



School of Law

**POSTPONING THE 2007 “RETYLING”
AMENDMENTS TO THE FEDERAL RULES OF
CIVIL PROCEDURE: A LETTER TO
MEMBERS OF THE JUDICIARY COMMITTEES
OF THE HOUSE AND SENATE**

**Jeffrey S. Parker, George Mason University
School of Law**

07-33

**George Mason University Law and Economics
Research Paper Series**

This paper can be downloaded without charge from the Social Science
Research Network at http://ssrn.com/abstract_id=1016221

SEPTEMBER 20, 2007

MEMORANDUM

TO: Members of the Judiciary Committees of the House and Senate

FROM: Jeffrey S. Parker, Professor of Law, George Mason University School of Law

RE: Postponing the 2007 “Restyling” Amendments to the Federal Rules of Civil Procedure

I write to urge the Members of the House and the Senate to enact legislation postponing the effectiveness of pending amendments to the Federal Rules of Civil Procedure. Without intervening Congressional action, these amendments will take effect on December 1 of this year pursuant to 28 U.S.C. § 2074(a). I recognize that this is an extraordinary request, but this year’s pending amendments also are extraordinary, as they will completely re-write each and every provision of the Civil Rules for the first time in their 70-year history. More fundamentally, they adopt a novel concept of rule interpretation—what one of the proponents calls “clarity without change”¹—that is antithetical to our jurisprudence and likely to produce disarray in the procedural system.

There is a substantial body of opinion, in which I join, that the proposed amendments are likely to produce a material degradation of civil justice in our federal courts by imposing enormous burdens of transitional cost, in exchange for little or no benefit. Perhaps more importantly, there is no indication that the judicial rulemaking committees have fully considered the potential consequences of these sweeping changes. For these reasons, the Congress should provide itself the opportunity to study these proposed rules—and the process and concepts that produced them—before they take effect.

I. Sources of the Pending Amendments

This year’s amendments to the Civil Rules are a culmination of a long-term project, dating from the early 1990s, to “restyle” all of the federal rules of practice and procedure. Though beginning as a rather modest effort to create a “style” subcommittee to the Standing Committee on Rules of Practice and Procedure, in order to vet proposed amendments received from the subordinate Advisory Committees, this effort quickly expanded to become the all-encompassing “restyling” project. Since that time, the project has “restyled” the Appellate Rules (1998), the Criminal Rules (2002), and now the Civil Rules. The Evidence Rules apparently are next on the list.

¹ Edward H. Cooper, *Restyling the Civil Rules: Clarity without Change*, 79 Notre Dame L. Rev. 1761 (2004). Professor Cooper was and is the Reporter to the Civil Rules Committee.

The records of the rulemaking committees are unclear on exactly how “restyling” came to be accepted as an important goal of the judicial rulemaking machinery,² but it appears to be an artifact of the “plain language” movement that was in vogue some years ago, somehow displaced from its original context of drafting legal documents intended for use by non-lawyers. This transformation is a mystery to me, as it would appear that procedural rules designed to guide litigation lawyers would be the least promising application for this type of “plain language” thinking. Nevertheless, the principal functionaries of the project have been drawn from the “plain language” movement. Bryan Garner, who is currently president of LawProse, Inc., was engaged as a consultant and prepared a sort of handbook or manual on how to “restyle,” entitled *Guidelines for Drafting and Editing Court Rules*, and published by the Administrative Office of the U.S. Courts.³ Joseph Kimble, a legal writing professor at Thomas Cooley School of Law and another exponent of “plain language,” was also a consultant to the committees, and the principal drafter of the restyled Civil Rules.⁴

The records of the rulemaking committees report years of extensive efforts on the “restyling” project by members, staff, consultants, and reporters. However, outside of the rarefied atmosphere of the committees, the project has received little notice. With a few exceptions, nearly all of the scant law review literature on “restyling” has been written by the consultants or reporters to the committees. Aside from those articles, and the obligatory public notices, there has been nothing of which I am aware that could be called outreach or independent

² This shift is reflected in an extremely vague reference in the September 1992 Report of the Standing Committee (page 13). According to a retrospective description in Robert Keeton’s preface to Garner’s style “manual” (see note 3 below and accompanying text), “[i]nitially, the Style Committee worked on amendments only, but the value of the work was so readily apparent that the Style Subcommittee was asked to produce fully restyled drafts of two sets of rules,” *Guidelines*, at iii. There is nothing in the underlying records to indicate how this value became “readily apparent,” nor even a description of that value.

³ Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules* (1996: Administrative Office of the U.S. Courts), reprinted at 169 F.R.D. 176 (1997).

⁴ See Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure*, Part 1, 84-Sep Mich. B. J. 56 (2005) and Part 2, 84-Oct Mich. B. J. 52 (2005). These short pieces were published as installments of a regular column in the *Michigan Bar Journal* called “Plain Language,” which is edited by Professor Kimble. Its credo is “to improve the clarity of legal writing and the public opinion of lawyers by eliminating legalese.” *Id.* at n.a.1. Professor Kimble also edits something called *Scribes Journal of Legal Writing*. For a revealing exposition of his point of view, see his article in that journal, entitled *How to Mangle Court Rules and Jury Instructions*, 8 Scribes J. Leg. Writing 39 (2002).

study of the concepts involved. There have been no law review symposia⁵ and no academic conferences on “restyling.” Two of the three public hearings on the Civil Rules restyling were cancelled, ostensibly for lack of interest.

In recent years, federal rules amendments have become so frequent that even experts in the field have difficulty in monitoring the committees’ work, and little incentive to do so. In my observation, critical comments from outsiders are unwelcome, and often ignored or discounted by the committees. The vast breadth of the “restyling” project only exacerbates these problems. As a result, the “restyling” project has received very little critical attention, and no rigorous debate, wither within the scholarly literature or otherwise. The committees and their consultants and staff essentially have been operating in their own world. Things like “restyling” take on a life of their own, as there is a tendency for those involved in the process to become psychologically invested in the work, especially when that work is protracted and in some ways tedious. Though this is an understandable human tendency, it is not a favorable environment for developing rules of public application.

II. The Concepts of “Restyling”

The overarching concept of the “restyling” project is captured in Professor Cooper’s slogan of “clarity without change” (*see* the Cooper article cited at note 1 above). In other words, the objective is to rewrite all of the rules to make them “clearer”—whatever that means—but without changing their content. As is stated in every note to the pending “style” amendments, “[t]hese changes are intended to be stylistic only.” Three questions immediately occur. How can different words have the same meaning? And, even if they do, what is meant by “clearer”? And, even if they do have the same meaning and are “clearer,” is it worth the obvious costs of wholesale amendments? For the moment, I will put aside the question of costs, and explore the concept of “clarity.”

In this respect, the “restyling” project is reminiscent of the type of English teacher that we all seem to have had somewhere around the 10th or 11th grade in high school, who had some very definite ideas about “good writing” or “clear writing,” and was obsessive in the enforcement of those ideas. One idea that can be seen throughout the “restylings” is a dislike for paragraph

⁵ There was a broader symposium in 2001 in the *Dickinson Law Review*, making the startling proposal of a “model set of drafting principles” that would govern all levels and branches of government, and every part of the legal profession. *See* Louis F. Del Duca, *Introduction to Symposium on the UCC, SEC, ALI, Federal Rules and Federal Government Simplification Experiences--is it Time for a Model Set of Drafting Principles?*, 105 *Dick L. Rev.* 205 (2001), concluding with the assertion that “[d]evelopment of a set of model guidelines as advocated by the authors in this Symposium for general use in drafting legal documents is therefore desirable and necessary,” *id.* at 211). Two of the contributions to that Symposium made reference to the Federal Rules “restyling” project.

structure (and even sentence structure), and a fetish for outline form. In every rule, there are far more divisions and subdivisions than before, resulting in an over-articulation bordering on the bizarre. An example can be seen (here I violate “restyling” dogma by using “passive voice”) in the proposed Civil Rule 4(a), in which a simple list of the requisite contents of a civil summons is now subdivided out into seven sub-subdivisions, replete with separate capital letters for such things as the court’s seal (which requirement will now be cited as Fed. R. Civ. P. 4(a)(1)(G)) and the clerk’s signature (which will now be cited as Fed. R. Civ. P. 4(a)(1)(F)). In a separate subdivision, Rule 4(a) now is to provide that the court may “permit” rather than “allow” a summons to be amended. Proposed Fed. R. Civ. P. 4(a)(2). The “restyling” proponents claim that such things make a rule “clearer” and “easier to read,” but I do not see it that way. It is actually harder to follow a sentence structure that is broken into seven separate subparagraphs, and the number of parentheses required to cite “restyled” rules would try the patience of Job. Nearly all of the rules take up more space on a page, and it is not self-evident how breaking sentences apart into disconnected phrases makes understanding any easier or faster, or the writing clearer. Much of “restyling” is of this nature.

Then there are other fixations on particular words or parts of speech. Garner forecasts with glee that the “restyled” Civil Rules will banish the word “shall” from the rules’ lexicon.⁶ Everywhere, there is a crusade to extirpate “intensifiers”—which seems to mean all adjectives and adverbs, and many prepositional phrases—as either redundant or “stating the obvious.” These examples could be extended indefinitely,⁷ to show that much of “restyling” is silly or trivial, or both. But that excursion would miss the important point.

It is too easy to ridicule “restyling,” because that makes it seem like a trivial matter. In my judgment, it is both silly and trivial in its claimed benefits. But whether I am right or wrong, it is not a trivial matter, because the object of the exercise is not an 11th-grade English composition. The object is the Federal Rules of Civil Procedure, and the past 70 years of interpretive case law, which together form a major capital asset of the American legal system. My 11th-grade English teacher may have had some good points, too, but that does not mean I

⁶ Bryan A. Garner, *The Art of Boiling Down*, 9 Green Bag 2d 27, 31n.31 (2005) (“Soon the Federal Rules of Civil Procedure will be purged of all *shalls*: in February 2005, the Standing Committee issued for public comment a massive redraft of the rules by recasting them according to the best modern principles of drafting.”).

⁷ For those interested in further detail, perhaps the best summary of “restyling” as affecting the Civil Rules can be found in the pamphlet released in 2005, entitled *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure* (February 2005: Judicial Conference of the United States, Committee on Rules of Practice and Procedure). In the front matter of that volume, pages x through xx contain a memorandum from Joseph Kimble outlining “Guiding Principles for Restyling the Civil Rules.” In the display of the rules themselves, there are side-by-side comparisons showing how much busier and convoluted is the result of “restyling.”

would engage that teacher to re-draft the Federal Rules of Civil Procedure. That poses a large amount of risk, and imposes a large amount of costs, to obtain a highly debatable benefit.

III. Critique of the “Restyling” Process and Product

Even if one assumes that “restyling” has some benefit and actually works as is promised by the restylists (both debatable points), my concern is with the enormous costs that will be imposed on the legal profession, the courts, and the public. I do not believe that the rules committees or even the other critics have fully considered all of the costs imposed.

Of course, some of the costs are obvious. Forests will be consumed in reprinting every book and pamphlet containing the Civil Rules. Some 25 volumes of the Wright and Miller treatise on Federal Practice and Procedure, and comparable components of the many other texts and treatises in the field, will have to be revised and probably expanded. All of this will be delightful to law publishers and treatise-writers, not to speak of the “plain language” experts and others who will produce still more books, articles, and CLE programs to re-educate the Bench and Bar on “restyling.” But none of these costs are in the public interest.

One of the supposed benefits of the project is to make the rules “easier” for the uninitiated, but, as a teacher of first-year Civil Procedure, I am daunted by the prospect of training my first-year students next term, when it will be necessary to teach both the existing rules and the restyled rules, under the “clarity without change” concept.⁸ But even if it were “easier” for the roughly 40-50,000 neophytes per year, what about the million-plus practicing lawyers? They will suffer from what the learning psychologists call “negative transfer of training,” and those who will suffer most are those most expert in civil litigation. Like the suggested replacements for the QWERTY keyboard, even if the restyled rules were “better” in some hypothetical sense, the switching costs will dominate, and the net result will be negative. If in fact the “restyling” tempts otherwise unqualified lawyers to dabble in federal civil litigation, that will produce costs of other kinds. Most of the costs of re-publishing and re-training will not be absorbed by the profession, but will be passed on to litigants (and to the courts) in various forms, including higher fees and more mistakes. In the end, as always, taxpayers and citizens will bear the largest share of the burden.

Then there are the cascading effects on other rule systems. Massive change, or “clarity,” in the Federal Rules of Civil Procedure is likely to trigger re-examination of the local rules of procedure in the 94 federal districts. Many state procedural systems also are based on the Federal Rules, and they too may need re-examination. Many administrative procedural systems follow or incorporate the Federal Rules, as do private dispute-resolution systems. Other sets of federal

⁸ Another of the restylists’ precepts is to eliminate “archaic” terms from the Rules. But these terms are actually useful in Law School instruction, as they encourage the student to investigate the historical foundations of the law and thereby gain a deeper understanding.

rules are interconnected with the Civil Rules, and will have to be conformed.⁹ Ironically, it is the very success of the Federal Rules of Civil Procedure as a baseline model of American procedure that will render the transition costs truly massive.

But even these transition costs are only the tip of the iceberg, because the more profound effects on the procedural system, and the delivery of legal services, will be largely invisible and ubiquitous. Much of the difficulty rests in the “clarity without change” concept, coupled with the committees’ failure to consider the nature of contemporary legal research. The rules committees emphasized their best efforts to retain the rule-numbering structures, as their answer to the research critique. Even on its own terms, that answer is doubtful.¹⁰ But research in annotated

⁹ For example, comments by the Advisory Committee on Bankruptcy Rules, though generally supportive, also observed that “[o]ur initial review of the restyled Civil Rules suggests that approximately ten Bankruptcy Rules may need to be amended to conform to the changes in the Civil Rules,” Comment 05-CV-016, at www.uscourts.gov/rules/proposed0206. Is this “clarity without change”?

¹⁰ Already, the signs of disarray are beginning to creep into the legal literature. Authors of law review articles addressing specific topics under the rules are finding it necessary to include specific directions on how to find the old “unchanged” law in addition to the new “clarified” rule. One example is Phillip A. Pucillo, *Rescuing Rule 3(c) from the 800-Pound Gorilla: The Case for a No-Nonsense Approach to Defective Notices of Appeal*, 59 Oklahoma L. Rev. 271 (2006). In discussing the “restyled” version of Appellate Rule 3(c), Professor Pucillo found it necessary to include an extensive note on the organizational consequences of the 1998 restyling, whereby, as he notes:

“Following a restyling . . . in 1998, Rule 3(c) was converted from a single paragraph of text into five numbered paragraphs, with the first of these paragraphs containing the respective content requirements of a notice of appeal . . . The actual focus of this Article, therefore, is Rule 3(c)(1). The pertinent provision will nevertheless be referred to simply as ‘Rule 3(c)’ in order to maintain consistency with references to that provision in cases and other literature authored prior to the restyling.”

Id. at 271n.2. See also, e.g., Nancy J. King and Susan J. Klein, *Beyond Blakely*, 51-Dec Fed. Lawyer 53, 58 (2004)(“A small number of defendants who were sentenced just as the Blakely decision was announced may be able to seek resentencing under Rule 35(a) (formerly Rule 35(c) before the 2002 “restyling” of the Federal Rules of Criminal Procedure”); Alicia Werning Truman, *Unexpected Evictions: Why Drug Offenders Should Be Warned Others Could Lose Public Housing if They Plead Guilty*, 89 Iowa L. Rev. 1753, 1764-65nn.67-68 (2004)(In discussing the “restyled” Criminal Rule 11(b)(1), the author notes that, before restyling “the content contained in this section was in section 11(c). The substance of the rule remained unchanged from the previous version, but the numbering and wording was changed,” *id.* at

rules or statutes, or digests, is no longer the dominant mode of legal research. Today, most legal research is conducted through computerized text-searching, so that the new-found “clarity” will deprive the researcher of direct access to the “unchanged” prior law. When faced with any issue under the new Civil Rules, the researcher now will have to check both the old “inferior” rule language and the new “superior” rule language, thus doubling the research burden.¹¹ Nor could any good lawyer—old or young—accept on faith that the restylists actually had produced “clarity without change.” That lawyer would have to examine whether the new language actually would bear the old interpretation, and argue her or his case accordingly. Any other choice would violate the lawyer’s duties to represent the client competently and zealously. Of course, judges would have to consider and decide these points. Given the number of issues, lawyers, judges, and cases affected, even a small incremental change in the research burden could easily run into many millions of lawyer-hours per year wasted by the restylists, before even considering the effect on the quality of civil justice.

This brings us to the most profound problem with “clarity without change.” Even assuming that this slogan is neither naive nor deliberately disingenuous, in the longer run it is untenable. Words cannot be detached from their meanings. Eventually, the “restyled” rules will have to bear their intended meanings, or else legal interpretation and construction becomes impossible. What this is likely to produce, and already is producing in the previously-“restyled” rules, is an entirely new generation of proposed rule amendments designed to “clarify” the previously-provided “clarity.” The first item in the proposed rule changes for the coming year is an amendment to Appellate Rule 4 that is described by the rulemakers as intended to “eliminate ambiguity arising from the 1998 restyling of the Appellate Rules.”¹² There are likely to be many more to follow, in overwhelming volume if the Civil Rules also are consumed in the “restyling” machine. Then, I predict that the rulemaking committees or their supporting staff will appear before your Judiciary Committees to ask for more resources, staff, etc., to feed the rulemaking churn.

This result is inevitable because an important principle of our law is that the meaning of legislative productions, such as statutes and court rules, must be taken, first and foremost, from the language of the rule or statute itself. “Clarity without change” denies that fundamental

1764n.67, while, as to “restyled” Rule 11(b)(2), “[b]efore 2002, this content was contained in Rule 11(d), *id.* at 1765n.68). These types of provisos will soon become obligatory in virtually all writing about federal procedure.

¹¹ Moreover, as illustrated by the law review examples given in the previous note, even citations have been changed, and the significance of these changes to the research effort is obvious to the authors of the scholarly literature, however “minor” it might appear to the rule-drafters, who mostly are not those who have to analyze, research, and use these rules.

¹² This is the description given on the courts’ official “Federal Rulemaking” web site, at www.uscourts.gov/rules/newrules1.htm.

principle, and therefore is untenable.

Nor has this insight eluded either the participants in or the critics of the “restyling” process. Although the legal literature is sparse, there is a revealing essay contributed to the 2001 Dickinson Symposium on “plain language” thinking by Professor Carol Mooney, who was the Reporter to the Advisory Committee on the Appellate Rules during their “restyling.” In reflecting on that experience, Professor Mooney wrote:

“To call these projects ‘style’ or ‘simplification’ projects in some way understates what is done and what is at stake. I read a recent article by Professor Linda Berger in the *Journal of Legal Education* on new rhetoric. I do not know much about new rhetoric and I do not pretend to really understand it. But there were a few things that Professor Berger said in that article that made me reflect on the process I had been involved in when we were rewriting the appellate rules. . . .

“My main point is that you cannot separate content or substance from style. . . .

“The dividing line between style and substance is probably even more illusive and ephemeral than that between substance and procedure. When one undertakes to rewrite a rule or a statute to make it clearer and more coherent, the process inevitably transforms what had been previously written. It transforms the rule. So, in many ways, it is true that content cannot be separated from the words used. . . .

“It became clear that calling this project a process of ‘restyling’ was . . . understating the process. Not only are rules subtly transformed by things such as creating subdivisions and headings, but the rewriting process inevitably uncovers ambiguities . . . which had never been litigated and never been resolved. When one uncovers an ambiguity and aims to bring clarity, one must choose among the many possible readings of the existing rule. . . . Even though we did not intend to change substance, some such changes were an inevitable result of the process.”

Carol Ann T. Mooney, *Clarification of the Appellate Rules of Civil Procedure*, 105 Dick. L. Rev. 237, 237-39 (2001). Professor Mooney’s thoughtful comments are a refreshingly candid admission that “clarity without change” is an illusion.¹³ Her remarks also reveal another of the pitfalls of obsessive rule re-writing: that “ambiguities which have never been litigated”—and therefore may present no problem in practice—nevertheless are resolved to “bring clarity” in the

¹³ I am a bit disappointed, however, that the Reporter to the Advisory Committee on the Appellate Rules referred to them in her paper’s title as “the Appellate Rules of Civil Procedure,” whereas the Federal Rules of Appellate Procedure also cover the thousands of appeals brought each year in federal criminal cases.

restylists' imaginations, rather than to address a real problem.¹⁴ In addition, they probably are resolved wrongly, because: (1) the resolutions are not based on real problems argued by real adversaries and considered by informative case law; and (2) the rulemakers themselves are people who, for the most part, are not regularly involved in representing litigants.

Perhaps the most troubling aspect of the rulemaking committees' process is that, when people who are involved regularly in the practical use or academic study of the rules do weigh in, their advice is ignored or discounted. A particularly dramatic instance occurred with the development of the "restyled" Civil Rules now pending. Following the preliminary draft of 2005, a voluntary group of 21 practitioners and scholars, led by Professor Stephen Burbank and practitioner Greg Joseph, offered their assistance to the Advisory Committee in reviewing the restyled Rules. They also submitted very thoughtful written comments.¹⁵ The substance of their views on the larger project was quite similar to those I have expressed above.¹⁶ Based upon their detailed study, a majority of the group, and both of the two leaders, were opposed to the "restyled" Rules. The majority were "either mildly or strongly negative" (Comment 05-CV-022, page 6), and stressed the ephemeral benefits as opposed to the certain and massive costs.¹⁷ The two organizers wrote: "We regret to say that we share the views of those opposed to the continuation of the restyling work. We acknowledge the potential benefits, but we believe that they will be dwarfed by the likely costs." *Id.* A second distinguished group that commented—the

¹⁴ A related problem noted in the literature is that this focus on imaginary problems often leaves real and recognized problems unaddressed. In Patrick J. Schlitz, *Much Ado About Little: Explaining the Sturm und Drang Over the Citation of Unpublished Opinions*, 62 Wash. & Lee L. Rev. 1429 (2005), Professor Schlitz, who was Professor Mooney's successor as Reporter to the Appellate Rules committee, lamented the opportunity costs of the restyling effort: "They did outstanding work, but the inevitable consequence of the restyling project was that little work could be done on the rest of the Advisory Committee's agenda," *Id.* at 1438.

¹⁵ All of the comments can be found at www.uscourts.gov/rules/proposed0206. The Burbank-Joseph group's comments are Comment 05-CV-022. Hereinafter, individual comments are cited by Comment number.

¹⁶ I was not a member of that group and had no connection with it.

¹⁷ A more technical but very substantial issue raised by this group was the "supersession" problem created by the second sentence of current 28 U.S.C. § 2072(b), which permits after-promulgated rules to override "[a]ll laws in conflict with such rules," which would include Congressional statutes. The rulemaking committees made some changes and prepared a lengthy memorandum addressing the supersession issue. See Memorandum re Supersession and the Style Project, at www.uscourts.gov/rules/congress0407. While I will leave the detail to the sources cited in this Memorandum, this "supersession" issue presents another reason for close Congressional scrutiny of the pending rules.

Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York—shared similar views:

“After completing our review of the proposed style revisions, and after reviewing the report and reasoning of the [Burbank-Joseph group], a strong majority of our Committee has concluded that the costs and other disadvantages of the style revision project outweigh its benefits. In fact, this was the unanimous judgment of every member of the Committee that who expressed a view on this question.”

Comment 05-CV-008, page 2. These two groups’ comments represent the only well-considered comments submitted on the overall question of desirability, and they were both negative. Other comments of note took a “neutral” position: the letter from the American Bar Association’s Section of Litigation carefully noted that “the Council of ABA Section of Litigation has taken no position on the Proposed Style Revision published for public comment.” Comment 05-CV-018. Who was in favor? Out of a total of some 16 comments on the Civil Rules’ “restyling,” it is true that, if weighted equally (which obviously they should not be), a majority were favorable, but most focused on minutiae rather than the overall question whether the restyling was worthwhile. The most positive general comments were from “plain language” groups and advocates, or from previous or current participants in the advisory committee’s process. No noted professional organization or group commented in favor of restyling.

The probable reason why there were not hundreds or thousands of well-considered and negative assessments, like those of the Burbank-Joseph group and the Eastern District Committee, is that sophisticated observers already know that they would be wasting their time, because the rules committees had made up their minds long ago to go forward, regardless of the comments, and heedless of the consequences to the legal profession and the public. A commonly-held view of the process was expressed in a 2006 article by Professor Hartnett, who had been a member of the Burbank-Joseph group:

“Opposition may be futile. So few seemed to care about the rewrite that two of the three hearings that the Advisory Committee scheduled for public comment were cancelled due to lack of interest. I have no illusion that an essay in a law review will awaken the bench and the bar from their slumber--law reviews are more likely to put readers to sleep. Nevertheless, this Essay argues that the restyled rules should not be approved.”

Edward A. Hartnett, *Against (Mere) Restyling*, 82 Notre Dame L. Rev. 155, 155-56 (2006).¹⁸ On the merits, Professor Hartnett described the evolution of his thinking, while he was looking at only

¹⁸ Professor Hartnett’s article also provides a very detailed demonstration of exactly why the announced goal of “clarity without change” is both impracticable and misguided, *See id.*, at 156-64 (“The Near-Impossibility of Changing Text without Changing Meaning”). Professor Hartnett also addresses the “supersession” problem, *see id.* at 171-78 and note 16 above.

a portion of the restyled Rules:

“[A]s I dug further, moving beyond comparison of two texts to an examination of judicial interpretations of the current rule and asking whether the restyled rule might change that interpretation, I became more and more concerned. The more I looked, the less sanguine I became. By the time I concluded my review, I decided that I could not support the adoption of the restyled rules.”

Id. at 157. These observations should give us all pause. Responsible rulemaking is a difficult task at best. But when rulemaking is cut loose from the accumulated wisdom of decades of case law, and tethered to a highly debatable concept of “style” for its own sake, responsible rulemaking becomes impossible.

IV. The Need for Congressional Action

Like Professor Hartnett, I am doubtful whether anything can now stop the runaway train of federal rules “restyling.” However, the only switchman now left is the Congress, and the primary responsibility for initiating that protective action rests with the Judiciary Committees of the House and Senate. I urge the Members to throw that switch, and divert this monstrosity onto a harmless siding, until the matter can be studied in depth by the Congressional Committees. I realize that I have just committed the restylists’ offense of mixed-metaphor, but I am still hoping to avoid the regime of the style police.

This year’s product of the “restyling” machine is not just another set of obscure and technical amendments to a few minor procedural rules. This is the *entire* Federal Rules of Civil Procedure—the largest, oldest, and most successful of the federal procedural rules. Hundreds of thousands of cases per year are directly affected by these rules, and millions more cases are influenced by their model, in state courts, administrative agencies, and other tribunals. Both in operation and in example, they are the standard by which civil justice in America is conveyed to the world. This is not a small matter; it is worthy of Congressional attention.

In the previous parts of this Memorandum, I have sought to show that the stakes here are much larger than a tangle with style dictatorship. There are important questions of public policy and jurisprudential development involved. There may be even more important questions glanced along the way. I was particularly struck by Professor Mooney’s remarks on her experience. Like her, I am not certain what this “new rhetoric” actually is, but I do not like the sound of it. It reminds me too much of Newspeak, the famous literary example of restylists’ efforts to change the way people think, and the way they perceive reality, by changing the words they use. If there actually is any semblance of this idea in “restyling,” then it must be stopped.

I also believe that the evolution of “restyling” reveals general problems with the judicial rulemaking machinery that warrant Congressional attention. So far as I can determine, the most responsible and well-reasoned comments submitted to the rulemaking committees were negative,

and highly negative. And yet, they could not derail or even decelerate the runaway train of “restyling.” That is a problem that will become ever more pervasive and difficult, if the bureaucratic impulses of the rulemaking machinery are left unchecked. Unlike administrative rulemaking, judicial rulemaking is immune from meaningful judicial review. The entire justification for permitting the Judicial Branch to legislate rules rests on the very slender reed that the courts provide a specialized expertise. But that expertise is not in legislation as such; it is supposed to be in the conduct of cases, not the “styling” of legislative rules. Courts and judges are the most ill-equipped agents of government for the promulgation of legislative rules, worse even than the executive and administrative agents. Legislation is the job of the Congress.

Furthermore, the entire machinery of judicial rulemaking is the creation of the Congress, and the Judiciary Committees in particular. The Congress may, and often has, taken a direct role in the promulgation of federal procedural rules, and it has a continuing responsibility of oversight. One example that would be a good model for the current situation is the original promulgation of the Federal Rules of Evidence, when the Congress postponed their effectiveness for approximately two years, from 1973 to 1975, while both the Senate and House Committees studied their provisions and made many needful changes. The result was a far better set of rules than either Branch alone would have produced. In the meantime, the Republic did not fall for lack of federal evidence rules. So also, there would be no significant negative consequence if the restyled Civil Rules were postponed for a like period.

I am well aware that the Judiciary Committees and the Congress overall have many important matters that demand their attention. But the issues raised by wholesale re-writing of the Federal Rules of Civil Procedure, on highly debatable notions of both law and policy, are no light or transient cause. If the Congress is ever again to exercise its authority to intervene in the rulemaking process, the time to do so is now.

V. Proposed Legislation

Drawing upon the precedent of the Federal Rules of Evidence, Pub. L. No. 94-12, 87 Stat. 9 (March 30, 1973), I would suggest the following language:

“Notwithstanding any other provisions of law, the proposed amendments to the Federal Rules of Civil Procedure that are embraced by an order entered by the Supreme Court of the United States on April 30, 2007, shall have no force and effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress.”