R. CIV. P. 27(a)(2).

76 FED. R. CIV. P. 4(d).

77 The agenda for the October 2–3, 2003, meeting provides examples. In addition to Style Project questions, the topics addressed at the meeting included a preliminary draft of a proposed Supplemental Rule G to govern civil forfeiture actions; an interim report from the Federal Judicial Center on filing sealed settlement agreements; a report by the Discovery Subcommittee on possible amendments to address discovery of computer-based information; a report by the Class Action Subcommittee; a suggestion that a new rule be considered to describe practice when district court relief is sought from an order that is the subject of a pending appeal; and possible amendments of Rules 15 and 50(b). *See* CIVIL RULES ADVISORY COMM., *supra* note 62.

cess continues, these proposals will be reviewed to determine whether some can suitably be advanced for adoption on a separate track that runs parallel to the style proposals and that aims for adoption at the same time as the style proposals. The advantages of this approach are to address the issues while they are fresh in mind and to reduce the temptation to amend the newly styled rules immediately after they take effect. The potential disadvantages are diffusion and perhaps confusion of the public comment process and the risk that substantive changes adopted at the same time as style changes will blur the distinction between substance and style as the new rules are assimilated into daily practice. These concerns are likely to curtail the number of substantive changes proposed in direct combination with the Style Project, advancing only those that seem right beyond any reasonable controversy.

G. Redundant Reassurances

The Style Project forces reconsideration of a powerful drafting reflex. Time and again, we persuade ourselves that it is wise to add words we believe to be unnecessary. The purpose may be to anticipate and forestall predictable misreadings—predictable because we do not trust people to apprehend the "plain meaning," or because we do not trust people to admit to a plain meaning they do not like. Instead, the purpose may be to provide reassurance. Rule 4(j)(2), for example, provides for "[s]ervice upon a state, municipal corporation, or other governmental organization subject to suit."[78] There is no need to add "subject to suit." Rule 4 prescribes the method of service, and does not purport to address such matters as Eleventh Amendment immunity or sovereign immunity. But these words protect against arguments that Rule 4 somehow limits sovereign immunity, and reassures those who fear that the arguments will be made. Or perhaps the reassurance is aimed in a different direction, to show that there is no purpose to authorize suit against an "organization" that is not an entity capable of suing or being sued under the law that halfway created it.

Redundant cross-references provide a more general illustration. By its own terms, Rule 11 applies to "[e]very pleading."[79] Rules 8(b)(1) and (e)(2) are among those that add redundant reference to "the obligations set forth in Rule 11."[80] Rule 26(b)(2) immediately follows Rule 26(b)(1), but a cross-reference to (b)(2) was deliberately added to (b)(1) in the 2000 amendments "to emphasize the need for

78 FED. R. CIV. P. 4(j)(2).

79 FED. R. CIV. P. 11(a).

80 FED. R. CIV. P. 8(b)(1); FED. R. CIV. P. 8(e)(2).

active judicial use of subdivision (b)(2) to control excessive discovery."[81] The voice of drafting reason says that such cross-references add distracting clutter. An excitable drafter may argue that they implicitly dilute application of the cross-referenced rule in all circumstances that lack the cross-reference. But time and again, veteran lawyers and judges fight for the redundant cross-reference because experience tells them that it reinforces awareness and application of the rule invoked.

In face of these competing arguments, should we adopt a general policy that prohibits intentional redundancy? That sets a high threshold? Or that permits redundancy whenever at least a few fear that language plain to the drafter may not be plain to all?

H. Integration with Other Rules: Style

As the third in time, the Civil Rules Style Project must honor style conventions developed in the Appellate Rules Project and hardened in the Criminal Rules Project. But it may be asked whether some departures may be allowed.

Apart from style projects, the Standing Committee has long favored adopting identical language for rules that address the same subject unless a substantive reason can be shown for distinguishing civil practice from some other practice. But the approach has been relatively flexible: at times justification can be found in the view that somehow the civil problem feels different. The "plain error" provision in revised Civil Rule 51, for example, was redrafted in a number of steps that culminated in adoption of the plain error language of Criminal Rule 52.[82] But the Committee Note states that application of the rule may be affected by the differences between criminal and civil contexts.[83] Would it be better to adopt deliberately different language when different meanings may be appropriate, even though we cannot articulate the differences?

The case for uniform expression across the several sets of rules seems still more compelling when the question seems to involve style conventions alone. Adherence to the same modes of expression across the rules will facilitate understanding. Unshakable stability has great virtue, yet it seems a shame to freeze style conventions. Contin-

81 Amendments to Federal Rules of Civil Procedure, 192 F.R.D. 340, 390 (2000). The Note further observes that: "The Committee has been told repeatedly that courts have not implemented these [(b)(2)] limitations with the vigor that was contemplated." FED. R. CIV. P. 26(b)(1) advisory committee's note (2000 amend.).

82 *Compare* FED. R. CIV. P. 51(d)(2), *with* FED. R. CRIM. P. 52.

83 FED. R. CIV. P. 51 advisory committee's note.

ued improvement is possible and will be inevitable unless we erect an impermeable barrier. And it does not seem likely that even a vigilant style review process will be able to stem all departures—whether or not improvements—as the full set of restyled rules are amended for substantive improvement. There may be some room to adopt new style conventions for the Civil Rules despite some departure from the conventions used in the Appellate and Criminal Rules.

I. Integration with Other Rules: Content

Civil Rule 5(a) now requires service of every "designation of record on appeal."[84] Appellate Rule 10 is a self-contained provision dealing with the record on appeal; it includes a service requirement, and it does not seem to require designation.[85] There may be archaic provisions like this that have to be weeded out. This prospect does not seem to present any distinctive policy question—the Style Project simply must be alert to the risk.

Deeper problems may arise from other relationships between the Civil Rules and counterpart provisions in other rules. Several Civil Rules address evidence questions, including particularly Rules 32, 43, 44, and 80. The complex relationships between these rules and the Evidence Rules have seemed to present issues that cannot be resolved in the name of style alone. If they are to be confronted, it must be in a separate project undertaken in conjunction with the Evidence Rules Advisory Committee.

J. "Committee Notes"

One of the central difficulties of the style enterprise is that new words are capable of bearing new meanings. Advocates will seize on every nuance and attempt to wring advantage from it. In the first years, the effort often will be willful: the advocate knows what the prior language was, knows what it had come to mean, and knows that no change in meaning was intended. As time passes, memory of the Style Project will fade. New meaning will be found without any awareness of the earlier language or meaning. In part that will be a good thing: substantive changes will be made because the new meaning is better than perpetuating the old. We cannot effectively prevent that process, and we may not wish to. But the committee notes are a vehicle for attempting to restrain these impulses. No doubt the notes will vanish from sight, and with them the reminders they might provide.

84 FED. R. CIV. P. 5(a).

85 *See* FED. R. APP. P. 10.

Still, there might be advantage in writing extensive notes to elaborate the meanings that are supposed to be clear in the restyled rules. This temptation has been resisted. The note to each rule states that the changes are matters of style alone. Many notes say no more. Some notes undertake to explain that the new clear expression simply captures the meaning of former uncertain expression.

Another temptation has been resisted as well. The Style Project might provide occasion to depart from the rule that the Advisory Committee cannot change a note without amending the rule. The involuntary plaintiff provision of Rule 19 is an example. This provision has a history that suggests a very narrow application.[86] The face of the rule, however, has no apparent limit. Any attempt to revise the rule will encounter grave difficulty, but it might be useful to attempt to reduce the occasions for inadvertent misapplication by a reminder in the note. The note could observe that no change has been made in the inherited language because it is difficult to state the intended limits, but that it is important to remember the intended limits. Restatements of present law are inherently dangerous, however, and in any event would distract attention from the core challenges of the project. They will not be attempted.

K. When Words Change Their Meaning

A particularly awkward question arises when traditional words are caught up in new fashions that may change meaning. Rule 12(h)(1), for example, lists defenses that are "waived" if not properly raised.[87] Beginning with criminal procedure, however, it is increasingly fashionable to distinguish between waiver and forfeiture. "Forfeiture" results from failure to timely raise an issue, and may be partly forgiven by allowing review for plain error.[88] "Waiver," on the other hand, is the intentional surrender of a known right and may be denied even plain error review.[89] Which concept is appropriate to Rule 12(h)(1)? Clearly it intends to cover nonintentional, inadvertent procedural forfeiture. Will that meaning be lost if future generations view "waiver" only as intentional surrender of a known right? But if "forfeit" is substituted today, will this seemingly harsh word generate confusion and immediate meaning changes? The cautious approach no doubt is wise, retaining current language without attempting to predict future word fashions.

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86 *See supra* note 58 and accompanying text.

87 FED. R. CIV. P. 12(h)(1).

88 *See, e.g.*, United States v. Thorn, 317 F.3d 107, 129 n.16 (2d Cir. 2003).

89 *Id.*

L. Forms

What should be done to restyle the forms? Many of the forms use antique dates for illustration—perhaps the most familiar is the June 1, 1936 date in Form 9.[90] That date recurs throughout the forms. Fixing that is easy enough. Perhaps further style changes also are desirable. But here again substantive concerns quickly appear. The most obvious example is the Form 17 complaint for copyright infringement, which has not been amended since 1948, long before the transformation of copyright law by the 1976 Copyright Act. The Forms will be styled after the rules are done. Present plans call for completion of the forms in time for publication during the period set for commenting on the rules.

M. Statutory References

The Rules occasionally refer to specific federal statutes. The "applicability" provisions of Rule 81 provide many examples.[91] The risks of this practice are apparent—it may be difficult to be sure that the initial reference is accurate, and statutes may change. But there may be real advantages. Specific statutory provisions may be the least ambiguous means of expression, particularly in the Rule 81 statements that identify proceedings that do—or do not—come within the Rules. The Criminal Rules Committee suggested that specific references might be helpful in pointing toward the proper statute, saving research time and reducing anxiety. The answer may be to refer to specific statutes only when necessary. Perhaps some showing of great convenience should be allowed as well. But great care remains appropriate.

CONCLUSION: A CALL FOR COMMENT

The Style Project is an ambitious undertaking. It has come far enough to show that it will succeed. The full measure of success will be assured, however, only if the bench and bar make the effort to examine the restyled rules with punctilious care. Side-by-side reading and comparison are required. It may be too much to ask any one person to assume this responsibility for every rule. But everyone has a favorite rule or two, whether the favor be love or hate. Begin with those and comment, even if the comment is only to say that the restyled version got it right. Beyond that, examine the relatively small number of Committee Notes that add explanations to the universal

90 FED. R. CIV. P. app. of forms, form 9.

91 *See* Fed. R. Civ. P. 81

style-only disclaimer. The burden is not great and the payoff may be valuable. Finally, pick a rule or a few to examine out of idle curiosity. Who knows what wonders may be revealed as many trained minds randomly explore the more obscure corners of this fascinating procedural machine?