

## The Restyled Federal Rules of Evidence

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# The Restyled Federal Rules of Evidence

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# *SYMPOSIUM*

## THE RESTYLED FEDERAL RULES OF EVIDENCE\*

### OPENING REMARKS

DEAN DAVISON M. DOUGLAS – Dean and Arthur B. Hanson Professor of Law, William & Mary School of Law

HON. SIDNEY A. FITZWATER – Chief Judge, United States District Court, Northern District of Texas; Chair of the Advisory Committee on Evidence Rules

### LOOKING BACKWARD

PROFESSOR DANIEL J. CAPRA – Reed Professor of Law, Fordham Law School; Reporter to the Advisory Committee on Evidence Rules

HON. ROBERT A. HINKLE – United States District Judge, Northern District of Florida; Chair of the Advisory Committee during the Restyling Project

PROFESSOR JOSEPH KIMBLE – Professor of Law, Thomas Cooley Law School; Style Consultant to the Restyling Project

HON. JOAN N. ERICKSEN – United States District Judge, District of Minnesota; Member of the Advisory Committee during the Restyling Project

HON. MARILYN L. HUFF – United States District Judge, Southern District of California; Member of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure; Standing Committee Liaison to the Advisory Committee

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\* This Symposium was held in the McGlothlin Courtroom at the William & Mary School of Law on October 28, 2011. The transcript has been lightly edited. The editors and staff of the *Law Review* express our gratitude to Judge Fitzwater, Professor Capra, and the panelists for giving us the opportunity to publish these proceedings. We also thank Professor Fredric I. Lederer, the director of the Center for Legal and Court Technology (CLCT), and Diane M. Gray, the CLCT court reporter whose gracious assistance and expertise made this publication possible. -Eds.

HON. REENA A. RAGGI – United States Circuit Judge, Court of Appeals for the Second Circuit; Member of the Standing Committee on Rules of Practice and Procedure during the Restyling Project

HON. GERALDINE SOAT BROWN – United States Magistrate Judge, Northern District of Illinois; Representative of the Federal Magistrate Judges Association

PROFESSOR EDWARD H. COOPER – Professor of Law, University of Michigan Law School; Reporter to the Advisory Committee on Civil Rules

#### LOOKING FORWARD

PROFESSOR KENNETH S. BROUN – Henry Brandis Professor of Law Emeritus, University of North Carolina School of Law; Consultant to the Advisory Committee and Research Director of the Restyling Project

HON. HARRIS L. HARTZ – United States Circuit Judge, Court of Appeals for the Tenth Circuit; Member of the Standing Committee on Rules of Practice and Procedure during the Restyling Project

HON. JOAN N. ERICKSEN – United States District Judge, District of Minnesota

PROFESSOR KATHARINE TRAYLOR SCHAFFZIN – Assistant Professor of Law, University of Memphis, Cecil C. Humphreys School of Law

PROFESSOR ROGER C. PARK – James Edgar Hervey Chair of Litigation, University of California, Hastings College of the Law

PROFESSOR DEBORAH J. MERRITT – John Deaver Drinko-Baker & Hostetler Professor of Law, The Ohio State University, Moritz College of Law

HON. ANDREW D. HURWITZ – Vice Chief Justice, Arizona Supreme Court; Member of the Advisory Committee during the Restyling Project

PROFESSOR W. JEREMY COUNSELLER – Professor of Law, Baylor Law School

PROFESSOR PAULA HANNAFORD-AGOR – Director, Center for Jury Studies, National Center for State Courts

## OPENING REMARKS

DEAN DOUGLAS: Let me welcome everyone here. My name is Dave Douglas, and it's my pleasure to serve as Dean of the Law School here at William & Mary. We're delighted that you selected William & Mary Law School to hold this gathering today, so I want to welcome you all.

You are here at a law school that is a certain study of contrasts, both old and new. We're the oldest law school in the United States, founded in 1779 by then-Governor Thomas Jefferson for a very specific purpose, and that was to train political leaders who would serve the new nation. Jefferson was an optimist and thought that the colonists would win their independence, and this law school was founded to train leaders that would serve the new nation. The vision succeeded.

President Monroe studied here, as did Chief Justice John Marshall and many senators in those early years, but it's also a place of new developments. You're sitting in our courtroom here today, which Fred Lederer assures me is one of the most—if not *the* most—technologically advanced courtrooms in the world. That's why, apparently, you can't drink your coffee in here. They're concerned about all this fancy equipment being damaged by spilled drinks. We apologize for that. But we're delighted you're here and hope that you have a wonderful day.

And for those of you who are from either Dallas or St. Louis, I know you're a little bleary-eyed this morning. My condolences to those from Dallas, but there's always Game Seven.

So have a wonderful conference, and I look forward to the chance to talk to you later today. Good luck.

JUDGE FITZWATER: On behalf of Judge Mark R. Kravitz and the members of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, my colleagues on the Advisory Committee on Evidence Rules, and our Committee Reporter, Professor Dan Capra, I want to warmly welcome you to the Symposium on the restyled Rules of Evidence.

I would like to begin by expressing our appreciation to the William & Mary Marshall-Wythe College of Law for hosting this

Symposium, and in particular, to Dean Davison M. Douglas and Professor Fredric Lederer. The Dean and the Law School welcomed us yesterday evening by hosting a lovely reception for participants in the Symposium and in the fall meeting of the Evidence Rules Committee. We are also indebted to the *William and Mary Law Review* for agreeing to publish the Symposium proceedings.

The restyled Rules of Evidence—which are scheduled to take effect on December 1, 2011, absent congressional action<sup>1</sup>—represent the last chapter in a decades-long effort to make the national rules of procedure clearer, more concise, and easier to use. The restyled Rules have been described as “Simpler. Easier to read. Easier to understand.” And although they have yet to take effect, they have already won prestigious awards: the 2011 Burton Award for Reform in Law, presented by the Burton Awards for Legal Achievement,<sup>2</sup> and a 2011 ClearMark Award presented by the Center for Plain Language.<sup>3</sup>

Beginning in the early 1990s, Judge Robert Keeton, who was then chair of the Standing Committee, and Professor Charles Alan Wright led an effort to adopt clear and consistent style conventions for all the national rules of procedure. The rules had been enacted without consistent style conventions, so there were differences from one set of rules to another, and even from one rule to another within the same set. Different rules expressed the same thought in different ways leading to a risk that they would be interpreted differently. Different rules sometimes used the same word or phrase to mean different things, again leading to a risk of misinterpretation. And drafters made no effort to write the rules in plain English.

With the approval of the Chief Justice of the United States, who presides over the Judicial Conference of the United States, the Advisory Committee on Evidence Rules undertook a restyling project beginning in the fall of 2007. This marked the first top-to-bottom restyling in thirty-six years since the Rules were

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1. The Rules did take effect on December 1, 2011.

2. See *The 2011 Burton Awards*, THE BURTON AWARDS FOR LEGAL ACHIEVEMENT, <http://www.burtonawards.com/2011event.html> (last visited Mar. 2, 2012).

3. See *2011 ClearMark Award Winners*, CENTER FOR PLAIN LANGUAGE, <http://centerforplainlanguage.org/awards/past-years/clearmark2011> (last visited Mar. 2, 2012).

enacted. The project required revising sixty-eight separate rules that addressed wide-ranging topics.

The Committee established a step-by-step process for restyling in compliance with previous restyling projects and with the Rules Enabling Act.<sup>4</sup> These steps involved multiple levels of drafting and review by a style consultant, the Advisory Committee on Evidence Rules, and the Style Subcommittee of the Standing Committee, as well as substantial input from judges, lawyers, and academics. The restyled Evidence Rules are the product of a thorough and intensive multi-year revision process that involved the best legal minds and legal writers.

The leader of this complex undertaking is my predecessor as chair of the Evidence Committee, Judge Robert L. Hinkle of the Northern District of Florida. I am personally pleased that he is participating in this Symposium so that he can receive the credit due him for guiding this important project to an award-winning conclusion. In addition to Judge Hinkle, Judge James A. Teilborg of the District of Arizona, Judge Marilyn L. Huff of the Southern District of California, and Attorney William J. Maledon of Phoenix, Arizona contributed significantly as members of the Style Subcommittee of the Standing Committee. Other Standing Committee members—particularly Judge Harris L. Hartz of the Tenth Circuit, Judge Reena Raggi of the Second Circuit, and Dean David F. Levi of Duke Law School—made important contributions by thoroughly and thoughtfully reviewing the Rules.

Two law professors were so integral to the restyling project that, without embellishment, they can be called the sine qua non of the restyled Evidence Rules: Professor Daniel J. Capra of Fordham Law School, who serves as Reporter to the Advisory Committee on Evidence Rules, and Professor Joseph Kimble of Thomas Cooley Law School, who served as the style consultant for the restyling project. Professor Capra's knowledge of the Evidence Rules has aptly been described as "encyclopedic." And Professor Kimble, a preeminent legal writer who also served as style consultant for the restyled Civil Rules, is the editor-in-chief of *The Scribes Journal of*

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4. 28 U.S.C. §§ 2071-2077 (2006). See generally 1 ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICY § 440 (2011), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Procedures\\_for\\_Rules\\_Cmtes.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Procedures_for_Rules_Cmtes.pdf).

*Legal Writing* and has been the editor of the “Plain Language” column of the *Michigan Bar Journal* for more than twenty years.

The restyled Evidence Rules are intended to be restated, plain-language versions of the prior Rules. The intent of the project was to make the Rules simpler, easier to read, and easier to understand without changing their substance. In fact, the most challenging part of the restyling project was to improve the style of the Evidence Rules without altering substance. As Judge Hinkle said, “There will be no change at all in the meaning or application of any rule. A judge or lawyer would get the right result using either a restyled rule or the old version. However, we think the chance of misunderstanding the rule is much smaller using the restyled version.”<sup>5</sup>

To ensure that no such changes would be made, the Advisory Committee on Evidence Rules adopted a working definition of a substantive change. A proposed change was substantive under any of these circumstances: under the existing practice in any circuit, it could lead to a different result on a question of admissibility; under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made; it changes the structure of a rule or method of analysis in a manner that would fundamentally alter how courts and litigants have thought about or argued about the rule; or it changes what has been referred to as a “sacred phrase,” a phrase that has become “so familiar as to be fixed in cement.”<sup>6</sup>

The restyling effort provides consistent terminology, plain language, and generally makes the Evidence Rules more user-friendly. This end product results from many specific techniques applied consistently throughout the Rules.

First, the restyled Evidence Rules use an effective format to achieve clearer presentations. Although Rule numbers and citations were preserved to minimize the effects on research, subdivisions were rearranged in some Rules to improve the organization. The

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5. *Restyled Rules of Evidence*, THE THIRD BRANCH, [http://www.uscourts.gov/News/TheThirdBranch/11-09-01/Restyled\\_Rules\\_of\\_Evidence.aspx](http://www.uscourts.gov/News/TheThirdBranch/11-09-01/Restyled_Rules_of_Evidence.aspx) (last visited Mar. 2, 2012).

6. Memorandum from Robert L. Hinkle, Chair, Advisory Comm. on Evidence Rules, to Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice & Procedure 4 (May 6, 2009), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV\\_Report.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed0809/EV_Report.pdf).



Rules are broken down into more subparts, using progressive (or cascading) indents and more headings to guide readers. There are also more vertical lists—all with hanging indents (which, unfortunately, not all publishers follow, although we ask them to). These formatting changes make the structure of the Rules graphic and make the restyled Rules easier to navigate, read, and understand even when the words are not changed.

Second, the restyled Evidence Rules reduce the use of inconsistent terms that say the same thing in different ways and thus create possible confusion. For example, consistent expression is achieved by not switching between “accused” and “defendant” or between “party opponent” and “opposing party” or between the various formulations of civil and criminal action, case, or proceeding.

Third, the restyled Evidence Rules minimize the use of inherently ambiguous words. For example, the word “shall” can mean “must,” “may,” or something else, depending on context. The potential for confusion is exacerbated by the fact that the word “shall” is no longer generally used in spoken or clearly written English. The restyled Evidence Rules replace “shall” with “must,” “may,” or “should,” depending on which one the context and established interpretation make correct in each rule.

Fourth, the restyled Evidence Rules minimize the use of redundant “intensifiers.” These are expressions that attempt to add emphasis but instead state the obvious and create negative implications for other Rules.

Fifth, the restyled Evidence Rules remove words and concepts that are outdated or redundant.

Finally, and more generally, the restyled Rules apply many other techniques for better legal writing and drafting. To get some idea of these, one can consult the style guide for all the restyling projects: Bryan Garner’s *Guidelines for Drafting and Editing Court Rules*.<sup>7</sup> Or one can review Professor Kimble’s four articles in the *Michigan Bar Journal* dissecting four examples from the old and new Rules.<sup>8</sup>

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7. BRYAN A. GARNER, *GUIDELINES FOR DRAFTING AND EDITING COURT RULES* (5th prt. 2007), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/guide.pdf>.

8. Joseph Kimble, *A Drafting Example from the Proposed New Federal Rules of Evidence*, MICH. B.J., Aug. 2009, at 52; *Another Example from the Proposed New Federal Rules of Evidence*, MICH. B.J., Sept. 2009, at 46; *Still Another Example from the Proposed New Federal Rules of Evidence*, MICH. B.J., Oct. 2009, at 54 [hereinafter Kimble, *Still Another Example*];

The Evidence Rules are used by judges, practicing lawyers, academics, and the public countless times each day. In the courtroom—where their impact is most direct—they must be easily understood and applied. Because the restyled Evidence Rules are clearer, more readable, and more consistent, we expect that they will be warmly welcomed by the bench, bar, and public alike.

Today's Symposium presents two distinguished panels—including key participants in the restyling project—to discuss the restyled Evidence Rules. Our panel members will take a look back and offer a look forward. They will share critical insights into how such a complicated project was completed—not merely successfully but with honors. And they will consider how the restyled Evidence Rules, which offer so much promise, will be used and applied in coming years.

As restyled, this is how Rule 102 captures the purpose of the Federal Rules of Evidence: “These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.” This Symposium is intended to celebrate the restyled Evidence Rules, which will enhance this lofty and salutary purpose. And it is intended to pay tribute to those whose vision, wisdom, talents, and dedication made the restyled Evidence Rules a reality.

#### LOOKING BACKWARD

PROFESSOR CAPRA: I'm Dan Capra, the Reporter to the Advisory Committee on Evidence. Let me give you some background. First, a quick thanks very much to Judge Fitzwater whose idea this was. It's great to have all that put together so nicely. And thanks so much for that starting point to the Symposium.

Second, thanks to William & Mary Law School, the Dean, and Fred Lederer, who have gone out of their way to help us here and to put us in this beautiful courtroom. Thanks to the *Law Review* students who are so voluntarily here today at 8:30 in the morning, and thanks to our panelists. Thanks to Ben Robinson and Jonathan

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*One Last Example from the Proposed New Federal Rules of Evidence*, MICH. B.J., Nov. 2009, at 50.

Rose who put this together in terms of logistics, all as part of the Administrative Office. They've done a wonderful job under difficult circumstances.

So we have two panels today. I'm moderating the Looking Backward panel. The Looking Backward panel, it's got the perpetrators of restyling, who are going to look back on the process and provide some commentary on it. We have everybody here today, and I will introduce them as we go.

Then after that there will be a short break, and there will be a panel, which we'll call the Looking Forward panel, that has people who will predict or provide some kind of background about how restyling is going to work in the federal—and possibly in the state—courts. So that's where we are at today. If we have time, we'll take questions from the audience.

So we start with the fearless leader, that's Judge Hinkle from the Northern District of Florida, who chaired this project and engineered this project to its successful conclusion, which, by the way, means that these will become the Federal Rules of Evidence on December 1.

JUDGE HINKLE: Thank you, Professor Capra. I'm delighted to be here at William & Mary. What an outstanding place. For those of you who are students, I hope you understand while you're here how good you've got it. This is really an extraordinary opportunity.

I'm delighted to be here to talk on the restyled Rules. They are a favorite subject of mine. I should start by saying to Judge Fitzwater, thank you very much for those kind words. It would be socially acceptable to say something suitably modest about that and to act embarrassed, but the truth is I enjoyed every word you said.

I do think the restyled Rules are substantially better than the older version. You won't be surprised to hear me say that. And I've tested the proposition. I've been a beta tester without anybody knowing it. As we went along, we had side-by-side versions, the old rule and the restyled version side by side, and I started taking the side-by-side version into the courtroom. As I would see an evidence question coming down the pike, I would look at the Rules, as I've always had to do. I don't have Professor Capra's command of all the Rules, so I sometimes actually look at the Rules during a trial. And I would look at the new Rules, and I do think they are substantially

better. I think it helped. Now, in fairness, I would say that there are lawyers who appear in my court who would tell you that the new Rules might have helped me, but they haven't helped nearly enough. That's a different problem.

The decision to restyle the Evidence Rules was not a foregone conclusion. When this round of restyling started with the Appellate Rules and then the Criminal Rules and the Civil Rules, Chief Justice Rehnquist approved going forward with the restyling of those Rules, but he did not approve at that point restyling the Evidence Rules. His view, as I understand it, was that the Evidence Rules are used in the courtroom on a moment's notice every day, that people have settled understandings and expectations, and that it would be disruptive to change the rules that are used in that fashion. But then the other restyling projects went forward. They were enormously successful. The reviews were overwhelmingly positive.

And as this finished up, it was time to look at whether we would do the same thing with the Evidence Rules. By that point, Chief Justice Roberts had taken office, and he approved giving it a shot, at least. And so we started in.<sup>9</sup>

I can tell you that in my view, Chief Justice Rehnquist was right: the Evidence Rules *are* different. They are used a little differently than the other rules because they're used in the courtroom on a moment's notice, whereas most of the time with the other rules, you can study them and look up cases and do what you have to do. But I think that cuts just the other way. I think that cuts in favor of restyling the Evidence Rules more than the others because you do have to read these very quickly in the courtroom.

I'm a football fan, and I grew up in Tallahassee. I was an undergraduate at Florida State. Coach Bowden, Bobby Bowden, was the coach for something over thirty years.<sup>10</sup> He would have a call-in show during the week. Invariably someone would call in and point out some play Coach Bowden should have run in the prior Saturday's game that would have been better. Coach Bowden would

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9. See Memorandum from Robert L. Hinkle to Lee H. Rosenthal, *supra* note 6, at 3-4.

10. Bowden coached the Seminoles from 1976 to 2009. See Andrew Carter, *Bobby Bowden Announces Retirement*, ORLANDO SENTINEL, Dec. 1, 2009, <http://articles.orlandosentinel.com/2009-12-01/sports/os-bobby-bowden-florida-state-retires-bowl-1201>.

say something like, “Yeah, buddy, you’re right, but dadgummit, I only had twenty-five seconds. You had three days to come up with that.”

I wanted to quote him because I understand this may be in the *Law Review*, and I think it’s terrific that Bobby Bowden would be quoted in a law review and that “dadgummit” would actually make it into the pages. I would hear him refer to twenty-five seconds, and I would say, “Oh, twenty-five seconds, that would be nice.”

If you are the lawyer trying a case, you don’t have twenty-five seconds to decide whether to object. You don’t even have five seconds. If you wait five seconds after your opponent asks a question, the witness is going to blurt out the answer, and the judge—if the judge is a little too clever—may say something like, “If you chance to hear the answer, you waive the objection.”

And so you don’t have five seconds. As a judge, if I pause to think for five seconds, the witness will blurt out the answer, or a lawyer will start talking—making a speaking objection or speaking response, even though I’ve told the lawyers not to do that. So a judge really has to be on top of this. Now, you can’t read the old Rules in five seconds, and you can’t read the restyled Rules in five seconds either. But in the heat of trial, you can see an issue coming up, and you can look at the Rules. I do that. You can read the restyled Rules much more quickly and understand them better than you could the other ones, so I think restyling was well worth doing.

It wasn’t a foregone conclusion that we were going to do this at all. It also wasn’t a foregone conclusion that the process would succeed. When the first effort was made to restyle the Civil Rules back in the early 1990s, Judge Keeton and Professor Wright, two very able people, tried to get that project going, and they ran into headwinds, and it didn’t work. And that’s when they doubled back and did the Appellate Rules first and then went through the others. The Civil Rules had just finished when we started on the Evidence Rules. The Civil Rules project was very successful, but there were some rough patches in that process and some opposition. So it was not a foregone conclusion that we would succeed with the Evidence Rules.

Professor Kimble brought the Advisory Committee examples of a couple of rules: the old rule and what a restyled rule would look like.

It was plainly much, much better. All of our members, I think, bought into the idea that we could improve these Rules, and we went through that process. I think the key to this was that we had people at all levels operating in enormous good faith. Not everybody had the same view, and you'll hear that as we go forward this morning. But I think it's fair to say that everybody on the Advisory Committee, everybody on the Style Subcommittee, where they did some very good work in short time frames, everybody on the Standing Committee that reviewed this at the end, all came to this with only one goal, and that was to do the best work on this project they could. Nobody had a hidden agenda.

You think about it: Where have you seen that happen? Where have you been to a board of directors meeting or board of trustees meeting or a legislative committee meeting, any kind of meeting anywhere, a tenured-faculty committee meeting, where have you ever been to a meeting where nobody had a hidden agenda? But I think for the Evidence Committee, for the Standing Committee, in their work on this project, that was true. And I think that's why this worked out so well.

I will give you one example of that. Judge Raggi is here, and she's going to speak in a minute. These Rules were adopted unanimously by the Advisory Committee and then unanimously by the Standing Committee. I think it's fair to say the hardest vote to get was Judge Raggi's, and she will explain that. I'm not going to talk about that, but I want to use it as an example of how people worked on this project.

I will digress to say that one of her points was: Did you really have to rewrite *every* Rule? Really, there was not a *single* Rule that was good enough? And I guess my response to that would be, if these Rules had been written in French, and we were going to translate them into English, we would have changed every Rule. Well, these Rules weren't written in French, but I'm not sure they were written in English, and we changed every one.

But here's the point. She could have looked at this project and brought her views to this, and you'll hear. She has a good-faith view about the Restyling Project that is not entirely favorable. She could have stopped right there, but she didn't. She sat down, separate and

apart from her views on restyling, and spent hours going through every one of these Rules.

Judge Hartz did the same thing. Dean Levi did the same thing. These are people at the Standing Committee that had not been involved as the process went along. When you've looked at these Rules a thousand times like all of us on the Evidence Committee and Style Subcommittee had, it is very hard to see them anymore. And so you make adjustments in the process, and if you're not careful, one of those late adjustments makes a little problem over here, and you just don't see it because you've looked at the Rules so many times. It was enormously helpful to have people with fresh eyes—people of great ability with fresh eyes—come in and look at this project at the end.

And so Judge Raggi caught some problems that would have been an embarrassment some years down the road when we caught them. Somebody would have found them down the road. She found them at that point, and that was enormously helpful. So I think that's an example of how the people on the Rules Committees looked at this. Everybody worked hard and did it in complete good faith with no hidden agenda. And I think it worked out.

PROFESSOR CAPRA: Thank you, Judge. Just to provide some background for people who aren't familiar with the rule-making process and what we're talking about, the Advisory Committee on Evidence Rules, which Judge Hinkle chaired, which Judge Fitzwater does now chair, was responsible for proposing the Rules. They go next to the Standing Committee. The Standing Committee—that's the Committee on Rules of Practice and Procedure—is a committee of the Judicial Conference. From there it goes to the Judicial Conference, then to the Supreme Court, and then from the Supreme Court to Congress. It becomes law, except for laws of privilege, within a particular period of time if Congress does nothing. That's the way the rule-making process works under the Rules Enabling Act, so that's what we're talking about now.

That stage that we're at now with restyling is that it's been approved by the Supreme Court. It's sitting in Congress, and we know absolutely, without any question, Congress is going to do nothing about this. It will be law on December 1. As I said, Judge Hinkle brought up an interesting point about the change in

administration to the Judicial Conference from Chief Justice Rehnquist to Chief Justice Roberts, and I think that was actually quite critical.

Part of the reason for that was that Chief Justice Roberts, when he was a judge on the D.C. Circuit, was a member of the Appellate Rules Committee and was very, very cognizant of what we do and how hard we work, and so I think that was important in terms of green-lighting this project. So let's go to Professor Joe Kimble, who was the chief restylist on this project.

PROFESSOR KIMBLE: Thanks, Dan. Well, there is so much to say and so little time. Actually, I've had my say on the restylings in some articles, one published in *The Scribes Journal of Legal Writing*, an article on the Civil Rules called *Lessons in Drafting from the New Federal Rules of Civil Procedure*.<sup>11</sup> It has scores of side-by-side examples. And I've written on the Evidence restylings in a series of four articles in the *Michigan Bar Journal*.<sup>12</sup> All these articles are online. You can find the articles on the Evidence restyling by just Googling "Plain Language Column," and you'll find an index to all those columns going back twenty-five years.

I trust that you can see the more obvious improvements in the Rules, but there are countless less obvious improvements sentence by sentence. I'll give you just a couple of examples.

What is probably the worst small-scale fault in the old Rules and, in fact, in all of legal writing? Unnecessary prepositional phrases. That's *unnecessary* prepositional phrases, not each and every preposition. Here's Rule 610, with the prepositions italicized:

Evidence *of* the beliefs or opinions *of* a witness *on* matters *of* religion is not admissible *for* the purpose *of* showing that *by* reason *of* their nature the witness' credibility is impaired or enhanced.

There are either six or eight prepositional phrases, depending on how you count "for the purpose of" and "by reason of," which are technically multiword prepositions or complex prepositions.

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11. Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 SCRIBES J. LEGAL WRITING 25 (2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Style%20Resources/Lessons%20in%20Drafting.pdf>.

12. See sources cited *supra* note 8.



All right, so there are six or eight in old Rule 610. There is one prepositional phrase in revised Rule 610:

*Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.*

And by the way, you have side-by-side versions of all the Rules, so as we're going through these, you might want to check the side-by-side versions.

Here's an example from Rule 612, about a witness's using a writing to refresh memory.

If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld.... If a writing is not produced or delivered pursuant to order under this rule....

"If it is claimed." By whom? Quick. If it is claimed by the producing party or the adverse party? You don't know. You have to wait and find out. Should have used the active voice. All right: "If it is claimed that the writing contains matters not related to the subject matter of the testimony." Where's the comma after "testimony"? It's not optional. Then "the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto." Note the inflated language and legalese: "excise," "not so related" instead of "unrelated," "remainder" instead of "rest," and the musty "thereto."

Next sentence: "Any portion withheld." Withheld by whom? The producing party or the judge? It's actually the judge, but you don't know because the old rule switched from "excise" to "withheld." If it had said "any portion excised"—which wasn't the best word to begin with—"any portion excised over objections," then it would have been immediately clear that it was the judge.

Next sentence: "If a writing is not produced or delivered pursuant to order." In other words, as ordered. Right? Not "pursuant to order." Now, what does "pursuant to order" modify? Does it modify all the way back to "produced"? It's not supposed to. It only really modifies "delivered," so the way to fix that is to start over again with

“delivered.” One word does it. “If a writing is not produced or *is* not delivered pursuant to order.” And the “under this rule” after “order” is completely unnecessary.

You might just compare the clarity and flow of these three sentences with the last four sentences of restyled Rule 612. See for yourself. And by the way, the new rule has 90 words as opposed to 124 in the old rule.

These are the fixes that we tried to make sentence by sentence, throughout the Rules. We could continue this exercise for hours, but we won't. In the *Michigan Bar Journal* articles, I identified dozens of drafting deficiencies in the old Rules in *each* of those four examples.<sup>13</sup> You can't imagine unless you look closely: verbosity, unwieldy sentences, clumps of unbroken text, uninformative headings, disorganization, miscues, clumsy phrasing, repetition, multiple negatives, inflated diction, hard-core legalese (“pursuant to,” “herein,” “thereon”), bad punctuation, and, of course, that great troublemaker, “shall.”<sup>14</sup> No one thing in the restyling made the difference; it was the cumulative effect of myriad smaller things.

Now, are the new Rules perfect? Of course not. You can always go back and find things and keep improving. Revising is endless. For one thing, there are for various reasons some structural flaws in the restyled Rules. Rule 502 has a freestanding undesignated paragraph before the first subdivision. Several Rules, like 801(d)(2), have so-called dangling text—text that continues after a vertical list without starting a new subdivision. 803 and 902 have different numbering than the other Rules. 803(6), for instance, instead of 803(a)(6) as in the other Rules.

There were inevitable challenges. Look at old Rule 803, the hearsay exceptions. It starts out like a list. “The following are not excluded by the hearsay rule.” That looks like it's going to set up a list. But then you get what looks like a subdivision with a heading, 803(1). There's a difference between a list and a subdivision, and 803 is really a hybrid. Then the items in the subdivision, all those items in 803, that long list of twenty-some exceptions, they're all

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13. See sources cited *supra* note 8.

14. See Kimble, *supra* note 11, at 79 (noting that the *Words and Phrases* online database cites more than 1,600 appellate cases interpreting “shall”); see also BRYAN A. GARNER, GARNER'S DICTIONARY OF MODERN LEGAL USAGE 952 (3d ed. 2011) (describing eight shades of meaning for “shall”).

sentence fragments. And some of those sentence fragments are very long, like 803(6).<sup>15</sup> But this was impossible to fix without starting over.

Naturally, my original drafts were modified as the process went along. Some of the calls I agreed with; some I didn't. Some were fairly easy, but many were hard, close calls. No doubt you'll hear about some of those today. For each one, there were principled arguments both ways. If the Advisory Committee voted that the call was substantive, that prevailed. If not, the style version prevailed, although occasionally the Committee would vote on a "sense of the Committee" regarding a style call. And so it went, for about three years.

During the Civil Rules project, some people, mostly academics, objected that you can't do this. You can't do this successfully. You're bound to make substantive changes. Well, so far, through three restylings since 1998, the Advisory Committees have had to fix two, maybe three, inadvertent substantive changes—significant substantive changes. And if others come up, I'm sure they'll be fixed. But even if, down the road, there are ten times as many rules that need fixing, I'd say the restylings were still worth it. Why? Because of the state of the old Rules.

Even apart from the gains in clarity and readability, we uncovered, through all the restylings, so many ambiguities, inconsistencies, gaps, and uncertainties—one after another—and we fixed most of them. Rule 806, to take just one example, had a critical ambiguity in shifting between "hearsay statement" and "statement."<sup>16</sup> Here's the lesson: style affects substance. Good style improves the substance—always.

And then beyond that, even, is the matter of professionalism. Generations of law students—you—have had to wrestle with the old rules, not just the Evidence Rules but in all your code courses. It's a shame, and it's attributable in large measure to the way lawyers have traditionally drafted. You have to struggle with these codes, and you start to think that this is all perfectly good and normal legal drafting. Well, it may be normal, but it's not good. The trouble

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15. FED. R. EVID. 803(6) (amended Dec. 1, 2011) (listing the elements of a Record of Regularly Conducted Activity—in a 108-word sentence fragment).

16. See Kimble, *Still Another Example*, *supra* note 8, at 54.

is that law schools have traditionally failed to teach legal drafting, which is a professional skill like any other, and a fundamental one, and one that needs to be learned. Most lawyers, no matter how brilliant, have not been trained in drafting. That's why the Standing Committee, going back to Robert Keeton and Charles Alan Wright and continuing since then, deserves immense credit for its commitment to a good, informed, consistent drafting style. And all four Advisory Committees, including the Evidence Committee, deserve immense credit for delivering on that commitment.

I'll end this the way I ended the *Scribes Journal* article. The new Rules will be far easier for law students to learn and for lawyers and judges to use. If any inadvertent substantive changes were made, they can be fixed. And people who resisted this conversion probably did not appreciate how poorly drafted the old Rules were, how they perpetuated the serious deficiencies that have plagued us for so long, how we should not be forever stuck in time, and how the new Rules mark a long stride forward for legal writing and professional competence—not to mention the practice of law.

PROFESSOR CAPRA: Thank you, Joe. So lest you think the Advisory Committee drank the Kool-Aid entirely on this, let's go to 803(1) and see what the issue is in terms of numbering. So Joe's right, you don't follow a number with a number. 803(1) should be 803(a). But what's the value of changing that in this circumstance? Well, you have to figure out what to write in a subdivision. Like what would the subdivision even say? What would (a) say? That's the first one.

And then there would have to be a (b) somewhere. You can't have an (a) without a (b). So what would (b) say? So let's make up another thing that we really don't need. Or what we could do is we could change the present sense impression exception from (1) to an (a). How about that? So now it's 803(a) instead of 803(1), excited utterance would be 803(b), and so forth. All of those options are bad options for the obvious reason that this is a very often-used rule, and if you change the numbering in any way, what you've done is you've disrupted electronic searches. You disrupted the expectations of all the parties that are applying this on a day-to-day basis.

There was a proposal to make 803(a) and then an 803(b), and the Advisory Committee rejected it. Was that a substantive discussion? No, not really. But the Advisory Committee said, essentially: "Over

our dead bodies.” So that’s what was going on here. And that’s a good segue to Judge Ericksen, a valued member of the Advisory Committee who did not drink much Kool-Aid at all, I will say. Judge Ericksen, I didn’t mean to steal your thunder.

JUDGE ERICKSEN: Thank you. Great. It was going to be a surprise to everybody what my view was! And I was struck when Professor Kimble started off by talking about how bad prepositions are. I took four years of high-school German and then another year of college German, and I left after there was a student from Louisiana in my class who kept saying things like “Er geht nach Hause.”<sup>17</sup> He was getting high grades, but all I remember from five years of German—besides the phrase “Hello, taxi, are you free?” and “Blood poisoning is no fun”—is a list of prepositions: an, auf, hinter, in, neben, über, unter, für, zwischen. So maybe that’s one of the reasons why I thought that the odds were long that the restyling was going to result in rules that would be better than the existing rules. Long odds are not impossible odds, though, and the result was not worse but in fact better.

I am incredibly grateful to the Chief Justice for putting me on the Committee and to the other Committee members, advisers, participants; the Reporter; and our style consultant for the brilliant contributions that they made to this project. May I also express my gratitude for the patient and respectful treatment that my confreres gave to my observations, which were large and also pitifully small, that came from many years of toiling in the trenches. We are friends for life.

In the beginning—and I have to use the passive voice here, I’m sorry—there was a collective understanding that the Rules of Evidence had to be restyled more cautiously than the Civil, Criminal, and Appellate Rules. Trials, as I tell my students, are the practical application of the Rules of Evidence. They’re complicated, and they move fast.

Now, I suppose you all know about the professor, the appellate judge, and the trial judge who went duck hunting. It’s a true story, I’m sure. So the professor considers when a bird flies overhead, “Hmm, I don’t know. It could be a rare species. It might not actually be a duck. What about the environmental impact?” He wanted to

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17. Pronounced with a heavy southern accent.

calculate the trajectory, and of course by that point the bird was long gone. The appellate judge looks up at the bird, compares its size, color, and shape to other birds that have turned out to be ducks, and also misses the shot entirely. The trial judge looks up, sees a shadow in the sky, blasts it to earth, and then says, “Gee whiz, I hope that was a duck.”

So we can agree that that joke is not mean-spirited and that trial judges and lawyers aren’t shallow or disorganized, but they have to react fast or else the moment will be lost and the objection waived. Now, in some versions of that joke, the professor and the appellate judge provide a detailed and thoughtful critique of all the mistakes that the trial judge made while he was shooting their dinner.

Professors, grammarians, appellate judges, and courtroom lawyers weighed in, not only at the meetings but also in public comment on the restyling. It was a grueling project, but I think the process is really outstanding. You really can’t argue with the results. We eliminated “civil actions.” We eliminated “criminal defendants.” We eliminated “party-opponent admissions,” “pain,” and “impending death.” Of course, we have “imminent death” now, which—grammarians’ assurances to the contrary—seems sooner.<sup>18</sup>

The Rules are cleaner and more consistent now. They deserve the plaudits and accolades that you’ve heard about. We have rules like 609(b), 301, 1101. They’re not so dense now. And so without that denseness, there is the possibility that the Rules as a whole won’t seem quite so impossibly intimidating. The more comfortable that lawyers and judges are with the Rules, the more likely it is that the Rules are going to be observed in *fact* instead of in the breach. The road to clarity was packed with land mines, and it was marked with very attractive road signs that could have led to complete and utter disaster. Unintentional substantive changes lurked at every turn. My comments here will focus on the disasters and the problems that were averted. Reliving some of these near misses shows how awesome the challenge of restyling this particular set of rules was, and it shows how persistence and good will finally brought the project home. Joe Kimble, from whom you just heard, is a skilled wordsmith. Time after time it was his skill that found the words

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18. FED. R. EVID. 804(b)(2) (“Statement Under the Belief of Imminent Death”).

that ultimately bridged the divide between the “don’t-touch-it” camp and the restyling purists.

To choose one of the articles to begin with, Article IV, as everyone knows, covers relevancy and its limits. We begin with Rule 401, the definition of (soon to be “test for”) relevant evidence. Trial lawyers can recite the definition of relevant evidence by memory: “Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>19</sup>

And now the version that will go into effect on December 1, and how we got there. It is no longer a “definition.” Definitions congregate in the “Definitions” section of the Rules. Now it’s a “test.” “Evidence is relevant if,” and now we have subdivisions, “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”<sup>20</sup>

Note the phrase “the fact is of consequence.” A reasonable person might think that there is no difference between that and a fact that is consequential. But the Committee observed that it would be easier for a party to argue against admitting a piece of unwanted evidence on the ground that it is not “consequential in determining the action” than that it is not “of consequence.” “Consequential” might be confused with “outcome determinative,” and such confusion could have real trial consequences. And so relevant facts will continue to be “of consequence” after December 1.

Article IV governs admissibility of “character” and “character trait” evidence. Now, are those the same? At one point the restyling would have gotten rid of plain old “character” on the ground that it was vague and imprecise. Fortunately, the Committee realized that “character traits” are not the same as “character” and that the difference matters, as when character is about to be smeared or assassinated. In Rules 404 and 405, both “character” and “character traits” will remain.

Similarly, the Committee was able to agree that under 404(b), bad acts “may be admissible,” which is not exactly the same as

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19. FED. R. EVID. 401 (amended Dec. 1, 2011).

20. *Id.*

saying “the court may admit” them. The difference is magnified if the court “may admit” as an *exception* to the general rule of not admitting them. And both of those potential 404(b) changes were headed off by discussions in the Committee.

What a grammarian or a stylist would not fully appreciate is that 404(b) is laden with red-hot emotion. Some states regard their identically worded rule as being one of *exclusion*. In federal court, the Rule is usually regarded as a rule of *inclusion*. If the Committee had adhered slavishly to the consistency principle of restyling, 404(b) would have included a reference to exceptions, as in 408(b). It might also have led to a new round of so-called clarifying litigation. Members of the Committee observed that the last round of clarifying litigation took forty years.

And there were other fortunate catches in Article IV. Rule 413(a) provides that when a person is on trial for sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible. But restyling prefers the singular to the plural, so it was going to be changed to “another offense.” Think of a defendant on trial for a sexual assault offense. Would that person not have an easier argument that his prior sexual assault offenses should be limited to one if he refers to a rule that actually says singular rather than the Rule that now expressly says plural? We ultimately concluded that, because of the high stakes and sensitive nature of the subject matter of the Rule, the difference might be substantive. The new phrase is “any other” sexual assault, and that’s true also with 414 (child molestation) and 415 (civil cases of molestation or assault). In 404(b), “any other purpose,” rather than “another purpose,” will replace the current “other purposes.”

Some of the changes are very small. Here’s an example. Rule 404(b)(2) has a list of other purposes, and they appear in no particular order. At one point, two of those words were going to be reordered: “plan” and “preparation.” They were going to be turned around on the theory that people plan before they prepare, and not the other way around. The Committee reasonably was concerned that that innocuous change would have set the Kremlin-watchers to wondering whether that change meant that the examples are *all* listed in some sensible order. “What does that mean? And what might the order be? And how might that be exploited to my advantage?” So that was not done.



Rule 403 contains a list of specific examples of reasons to exclude relevant evidence. Prejudice and time-wasting are a couple. But if we retitle the Rule to say “excluding relevant evidence *for specific reasons*,” then that could have limited what has always been seen as a rule that gives pretty broad discretion.

Rule 410(a)(3) has always placed a cloak of inadmissibility around statements that were made during change of plea hearings in criminal cases. Had the Committee not been alert, the Rule would soon apply more narrowly to statements “about the plea.”

Rule 410(a)(4) talks about “an attorney for the prosecuting authority.” A proposed change to the shorter “prosecutor” was rejected on the grounds that Congress chose the phrase and sometimes attorneys represent the prosecuting authority but aren’t “prosecutors” in a strict sense. And “prosecutor” sounds like an individual person, whereas “attorney for the prosecuting authority” better suits the reality that in a criminal case a governmental entity, not a person, brings the action. The second clause of Rule 406 spent time on the chopping block.<sup>21</sup> And in one way, you have to admit that it does not really seem necessary to say that habit evidence does not have to be corroborated or have an eyewitness, no such requirement having been imposed by courts for a very long time. But of course, the reason courts have not imposed such a requirement is that in 1975 the Rules went into effect and displaced the common law requirement of those things. If you take that out, thereby removing the reference to the common law antecedent, might you not reopen the door?

You see that a few themes recurred in this years-long process. Some of the changes would have worked actual, beyond-dispute substantive changes; some proposals carried the risk that an interpretation might be made that could work a substantive change. Others might have resulted in unnecessary litigation and argument; people might get their hopes up about arguments that they had long since abandoned. Sometimes Congress chose a word or phrase, and other times a rule had a very clear common law reference. There are times in the Rules when the passive voice really is the best voice,

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21. FED. R. EVID. 406 (“Evidence of the habit of a person or of the routine practice of an organization, *whether corroborated or not and regardless of the presence of eyewitnesses*, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.” (emphasis added)).

and when a lack of precision is precisely what is required. We often argued and struggled over words and phrases in the Rules that have acquired subtle meanings to courtroom lawyers and judges that are not found in a dictionary.

This last is the category that was the most challenging. It is one thing to explain that the stated goal of interpreting the Rules cannot be changed from seeing that proceedings are “justly determined”—this is in Rule 102—to achieving a “just result,” because that has constitutional implications. But imagine a trial lawyer trying to explain to a professional grammarian that “interrogating” as in Rule 611 is not the same as “questioning.” Look in the dictionary. Interrogating, questioning: same thing. They do *not* mean the same thing, any more than being examined is the same as testifying, which you see in 608(b).

“Stress of excitement” in Rule 803(2) is not a phrase that we use anymore. It’s from common law, but it doesn’t mean the same as “stress or excitement” or even “stress of the excitement.” It has its own meaning. It’s not modern speak, but it has to stay there.

Present sense impressions explain *or* describe.<sup>22</sup> You can’t get rid of “or explaining,” even though it would cut words. And then, again, in 703, you take experts. An “expert in a particular field” is probably going to be understood to be more closely aligned than an “expert in the same field.” The words are not especially different, but the *sense* of them in a courtroom is different. And because the *sense* or the *feel* of a word didn’t usually qualify as substantive, the Committee had to let some changes go through that we would not have chosen. It will be interesting to see how some of those reworkings might result in subtle changes over time in some of how the Rules get applied.

And there are some of these that are kind of touchy matters. I’m curious about prior consistent statements. I know that in some states, at least in Minnesota, there’s a departure from the Federal Rules in the interest of perceived fairness.<sup>23</sup> The existing phrase in federal 801(d)(1) is “consistent ... and offered to rebut an express or implied charge of recent fabrication or improper influence or

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22. FED. R. EVID. 803(1).

23. See MINN. R. EVID. 801(d)(1)(B) (2006) (“A statement is not hearsay if ... [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... consistent with the declarant’s testimony and helpful to the trier of fact in evaluating the declarant’s credibility as a witness.”).

motive.” We did manage to avert a truly serious substantive misstep that would not have made the recency requirement apply to improper influence or motive. The restyled Rule is going to provide for admission to rebut a charge “that the declarant recently fabricated it or acted from a recent improper influence.” With the old Rule, the word “recent” was generally understood to mean “intervening,” and, of course, that shouldn’t change. That is the law. But the change puts emphasis on the word “recent,” so you wonder whether we might have disputes about how recent is recent, in an absolute time sense rather than in the sense of predating an intervening event. We’ll see about that.

There are other changes that I worry about. Rule 104(a) contains an example of getting rid of “shall” just for the sake of getting rid of the word “shall.” The Rule provides that preliminary questions about admissibility and so forth “shall be determined by the court.” To me that was just an assignment of responsibility. Somebody has to decide these questions, and we’re putting the responsibility on the judge as opposed to the jury. Now the Rule says that “[t]he court must decide any preliminary question.” If the court “must decide,” perhaps an appellate court will require detailed findings in support of the decision as well. Another rule that will create a duty is 404(b)(2)(A). Today, notice by the prosecution is a condition of admissibility; after December 1 it will be a prosecutorial duty (“the prosecutor must”), not explicitly tied to admissibility. Rule 103(c)—soon to be (d), but don’t get me started—has some examples now. They’re being removed on account of being neither exhaustive nor restylistically appropriate. I thought they were helpful hints, and the Rule seems broader without them.

These changes had to just go ahead even though we had some concerns. Mostly we came to agreement, even if it did mean bending some of the restyling protocols. As I mentioned, some passive and imprecise language was retained, and for good reason. For example, it’s not clear what the intent requirement was for implied assertions in 801(a), and that’s going to continue to be unclear. Rule 611(b) retains the passive voice. “Cross-examination should not go beyond the subject matter of the direct.” That is different than saying the court can’t allow it, which might imply that the lawyers should feel free to give it a try.

Proposed changes that would have been monumentally problematic have, to the best of our collective ability and my belief, been avoided. We almost changed 606(b)(1) from jurors not being able to testify about things that *affected* them to not being able to testify about things that might have had an effect *on* them. Note the difference there between the subjective effect and the external event. But we didn't. We could have taken out the reference to "convicting jurisdiction" in 609(a)(1) to save words, but that would have created confusion when the convicting jurisdiction and the trying jurisdictions didn't treat the offense the same way, and so we didn't do it. We could have moved "interests of justice," which sounds so noble, ahead of the opportunity to explain or deny in 613(b), but that would have obscured the fact that "justice" provides a rare exception to the Rule's requirement that witnesses have an opportunity to explain, and not an independent and equally valid basis to admit extrinsic evidence of a prior inconsistent statement. So we didn't do it. Rule 803(18) might have been restyled to say that a publication had to be shown to an expert witness, but that would have been a big and problematic change from the current requirement that a statement *in* the publication be brought to the expert's attention, and we didn't do that either.

A trial judge—and I actually checked with my court reporter to see if the statement that I'm about to make was true, and she, who has unimpeachable credibility, said yes—might be called upon to make thirty to forty evidentiary rulings in a single day of trial. Hardly any of those rulings will receive appellate review. If it's a criminal case that results in acquittal, none of them will. Appellate cases cannot possibly tell the whole story of how the Rules of Evidence are going to act in the courtroom. So when the best researcher in the world reports back that there are no cases where the difference between an "inference" and an "opinion" mattered, that does not mean that arguments about Rule 701 in the trial court won't change now that "inferences" has been deleted.

And the skepticism that some trial lawyers and some trial judges expressed about restyling was partly due to the difficulty in getting a feel for the Rules from reading appellate opinions. Another concern, of course, was that evidentiary objections, responses, and rulings have to be made in a split second. If you're too slow to object when the witness is asked if he has stopped beating his wife, there

isn't much you can do after he says, "No, and I kicked the dog, too." Some evidence questions can be foreseen. You can prepare for them, but not all of them.

Trials are expensive. They are high-drama, high-stakes events. The clients are terrified. Lawyers lose sleep. They forget to make their mortgage payments. They ignore their families. It takes years to develop the great courtroom skills of organization and persuasion and facility with the Rules of Evidence, which, after all, are the rules that control it all.

With all the information to manage in a trial, there just isn't time to be learning the fine points of the Rules, much less comparing versions, and reading the Advisory Committee comments. The Rules have to be ingrained, and their application has to be almost instinctive. It takes time to know that if something sounds wrong, you can stand up and object, confident that the basis of the objection is going to come to you.

The neural pathways that make this possible start to get laid down in law school, and with experience they do become second nature. That's how an attorney can keep one eye on the witness, another on the jury, a third on opposing counsel, and a fourth on the judge while making and responding to an objection. Flipping through the Rules hardly ever makes a good impression on the jury, and it doesn't generally yield the right rule either.

So it's no surprise that lawyers, some of the very best of whom started laying down their neural pathways in common law times, were not agitating to change the language of the Rules. I'm here to tell you, if you haven't already gathered, that the fiercest restyling skeptics had a voice on the Committee and helped keep the restyling as light as possible.

I do appreciate more than I can say the vigorous and respectful debate that we all had in the process. I found it to be an honor to help out. As in life, it will be fun to see what happens next.

PROFESSOR CAPRA: Thank you, Judge Ericksen. By way of background, the way the process worked was Joe Kimble would start with the draft of the restyling, and then the Style Subcommittee of the Standing Committee and I would get the first draft. Joe would revise after our comments. Then it went to the members of the Advisory Committee. The Advisory Committee was told to avoid, as much as possible, allowing any substantive

changes. So, when disputes went to substantive changes, it was the Style Subcommittee or the Standing Committee that did most of the work. They had the final word on style changes, and the work that they did was quite remarkable.

I was just astounded at the work of the Style Subcommittee. It was chaired by Judge Teilborg, and Judge Huff was a member of that, and she also served as a liaison from the Standing Committee to the Evidence Rules Committee. Her work was just critical, and I want to speak for the record that we're sorry that she's leaving to another committee, but based on interrogation yesterday, that was not her decision, so I'm going to leave that to Judge Huff.

JUDGE HUFF: Thank you for the opportunity to reflect on the restyled Federal Rules of Evidence. I will speak as a representative of the Style Subcommittee and as the liaison to the Standing Committee during the project. I focus my comments on three topics: perspective, process, and product.

On perspective, the Style Subcommittee had prior models for its work from other restyling projects for the Federal Rules. To improve consistency in the rules process, the Standing Committee on Rules of Practice and Procedure created a Style Subcommittee in 1991 chaired by a great legal writer, Charles Alan Wright. Its charge was to review and improve the drafting style of all amendments to the Federal Rules. Soon, its work broadened to use clear and consistent style conventions for all the Rules of Procedure. To that end, the Style Subcommittee participated in the redrafting of the Federal Appellate Rules, the Rules of Civil Procedure, and the Criminal Rules prior to this restyling project. Each of the restyling efforts—though time consuming and arduous—proved to be highly successful in improving clarity and consistency of the Rules. Restyling the Federal Rules of Evidence was a challenge due to importance in litigation and historical practice.

Each of the restyling efforts provided a helpful model for our style task. Historically, evidence came from the common law. In 1965, Chief Justice Earl Warren appointed an advisory committee to draft rules of evidence. After its work through the Conference, the Supreme Court transmitted the rules to Congress in 1972. Congress revised the rules, held hearings, and eventually enacted the Rules of Evidence into law in 1975. Numerous amendments followed over time. The Historical Note for the Federal Rules of Evidence consists

of four pages documenting various amendments to the Rules.<sup>24</sup> With the development and use of the Rules of Evidence over time, the style members knew that it was important to restyle the Rules without inadvertently changing a rule's intended meaning.

On process, the Style Subcommittee, chaired by the able Judge Teilborg, worked on a protocol reviewing written suggestions and discussing proposals on numerous conference calls over the multi-year project. The protocol generally followed key steps. The restylist, the dedicated Joe Kimble, prepared a first draft. The excellent reporter, Dan Capra, commented on the draft, pointing out potential substantive changes and making suggestions. The restylist prepared a second draft for review by the Advisory Committee.

The Advisory Committee, chaired by the knowledgeable Judge Hinkle, reviewed the second draft to eliminate any substantive changes and to provide style suggestions. If the proposed change was a style suggestion, the Style Subcommittee would decide the proper wording.

The Style Subcommittee applied uniform style principles, using Bryan Garner's *Guidelines for Drafting and Editing Court Rules*.<sup>25</sup> The style principles promote clarity, readability, and consistency. For clarity, the principles seek to identify instances of vagueness and ambiguity to sharpen the wording. For example, we generally draft in the singular. We draft in the present tense. We use the active voice over the passive voice. We apply a logical syntax. We place an exception to a rule where it can be read most easily.

For readability, we avoid legal jargon, use a word or phrase consistently, express a single idea in a short sentence, and promote a logical structure with headings and subheadings to help the reader. For brevity, we eliminate unnecessary words and use shorter, more accurate expressions of an idea. In sum, we apply proper grammar to the Rules, and in so doing, we end up with clearer Rules.

Due to the volume of material, the participants focused on the Rules in three groups. Then, the participants did a final review of all Rules. In August 2009, the Standing Committee released the

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24. STAFF OF H. COMM. ON THE JUDICIARY, 111TH CONG., FEDERAL RULES OF EVIDENCE, at VII-X (Comm. Print 2009).

25. See *supra* note 7.

draft amendments for public comment. The participants in the restyling project reviewed each of the public comments and incorporated appropriate suggestions into the final product. The Standing Committee weighed in on the draft and then transmitted the proposed Rules to the Judicial Conference. The Supreme Court decided to issue the amendments. Because Congress did not intervene, the restyled Federal Rules of Evidence take effect on December 1, 2011.

We are proud of our work to improve the usefulness of the Federal Rules of Evidence. The last topic is the best: the product. Restyling improves the end product. I will finish with a comparison of two rules, one that follows the style conventions and one that does not. A good example of the benefits of restyling is Rule 301. The Rule takes a lengthy seventy-five word sentence and condenses it into two shorter sentences of thirty-one and nineteen words to improve clarity and readability. The revision is a more understandable rule. The revised Rule eliminates the bulky reference to “civil actions and proceedings” and uses “a civil case” instead. The Rule changes the complicated phrase “but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast” to a clearer version. It now reads, “But this rule does not shift the burden of persuasion, which remains on the party who had it originally.”

The other example shows the limits of restyling. Restyling conventions call for outline order. The original Rule 803 on hearsay exceptions did not use typical outline order. Instead, it contained 803(1) through 803(24). Style convention dictates a change to 803(a), and down the alphabet. To retain the ability to electronically search existing law on these important sub-parts, we retained the original structure of the Rule. The Rule 803 example illustrates the practical point that the restyling should help, not confuse, the reader.

In closing, the restyling project benefits the bench, the bar, and the public by improving clarity and consistency. When the Rules are clear, litigation over ambiguous meaning decreases and compliance with the Rules increases. The net result is an excellent example of the rules enabling process at work to improve the administration of justice. As a trial judge, I can't resist saying to those who criticize the restyled Rules: objection overruled.



PROFESSOR CAPRA: Thank you, Judge Huff. Now, Judge Reena Raggi from the Second Circuit, who was on the Standing Committee during this process and now has become the chair of the Criminal Rules Committee. I'd just like to say, as Judge Hinkle said, her impact on the Rules was substantial in terms of probably protecting against maybe twenty-five—it's hard to even state by number—substantive changes that we didn't see after two years working on it. Judge Raggi saw them. I don't know how long it took her. I would guess ten minutes the way she works, but she saw these problems, and so for the record, thank you Judge Raggi, and I turn it over to you.

JUDGE RAGGI: Let me begin by thanking Judge Fitzwater and the Evidence Committee for inviting me to participate in this program. I also thank my good friends, Professor Capra and Judge Hinkle, for allowing me to play the role of kibitzer as they and the Evidence Committee pursued their extraordinary restyling efforts. This morning I've come to realize that the most extraordinary accomplishment of these two gentlemen is keeping Judge Ericksen and me from ever meeting until this morning, or the world might have been a very different place.

Now, for those of you not from Brooklyn but committed to precise use of language, a "kibitzer" is sometimes defined as a person who looks on as an activity is performed by others and offers unwanted and usually meddlesome advice. As any district court judge could tell you, this is a task for which we appellate judges are quite well qualified. You see, I was one of the restyling skeptics but, alas, to little effect.

I came to the restyling of the Federal Rules in medias res, so to speak. When I joined the Standing Committee on the Federal Rules almost four years ago, the commitment to restyling had already been made. Indeed, all the Federal Rules had been restyled except for Evidence and Bankruptcy. So my general reservations about restyling, though frequently expressed, mattered not a jot. The die had been cast, the knives were sharpened, and Evidence was next.

Still, I think a bit of kibitzing was warranted—I'll even presume to say helpful—even at the end of a comprehensive endeavor, because as Judge Hinkle said, the Evidence Rules are different from the other Federal Rules in important respects that merit attention.

First, they are relied on more heavily than any of the other Rules. I submit that if you were to look in a district judge's chambers—that is, a trial judge's chambers—to find the shelf where the judge keeps those paperback copies of the Federal Rules that we get every year, you would quickly see that the volume that shows the most wear is the Evidence Rules. I'm not simply speculating. I was a trial judge for fifteen years.

Not only do the Evidence Rules get the greatest use. They are also the rules that must be used most quickly. I don't think I can improve on anything Judge Ericksen said about how quick use depends not only on finding the right section and the volume, but also on years and years of experience with the Rules. When issues arise under other Federal Rules, parties file motions, judges do research and everyone has time to ponder the matter. But the Evidence Rules are frequently invoked on the fly in the crucible of a trial. And so, more than any of the other Federal Rules, with Evidence there is a particular need for clarity, both with respect to organization and expression. And further, there is a need for stability.

And so we come to the recent restyling of the Evidence Rules. My general skepticism about restyling derives in no small part from a general view that we should be most reluctant to tinker too much with the Federal Rules. At the outset, let me observe that I do not share the view expressed by others today that the Rules as they had existed were "so poorly drafted" as to be almost an embarrassment to the judiciary. Rather, I assume that those of our predecessors who drafted the Rules in 1965 were every bit, if not more, intelligent than we are. After all, they went to school when you still had to diagram sentences.

Because I don't view the original version of the Rules as an embarrassment, I am hesitant to tinker with them. Indeed, over the last few months, as I've told judicial colleagues or members of the bar that I was about to move from the Standing Committee to the chairmanship of the Criminal Rules Committee, the most common reaction has been, "Please stop tinkering with the Rules so much." You see, judges and lawyers get used to the Rules, and the benefits of that familiarity should not be dismissed or trivialized. Indeed, that familiarity is so strong that many judges and lawyers knew the exact place on the page to find language in Rule 404 about admit-

ting similar act evidence, or Rule 609 for inquiring into a witness's prior criminal convictions. Now, I didn't pick those two rules at random. Those happen to be rules where I do think restyling makes an improvement by breaking down the standards that we're familiar with into numbered or lettered parts. That is something that can be very helpful visually to judges and lawyers in quickly applying an evidence rule. But even such improvements come with a cost, and I do not think we should ever ignore that fact. Rather, we must ask whether an improvement is worth the cost that it imposes.

For example, it's frequently observed that restyling is not intended to effect any substantive change in the Federal Rules, but that concern does surface from time to time. At next week's Criminal Rules Committee meeting, we will try to remedy an unintended substantive concern in the restyled Criminal Rules.<sup>26</sup> More to the point, we can hardly expect that judges or lawyers, in applying the restyled Rules, including the Evidence Rules, will not carefully read the new language to make sure that a circumstance that they almost instinctively thought fit comfortably within the old rule also fits within the new rule, notwithstanding the caveat about "no substantive changes." In short, it will take time for judges and lawyers to become familiar with the new language, and for all of us to know whether, in the long run, users of the Evidence Rules—and I emphasize users, not commentators—will find the restyled Rules so much better than the former version as to justify the transaction costs incurred. We can know that only in the long run, not today.

Further, as all lawyers know, language matters. So, even if restyling is not intended to effect substantive changes, we can expect litigation over how particular language, new language, should be construed. That can only mean some of those headache-generating opinions we on the courts of appeals like to write that reproduce the language of the old and the new rule next to each other and discern shades of meaning not anticipated by the restylers despite all the careful readings that were done in this process.

If these transaction costs make me skeptical of restyling generally, how much more am I concerned about restyling where I'm *not*

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26. See Memorandum from Reena Raggi, Chair, Advisory Comm. on Fed. Rules of Criminal Procedure, to Mark R. Kravitz, Chair, Standing Comm. on Rules of Practice & Procedure 2-3 (Dec. 12, 2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CR12-2011.pdf>.

sure I see improvement? For example, restyling has banished certain words or phrases from the Federal Rules. We've heard a lot today about minimizing prepositions. So, in the Federal Rules, you will no longer find the phrase "citizen of the United States." It is now "United States citizen." I'm still waiting to hear a persuasive explanation as to the benefit derived from that kind of tinkering. Getting rid of a preposition doesn't do it for me. Indeed, as I have tartly observed, it's a good thing our restyling portfolio is limited to the Federal Rules and does not extend to other legal writing, like the Constitution, which uses the exact banned formulation "citizen of the United States" in any number of obscure passages, like the Fourteenth,<sup>27</sup> Fifteenth,<sup>28</sup> and Nineteenth Amendments,<sup>29</sup> just to cite a few examples. Now, I don't really think it much matters whether the Rules refer to someone as a "United States citizen" or a "citizen of the United States." My concern is with "tinker, tinker," especially to remove language that remains viable in our foundational document.

But that's just kibitzing. Of more concern is the restyling's ban on another word routinely used throughout the Constitution: "shall." "Shall," I submit, is an elegant word long and readily understood in the law to reference an imperative, a duty, a requirement. In other words, it's not Oscar Hammerstein asking, "Shall We Dance?" Rather, in the famous words of Article 1, Section 1: "All legislative powers herein granted *shall* be vested in a Congress of the United States, which *shall* consist of a Senate and House of Representatives."<sup>30</sup> Does anyone think it is so confusing that those "shalls" need to be restyled as "musts" or "shoulds"? In any event, take it from me, "must" is not a word you want to use too often with respect to Article III judges. We don't take to it kindly.

And yet, the Rules of Evidence and all the Federal Rules have been restyled to make "shall" the most offensive verba non grata—with one exception. I don't want you to have to hunt for it.

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27. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States ... are citizens of the United States.").

28. *Id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged ... on account of race, color, or previous condition of servitude.").

29. *Id.* amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged ... on account of sex.").

30. *Id.* art. 1, § 1 (emphasis added).

Rule 56 of the Rules of Civil Procedure, the rule for summary judgment, states that the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact, and the movant is entitled to judgment as a matter of law. I don't want you to think the restylists missed the offending "shall." It was restyled to substitute "should" for "shall," and there was such a hue and cry in the bar as to whether a substantive change had been effected with respect to district courts' obligation to grant even partial summary judgment on minor points when it was clear they were going to have to take the core of the case to trial, that the Standing Committee decided to throw up its hands and make it clear that no substantive change had been effected and, in this one circumstance, to tolerate the word "shall" in the Federal Rules. Let me suggest, to borrow in a single sentence from both Shakespeare and Churchill—no mean linguistic stylists—that this sort of minor tinkering is much ado about nothing and incurs the sort of transaction costs up with which we should not put.

In effecting any amendment to the Federal Rules, stylistic or substantive, I think we have to be able to distinguish not simply between bad ideas and good ideas, but between something that's a good idea and something that needs to be made a rule.

I hear lots of good ideas at committee meetings. I hear only a few that require a rule or a rule amendment. Like laws, rules benefit from stability. So in considering a rule, the first thing I ask is: what's the problem that needs to be solved? As far as I can tell, even if the restyled Rules are a good idea—a very good idea if one really had been handed a blank piece of paper—there wasn't enough of a problem with the language of the original Rules to warrant the kind of substitution or restyling that we now have.

But as I said, the battle over restyling was lost long before I entered the fray. Though I've expressed my reservations often and continue to do so today, I did carefully read a draft of the restyled Rules and tried as best as I could to offer Judge Hinkle and Professor Capra my best constructive ideas for how they could make the Rules as clear as possible. And while Judge Hinkle and Professor Capra have expressed thanks for that effort today, I have long suspected that my transfer from the Standing Committee on Rules to the Criminal Rules Committee was to make sure that I

could never again have a vote on anything to do with Evidence. Just kidding—sort of.

Still, I like to think I played the role of a constructive commentator and not just a casual critic or kibitzer. I applaud the efforts of the restyling committee, and I *shall* hope, albeit with some caution, that their efforts will benefit us all.

PROFESSOR CAPRA: Firstly, Judge Hinkle, I apologize for putting these two together.

PROFESSOR KIMBLE: Is there going to be time for a short response?

PROFESSOR CAPRA: No.

JUDGE RAGGI: Let me just remind you, Joe, that the phrase is “In victory, magnanimity.” It’s “In defeat, defiance.”

JUDGE HINKLE: I just want to say that Judge Raggi didn’t give us enough credit. We thought about changing “United States of America” to “American United States.”

PROFESSOR CAPRA: Yeah. I think this is a good time to give credit to somebody who’s not here today, and that’s Judge Lee Rosenthal who was the chair of the Standing Committee and who, as head of all this process, brought all the warring factions together and got everybody to work together as an efficient unit. She did a great job at this. And she was responsible, as you’ve heard what Judge Raggi was just referring to, for adding back the “shall” into Rule 56.

When that got added, I contacted her. I sent an immediate e-mail saying, “So we can add ‘shalls,’ too?” There was a one-word response: “No.” So now I’ll look to Geraldine Soat Brown, who is a magistrate judge serving in the Northern District of Illinois and a representative of the Federal Magistrate Judges Association. She provided very valuable comments on the restyling, so I’m going to leave it to her to talk about those comments.

JUDGE BROWN: Thank you. Professor Capra, distinguished members of the Advisory Committee on the Federal Rules of Evidence, and other distinguished guests, I bring greetings today from the members of the Federal Magistrate Judges Association (FMJA) and our thanks for your gracious invitation to join you in celebrating the completion of your project to restyle the Federal Rules of Evidence.

The FMJA members greatly appreciate the Committee's work to make the Rules more effective for judges and lawyers alike. The FMJA reflects the perspective of United States Magistrate Judges across the country, which is a view from the front-line trenches. Because of our role in the judiciary, we are often among the first called upon to apply new or revised Rules in pending cases. We are often the prow of the ship, where the waves hit first.

To illustrate, my chambers tallied the decisions interpreting relatively new Federal Rule of Evidence 502 that were reported on Westlaw or Lexis as of August 5, 2011. Of 182 reported decisions, 105, that is to say 57 percent, are decisions by magistrate judges. Of the sixty-eight decisions by district judges, twelve reviewed decisions about Rule 502 made initially by magistrate judges. In nine of those decisions, the district judge agreed with the magistrate judge's decision, and in one, the district judge agreed in part.<sup>31</sup>

The magistrate judges work daily with the Federal Rules of Evidence and the Rules of Civil and Criminal Procedure. We take a great interest in the drafting and revising of those rules, and the FMJA appreciates the opportunity to comment on proposed revisions and the consideration that the Advisory Committees on the Federal Rules give to our comments.

Surprisingly, for such a major undertaking as restyling the Federal Rules of Evidence, only nineteen comments were submitted when the proposed Rules were circulated to the bench and bar for comment.<sup>32</sup> The FMJA made both general and specific comments to the proposed restyled Evidence Rules. The one that no doubt brings me here today is the general comment: "As an initial matter, the FMJA doubts the value of restyling the Federal Rules of Evidence."<sup>33</sup>

In transmitting the Committee's report to the Standing Committee on Rules of Practice and Procedure, Judge Hinkle

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31. Judge Brown thanks her law clerks, Janelle Skaloud and Lisa Mazzone, and her intern, Joseph Hammon, for their research about these decisions.

32. See *2009 Evidence Rules Comments Chart*, U.S. CTS., <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0809Comments/2009EVCommentsChart.aspx> (last visited Mar. 2, 2012).

33. Letter from Thomas C. Mummert, III, President, Fed. Magistrate Judges Ass'n, to Peter G. McCabe, Sec'y, Comm. on Rules of Practice & Procedure (Jan. 11, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2009%20Comments%20Committee%20Folders/EV%20Comments%202009/09-EV-011-Comment-Mummert.pdf>

observed that the FMJA's comment was the only one of the nineteen to express such doubts.<sup>34</sup> It may be, as he suggested, that opposition to the restyling has faded because of the success of earlier restyling projects.<sup>35</sup> But let me suggest that it may also be attributed at least in part to the fact that, by the time the restyled Evidence Rules were released for public comment in August 2009, the issue of *whether* they were going to be restyled may have appeared to be moot. A massive project had been undertaken to restyle sixty-eight rules. It may have seemed to many unlikely that the work already done would be scrapped. The horse was already out of the barn.

Why, then, did the FMJA feel obligated to express its doubts? Because the FMJA did not see any pressing need for restyling but did see significant risks. The project of restyling the Federal Rules with consistent style conventions began in the 1990s, as you've heard today.<sup>36</sup> The Federal Rules of Civil Procedure, which had been adopted in 1937 and amended many times in the years that followed, were prime candidates for restyling. Before restyling, the Rules of Civil Procedure were a patchwork of amendments in the different writing styles of the 1930s through the beginning of the twenty-first century.

The Federal Rules of Evidence, however, are different in several respects. Since the Evidence Rules were adopted as a body in the 1970s, they have been amended only a little more than a dozen times. They were not the patchwork that the Rules of Civil Procedure had become. Most importantly, the Evidence Rules are not merely procedural. Rather, as you've heard referred to earlier today, they are a codification of the common law of evidence. The Evidence Rules do not only tell us how something will be done; they tell us what the judge and jury can consider.

That distinction was discussed when the concept of uniform rules of evidence was first presented to Congress in the 1960s and 1970s. The House Subcommittee on Criminal Justice considered a thresh-

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34. Memorandum from Robert L. Hinkle, Chair, Advisory Comm. on Evidence Rules, to Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice & Procedure 5 (May 10, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-2010.pdf>.

35. *Id.*

36. See Memorandum from Robert L. Hinkle to Lee H. Rosenthal, *supra* note 6, at 2.



old question, “Are the Rules of Evidence substantive in nature?”<sup>37</sup> The Subcommittee concluded that the Rules of Evidence are indeed more than rules of practice and procedure.<sup>38</sup> Congress then revised, and in some instances deleted, the proposed Rules as drafted by the Judicial Conference Advisory Committee.<sup>39</sup>

The FMJA was—and is—concerned that changes in the text of the Evidence Rules will change what will be admitted into evidence no matter how many times the Committee’s comments repeat that there is no intent to change the result of evidence admissibility. Indeed, many of those who commented on the proposed draft of the restyled Rules thought that the restyling made substantive changes to one or more of the Rules. For example, the National Association of Criminal Defense Lawyers observed that the draft of restyled Rule 401 “could affect the result in a ruling on evidence admissibility.”<sup>40</sup> The Committee’s minutes also reflect that a representative of the Department of Justice met with the Committee to explain that the restyled Rule 410(a)(3) circulated for public comment would create a substantive change in the admissibility of defendants’ statements.<sup>41</sup>

The Committee and its Reporter, Professor Capra, did yeoman’s service to avoid changes that might be perceived incorrectly as substantive. At the Committee’s April 2010 meeting, the Committee reviewed each of the Rules on which a comment had been received to the effect that the restyling changed the meaning. In a good many instances, the Committee agreed with the comment and modified

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37. See William L. Hungate, *An Introduction to the Proposed Rules of Evidence*, 32 FED. B.J. 225, 228 (1973). When the article was published, Mr. Hungate was the chairman of the Subcommittee on Criminal Justice of the House Committee on the Judiciary. From 1979 to 1992, he served as a United States District Judge for the Eastern District of Missouri.

38. *Id.*

39. *Id.* at 229-31.

40. Comments from William J. Genego, Co-Chair, Comm. on Rules of Procedure, Nat’l Ass’n of Criminal Defense Lawyers, to Comm. on Rules of Practice & Procedure 1 (Feb. 17, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2009%20Comments%20Committee%20Folders/EV%20Comments%202009/09-EV-019-Comment-Genego.pdf>.

41. Minutes, Meeting of the Advisory Comm. on Evidence Rules, in N.Y.C., at 28-29 (Apr. 22-23, 2010) [hereinafter Committee Minutes], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV04-2010-min.pdf>.

the proposed restyling. That was the case, for example, with restyled Rules 103(a), 411, 412(b)(1)(B) and 801(a).<sup>42</sup>

Take, as an example, the restyled definition of hearsay in Rule 801(c). The definition of hearsay as “a statement ... offered in evidence to prove the truth of the matter asserted” is one of the most sacred of the “sacred phrases” in the Evidence Rules. Countless judicial opinions and law review articles have been written about Rule 801(c). The proposed restyling would have changed that definition to “a prior statement ... that a party offers in evidence to prove the truth of the matter asserted by the declarant.”

The FMJA’s comment expressed our concern that any modification of the long-established definition would inevitably be interpreted as having some substantive impact. The FMJA was particularly worried that adding the phrase “by the declarant” would change the established law. As we said, hearsay is not a statement offered to bolster the truth of *any* statement made by the declarant; it is a statement offered to prove the truth of the matter asserted in that very statement. The additional phrase, we feared, would suggest that the hearsay rule applies to any statement used to bolster the truth of the declarant, which is not the law.<sup>43</sup>

Professor Richard Friedman of the University of Michigan Law School identified the same problem with the word “declarant,” recommending in his comment that “declarant” be changed to “statement.” Professor Friedman added, “If you don’t pay attention to anything else I say here, I hope you change that word.”<sup>44</sup> The Committee ultimately agreed to delete the phrase “by the declarant” and substitute “in the statement.” Restyled Rule 801(c) now defines hearsay as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.”<sup>45</sup> In the FMJA’s view, that revision avoided a significant substantive change in a critical part of the law of evidence.

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42. *Id.* at 7 (modifying text of Rule 103(a)); *id.* at 30 (modifying text of Rule 411); *id.* at 32-33 (modifying text of Rule 412(b)(1)(B)); *id.* at 72-73 (modifying text of Rule 801(a)).

43. Letter from Thomas C. Mummert, III to Peter G. McCabe, *supra* note 33, at 8-9.

44. Letter from Richard D. Friedman, Professor, Univ. of Mich. Law Sch., to Comm. on Rules of Practice & Procedure 1 (Feb. 15, 2010), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2009%20Comments%20Committee%20Folders/EV%20Comments%202009/09-EV-013-Comment-Friedman.pdf>.

45. Committee Minutes, *supra* note 41, at 74.

In other instances, though, the Committee disagreed with a comment that restyling changed the substantive law and did not make a change in the restyled draft. That was the case, for example, with the comment on Rule 404(b)(2).<sup>46</sup> Also, if no public comment addressed a restyled rule, the Committee generally did not revisit it.<sup>47</sup>

What does not initially appear to be a substantive change can, however, reveal itself to be one over time. For example, in the case of Rule 104(b) regarding conditional relevance, the Committee itself recognized that the restyled Rule as released for public comment did not correctly capture the previous Rule and would, therefore, be making a substantive change.<sup>48</sup> The Committee then modified it.<sup>49</sup>

These examples illustrate the FMJA's apprehension that, even with the great care taken by the Committee and its Reporter, changes in text will be interpreted as changes in substance. In the case of the Evidence Rules that more than one thousand federal judges use every day, such interpretation is, we submit, almost inevitable. Our worry is that the restyling may change what is admitted into evidence, notwithstanding the restylers' best intentions and most careful effort.

Another point: What becomes of the vast body of case law interpreting the Evidence Rules, not only by the federal courts but also by the state courts in states that model their own evidence codes after the Federal Rules of Evidence? As a judge, I know that it is difficult to apply a decision that interprets the words of a particular rule when the wording of that rule has changed.

The FMJA's comment might have been the only one of the nineteen to express doubt about the value of restyling the Evidence Rules after the project was done, but the Committee itself was initially uncertain about the merits of the undertaking. The minutes of the Committee's meeting of November 2006 reflect that a number of Committee members voiced concerns very similar to the FMJA's.<sup>50</sup> Eventually the Committee members became convinced

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46. *Id.* at 21-22.

47. *Id.* at 3.

48. *Id.* at 8-9.

49. *Id.*

50. Minutes, Meeting of the Advisory Comm. on Evidence Rules, in Wash., D.C., at 2-3 (Nov. 16, 2006), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/>

that the benefits outweighed the risks and undertook the work that will conclude when the restyled Evidence Rules take effect on December 1, 2011.

Restyling is hard work, requiring the difficult task of implementing guidelines for drafting and editing court rules while keeping an eye on the perspective of the end users: the attorneys and the judges. The FMJA recognizes and respects the extraordinary effort the Committee undertook and appreciates being invited to join you as you celebrate the project's completion. The magistrate judges look forward to interpreting and applying the restyled Rules in the spirit with which the Committee undertook the project. Thank you very much.

PROFESSOR CAPRA: Thank you. Steve Saltzburg was a consultant to the Committee from the ABA, and a valued participant at the restyling meetings. Unfortunately, Professor Saltzburg can't be here today. He's prepared written remarks that I'm going to enter into the record.<sup>51</sup>

Our last speaker then on this panel is a veteran of the restyling wars. Professor Ed Cooper from the University of Michigan was the Reporter for the Civil Rules Committee when those Rules were restyled, and we thought it would be a very good idea to bring his perspective on what restyling has meant.

And before we even get to that, I'd just like to say, as you can see, we did not stack this as a restyling lovefest. We tried to make a balanced panel. I hope I made it somewhat balanced. It seems like we wanted to set a torch to the thing. So, to Ed.

PROFESSOR COOPER: Thank you, Dan.

Dan, in referring to me as the Civil Rules Reporter, reveals evidence is not my turf. But I'm here, and I leapt at the invitation to be here as an exercise in nostalgia. I loved the restyling process for reasons that only a true procedure geek will appreciate, and I intend to proceed with the ten minutes I was offered, and not to exceed them, with essentially two packages, both addressing the theme you've heard constantly, and that is that the style project aimed to improve expression without changing meaning.

The first part of the package is meant to reflect the tensions that oozed out of the repeated statements this morning and to be both reassuring and, in some ways, troubling. The second part will be illustrations of the related proposition: how you deal with ambiguity when it is your object not to change meaning.

First, it is not possible—the academics are right for once—to change expression without changing meaning. If you really took seriously the object of freezing the meaning, expressing it more clearly, you would not undertake the task. Start with this proposition. Suppose we froze the words of the Civil Rules on November 30 of the year 2007 or the Evidence Rules on November 30 of the year 2011. Their meaning would change. If you do not accept that, let me refer you to Civil Rule 8(a)(2). The complaint “must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief.” And then add two words: *Twombly* and *Iqbal*.<sup>52</sup> The words of any rule evolve in a constant, essentially common law process, and that is something that the rulemakers depend upon.

Second, why do you hope for improved clarity? I suppose the most modest ambition would be that you would always achieve exactly the same outcome with less cost, less effort. And that sounds good. You might also hope that from time to time you will achieve a result that is more in keeping with what you take to be the true meaning, the original meaning, whatever you conceive by that; that is to say that you’ll achieve a different result. You aim for that with style.

Beyond that, when you start to change punctuation, when you add a comma—we heard nostalgic references to the comma this morning—when you change words, you are bound to change meaning. No two words mean exactly the same thing. That is why we have so many of them. They differ in not simply connotation but evocation, in tone, in temper, in meaning and understanding. When you change words, you’re going to change meaning. Judge Ericksen offered an example: “interrogate” and “question” are two different words, and they carry very different tones. Professor Kimble said style affects substance. Good style always improves substance. And all of that is to say, yes, the style project is going to change substance. It will in the Civil Rules. It will in the Evidence Rules, and that is a good thing.

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52. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

To the academics who say you can't do it, the response is, so what? What we're doing is paving the way for that common law process of evolution, freeing it still further to achieve the adaptation of the Rules to perceived changes of need, of circumstance, and the overall thing is very well worth it.

Second, and this is something that Judge Hinkle touched on lightly; it's a lovely story. Sam Pointer volunteered the Civil Rules to go first in the style project. After some sort of tentative beginnings of "How do we do this?" we decided the only thing to do is to have a meeting devoted entirely to style. Legends abound about the two and a half days the Civil Rules Committee met in a lovely windowless room at Sea Island, Georgia. Gorgeous outside, for those of us from the Midwest in February. In two and a half days exploring about ten of the Civil Rules, we found time and time and time again that no one in the room, not all of us put together, knew what this part of that rule meant.

There were unnumbered ambiguities, and so we abandoned the project. Let somebody else go first. They did the Appellate Rules. They did the Criminal Rules. And it came the Civil Rules' time to take it on again, and we began with a proposition: if we find an ambiguity that we cannot resolve, we will deliberately carry the ambiguity forward in the rule text. To resolve an ambiguity, does it mean A? Does it mean B? If you pick A, you are choosing a meaning, and it may not be the right one. That was the starting principle.

But there was a certain amount of courage about it. Rules were found where either there was an ambiguity in the text or an apparently wrong meaning in the text, and the Committee concluded that we could change when the change conformed to actual current understanding notwithstanding the rule text.

One small illustration and then the big one. The small illustration, Rule 33 from 1970, said that an interrogatory "is not necessarily objectionable" merely because it asks for a contention or an opinion. It's "not necessarily objectionable." Maybe it is. Maybe it's not. And we're not going to tell you which is which. What do you do with that one? The Committee struck "necessarily." Just took it out, because the lawyers on the Committee reassured us that nobody pays any attention to that. They read the word out of the text. We can take it out. So the Committee did.

Now, the big one that you have heard. Judge Fitzwater began with it. Bryan Garner tells us that as a word of command, “shall” is hopelessly, irretrievably ambiguous. He identifies seven and maybe eight different meanings for the word “shall.”<sup>53</sup> Hence, the absolute proscription. The words that substitute for “shall” in the Rules are “must,” “should,” “may,” “is.” In the Constitution, “shall be,” in the passages we heard, means “is.”

Rule 56. In the style project, as to the word “shall” as it appeared in the Rule from the beginning in 1938, the Committee considered what to substitute. And very deliberately they chose “should.” A couple of Supreme Court opinions, a respected treatise, and some lower court opinions all say that there is discretion to deny summary judgment even if the summary judgment record does not seem to show a genuine dispute as to any material fact.<sup>54</sup> Many reasons are advanced for why that is the way it should be. But that discretion is a good thing.

We published the Rule, with an extra long period for public comment. No comment, no reaction. December 1, 2007, Rule 56 says “should” grant summary judgment. Then the Committee decided to undertake a project to revise the procedures of Rule 56. The project was determined not to affect the summary judgment standard, not to touch the *Celotex* identification of the moving burden under Rule 56,<sup>55</sup> but was launched to address the procedures that surround it. When the draft proposal was published, it carried forward the style “should grant.”

All pandemonium broke loose. The lawyers representing those who typically moved for summary judgment, also known as defendants, suddenly noticed. This time they were reading Rule 56. You can’t do that. It says he’s entitled to judgment as a matter of law. “Shall” means “must.” Got a right to it. Oh.

And the Committee worried about that at great length, with very substantial continuing support for the proposition that “should” is the proper concept but also concern about trespassing on that

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53. See GARNER, *supra* note 7, at 29-30.

54. See FED. R. CIV. P. 56 committee note to 2007 amendments (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948); 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2728 (3d ed. 1998) (collecting cases)); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

55. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

voluntarily fenced-off zone. What is the standard? What is the moving burden? And thus they came face to face with the conflict between two principles. One is, “Thou must not say ‘shall.’” And the other is, if you find an ambiguity that you cannot comfortably resolve, you carry the ambiguity forward and keep the word. “Shall” was restored deliberately to carry forward ambiguity, to allow the question whether there is discretion to deny summary judgment to continue to work out in practice.

Now, that’s the story. That is why “shall” has been restored in pristine, solitary splendor in Rule 56, and if any of you as you go through your careers—now I’m pessimistically focusing on the young among you—have a chance to push that toward “should” or even “may” grant summary judgment, more power to you.

One last thing. This is another sort of pet illustration. Judge Fitzwater noted the concept, when you have the same thought expressed in different rules, you should use the same words to express it. One illustration perhaps will suffice. Before the style project, the Committee completely rewrote Rule 51 on jury instructions. One issue to be resolved is what I prefer to think of as fundamental error. All but the Seventh and Ninth Circuits had recognized that, notwithstanding a failure to properly request and object, the court of appeals may notice and may reverse for a fundamental error in a jury instruction.<sup>56</sup> It seemed a good idea to write that into the Rule and make it uniform.

How do we express it? Well, at some point the thought occurred, well, there is a plain error rule in the Criminal Rules, Rule 52, an all-purpose, general, useful plain error rule. Let us use the language “plain error that affects substantial rights” from the Criminal Rule in the Civil Rule. A matter of some easiness, but is this really the same thought? Are there differences? Having decreed that the same words must be used in the Rule, the Advisory Committee and the Standing Committee approved a Committee Note that says the language is borrowed from Criminal Rule 52, but there are differences in the context between civil jury instructions and other contexts, and the words will be applied to reflect the differences in context. The Committee Note says that this doesn’t mean the same

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56. See WRIGHT, MILLER & KANE, *supra* note 54, § 2558 (collecting cases and noting that “the Seventh and Ninth Circuits stood alone in reading Civil Rule 51 literally”).



thing. It shouldn't mean the same thing. If we're going to use the same words so we feel better, that's the sort of thing that should be kept in mind as rules are continually styled and restyled. Be very sure that you mean the same thing before you use the same words.

PROFESSOR CAPRA: Thank you, Ed. So that's the conclusion of our panel. I can say for the record that we went over time, so we're going to take a ten-minute break, and then we'll reconvene. But before we do, I want to introduce in advance the moderator of the next panel, since he probably won't introduce himself, and that's Professor Ken Broun, who was on the Evidence Rules Committee from 1993 to 1999 and since then has been a valuable consultant to the Committee. He was so good, they never put another academic on the Evidence Rules Committee. He is our resident academic. He was referred to in Judge Ericksen's statement as the best researcher in the world, and I can agree with that.

#### LOOKING FORWARD

PROFESSOR CAPRA: I want to call the Symposium back to order, and I just wanted to relate a statement made to me privately during the break by some Advisory Committee members who were there during the restyling. They asked me to state for the record that they signed on to the project because experienced people had made the judgment that this was a worthwhile project, and out of respect for Judge Hinkle and his excellent leadership. Is that a fair statement?

JUDGE BRODY: Yes.

PROFESSOR CAPRA: That's Judge Anita B. Brody, a valued member of the Advisory Committee during the restyling, who said that's what I said.<sup>57</sup> So now I'll turn it over to Ken Broun.

PROFESSOR BROUN: Thanks very much, Dan. It's really my pleasure to be here today, and it's been my great honor to be involved with the Evidence Rules Committee for eighteen years, which is a long time seeing as I'm only twenty-seven years old. But this was a great project. It was wonderful to work and see the great intellectual discussions that took place, led by Dan and Joe, and the

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<sup>57</sup> Judge Brody is a United States District Judge for the Eastern District of Pennsylvania.

great input put in by both restyling advocates and restyling skeptics.

This is a product of a lot of work. I had only minor roles in this. I was the guy that was sent out to research the esoteric parts of it, inferences versus opinion, “stress of excitement,” which is really an historic phrase, which is really important. I’ll introduce the panelists as they speak. It is much more heavily academic than the other panel, but I think that the speakers are going to talk about the judicial use of this.

I’ve been teaching from the restyled Rules this semester, and it is somewhat easier, but there are still things in the Rules that are counterintuitive, and they didn’t change in the restyled Rules. But that’s okay. I do remember in the earlier days of the Committee when Judge Winter was the chair, and I remember him commenting to an academic on the Committee who said, “You know, that’s really hard to teach. If the rule is that way, it’s really hard to make the law students understand it.” And Judge Winter said, in characteristic fashion, “That’s your problem.”

I’d first like to introduce Judge Harris Hartz, who was a member of the Standing Committee and who was very much involved in this. He’s going to speak first on the interpretation of the restyled Rules.

**JUDGE HARTZ:** I am not an orator. But I can dream. And I have a dream. I have a dream that after the restyled Rules of Evidence take effect in December, all controversy on evidentiary issues will end. Appellate judges will agree with one another, so our decisions will be unanimous. We will always affirm the district court, because it will always get it right. In fact there will be no issues for the district court to resolve because the litigating attorneys will refer to the restyled Rules and agree on what is admissible and what is not. Law students will be able to read the Rules and understand them fully. Evidence courses will not be necessary. Nor will evidence professors. Best of all, Dan Capra can fulfill his lifelong dream of retiring and moving to New Mexico.

But like all who must submit to reality, I also have a Plan B. And my assignment this morning is to talk about special problems or concerns that may arise in interpreting the restyled Rules, in contrast to typical rule changes.

The restyling of the Rules of Evidence is a wonderful accomplishment. Almost all the impact of the restyled Rules will be to elimi-

nate problems or concerns, not raise them. The Rules are clearer and more accessible. Problems will arise, however, when the restyled Rules are ambiguous or when they appear to state a proposition contrary to the judge's prior understanding of the Rules. As with any problem in understanding a rule of practice or procedure, a review of the "statutory history" of the rule may be helpful. But the way in which that history should be used will be quite distinctive when one is construing a restyled rule.

Ordinarily, the initial assumption when the language of a rule has been changed is that the change effects a change in substance. At the least, the change must have been intended to eliminate a construction of the rule adopted by some, even if only a small minority, of courts.<sup>58</sup> But that assumption must be reversed when the change is the result of only a restyling effort. The court must assume that the rule means the same as it did before restyling.<sup>59</sup> This proposition has special force when the statute explicitly states that no substantive change is intended.<sup>60</sup> And it should apply to rules as well as statutes. One important consideration is that those enacting the new language (or, in the case of Congress with respect to new rules of practice and procedure, those who could veto the change) may well not examine the change as carefully when they have been informed that no substantive change is intended.<sup>61</sup>

I will try to indicate through a few examples how the fact that a rule is a restyled rule may affect how it is interpreted. The restyling may create an ambiguity, eliminate an ambiguity, or inadvertently change the rule.

First, creating an ambiguity. Rule 404(b) concerns the admissibility of evidence of uncharged misconduct. The pre-restyling version spoke of "[e]vidence of other crimes, wrongs, or acts." I had assumed that the function of the word "other" was to signal that the Rule addressed only matters "other than" the charged misconduct. There

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58. See, e.g., FED. R. EVID. 404(a) 2006 advisory committee note ("The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait.").

59. *Finley v. United States*, 490 U.S. 545, 554 (1989) ("Under established canons of statutory construction, it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." (internal quotation marks omitted)).

60. See *Newton v. FAA*, 457 F.3d 1133, 1142-43 (10th Cir. 2006).

61. See *id.* at 1143.

was, of course, no restriction on evidence of the crime with which the defendant was charged. The restyled Rule, however, has moved the word “other” so that the Rule now speaks of “[e]vidence of a crime, wrong, or other act.” Does the movement of the word “other” mean that now even evidence of the charged crime is subject to the requirements of Rule 404(b)? If the new Rule 404(b) were not a restyled rule, one might assume that the movement of the word had a substantive purpose and must have been intended to bring all evidence of crimes within the purview of Rule 404(b). But because the change is merely a restyling, that interpretation can be rejected because no substantive change was intended.

A similar, but slightly different, issue arises with respect to the restyled business-records exception to the hearsay rule, Rule 803(6), and a few analogous rules. The Rule states that a record is admissible if—and then lists five conditions. The last condition is “neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.” Does the proponent of the evidence have the burden of negating lack of trustworthiness, or does the opponent have the burden of proving lack of trustworthiness? The Rule is ambiguous, but because the proponent of the evidence certainly has the burden of persuasion with respect to the first four conditions and the five conditions are treated in parallel fashion, one could infer that the proponent must prove trustworthiness. On the other hand, the pre-restyling Rule states that the record is admissible if certain conditions are met “unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.” Most judges would construe the “unless” language as placing the burden on the opponent to show lack of trustworthiness. Should a judge construing the restyled Rule infer that because the restyling was not intended to change any substance, the burden should be on the opponent to show lack of trustworthiness?

Second, eliminating an ambiguity. Ambiguity provides an opportunity for creativity—sometimes good, sometimes bad. Clarification in the restyling, even if it is consistent with all precedent, can prevent “growth” in the Rules of Evidence that would otherwise have been possible. I have no examples from the restyled Rules, but the Supreme Court’s decision in *Tome v. United States* can illustrate

the point.<sup>62</sup> The Rules of Evidence permit the admission of a prior consistent statement “to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.” The Court in *Tome* said that the prior statement must predate the alleged fabrication, influence, or motive. If, in the absence of the Supreme Court decision, the Rule had been restyled to clarify this predating requirement, it may well have been consistent with all reported federal decisions, but it would have precluded a thoughtful (creative) court from construing the Rule to permit admission of a prior consistent statement that postdated the alleged influence even when the circumstances of the statement strongly rebut the claim that testimony was the result of improper influence.<sup>63</sup> Could a court rely on the ambiguity in the pre-restyled version and reach a result contrary to the restyled language because no substantive change was intended?

Finally, restyling, by focusing on the need for a better expression of the rule, may inadvertently change the rule. Again, I do not have an example from the restyled Rules of Evidence. But I did encounter the issue in construing the restyled Rules of Civil Procedure. The pre-restyled Rule 4(i) said, in essence: “Service upon the United States shall be effected ... by also sending a copy of [the summons and of the complaint] ... to the Attorney General.” Restyled Rule 4(i) improved the language to say: “To serve the United States, a party must ... send a copy ... to the Attorney General.” The issue in my case was whether the pro se plaintiff properly served the United States by personally mailing the summons to the Attorney General. The restyled Rule would certainly suggest that the service was proper. But researching the pre-restyling Rule led the panel to conclude that all service, including the mailing, had to be effected by a process server or the marshal. Because the restyling was not intended to change any substance, we followed the prior Rule, construing the language “a party must” as implicitly recognizing that the party must act through a process server.<sup>64</sup> Another court, however, could quite reasonably have determined that this con-

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62. 513 U.S. 150 (1995).

63. See *State v. Altgilbers*, 786 P.2d 680, 684 (N.M. Ct. App. 1989).

64. See *Constien v. United States*, 628 F.3d 1207, 1213-15 (10th Cir. 2010).

struction was too much of a stretch, regardless of the restylers' intent not to change any substance.

In short, restyling differs from the typical rule change because when the Advisory Committee note says that no substantive change is intended, a court construing the restyled rule may find it advisable, or even necessary, to adopt what would otherwise be a strained reading of the restyled rule in order to conform its meaning to the predecessor rule. It will be interesting to see whether the restyled Rules of Evidence give rise to such look-backs.

PROFESSOR BROUN: Thank you very much, Judge. The next speaker is a recall from the first panel. We have drafted her again. This is Judge Joan Ericksen from Minnesota, who's going to talk to us now in a forward-looking way as opposed to her backward-looking way. I'm also going to ask her to talk about what the trial judge does when she finds out that what she thought was a duck was now, it turns out, a bald eagle, and she's facing federal criminal charges.

JUDGE ERICKSEN: Absence of mens rea! So now I'm going to talk about how I was all in favor of the restyling. I have been asked to speak just briefly from a district judge's perspective about this completely imaginary, hypothetical, make-believe world in the future in which a substantive change turns up even though we tried to avoid it. What's going to happen? What do you do? What's the right thing to do?

And let me just ask, because we have second-year students here. Have you all taken criminal procedure? Do you all know about *Leon*?<sup>65</sup> Search warrants are okay if done in good faith; you need that to understand what I'm about to tell you. So I have a friend who, when I was being sworn in years ago to the Minnesota Supreme Court, came up to me. And I thought, "Well, okay, here's another person who's going to say something nice to me." And what he said was—since I'd been a county court judge before that—"So now in your new job, are you still going to sign search warrants? Because I've spent the last week defending one that you signed as a county judge." And the only thing I could think of to say in my stunned state was, "What's the matter, you never heard of *Leon*?"

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65. *United States v. Leon*, 468 U.S. 897 (1984).

And so here, I guess the corresponding answer would be, “What’s the matter, you’ve never heard of harmless error?” But it is good to think in advance about what might happen when something is uncovered because, as you heard before, hardly ever did we give these Rules a reading that we didn’t see some new wrinkle or something that we had missed before. So it’s actually realistic.

Now, here’s my belief: in the event of a significant substantive change, if the rule indubitably says what it says, it doesn’t matter what the Advisory Committee comment says. It says what it says, and you must apply the rule as it is written. The Committee can ultimately change it or fix it, but until then, it’s my belief that the rule has to be applied the way it’s written. Think of it this way. We’ve spent years. We’ve gone to extraordinary lengths to make the Rules more accessible and easier to understand for the common person, also known as the *pro se* litigant. But the common person and I don’t think that in that process we meant to insert hidden meanings in the form of an *opposite* meaning—resulting in a Rule understandable only to the knowledgeable few who know how the former rule was interpreted and then can point to the comment and say that no substantive rule change is intended. Alice would be in Wonderland.

And the Committee, of course, has an ongoing responsibility to monitor the development of evidence law, and that applies to monitoring how the changes are going to play out. But it’s going to be more difficult to keep track of this than to keep track of substantive changes in the Criminal or Civil or Appellate Rules because of some of the things I mentioned earlier. You’re not going to know about very many of them. It’s possible that an issue is going to be directly brought to the Committee, maybe by a judge or one of the lawyers, but it probably is not most people’s first inclination upon seeing a problem to notify the applicable Rules Committee. I mean, who would ever think of that?

Something might bubble up in the blogs or the legal publications that would alert the Committee, and there might be an appellate opinion or a district court opinion on it, and then you would know. So I guess there’s comfort in the fact that the more significant the problem, the more likely it is that the Committee will ultimately find out about it and be able to do something about it.

But more likely than a substantive change that seems glaring, once it's called to your attention, is a more subtle change. And these are going to be really difficult to ferret out because of the way evidence questions are resolved. A lot of discretion is exercised in evidentiary rulings—more exercise of discretion is there than is actually, technically called for in the Rules. I know you don't know that, so here's a shock.

So in the exercise of this discretion, the change might make a difference, but how are we ever going to know? For one thing, the ruling won't necessarily be appealed, and if it is appealed, it might be harmless error, and so it's not going to get a rigorous workup. And even if you go back to the trial and read the transcript of the conversation at sidebar, Attorney One will object, citing the language of the restyled rule. Attorney Two will respond that no substantive changes were intended. The judge will turn to the book and observe that the Committee Note does indeed say what Attorney Two says. But is the judge really going to think back to what the ruling would have been under the old rule and then compare it to the new rule? I think that's very, very unlikely.

The more likely thing is that it's not going to be entirely clear to anybody what the old ruling would have been. And unless things are going to be really confusing, everybody's going to have the Rules. So the attorneys and the judge are all looking for the answer in the same Rules. So as a practical matter, if you go back and look at this transcript, trying to figure out if the change in the restyling has made any difference, you'll see lip service being given to the principle of "no substantive change." But the thinking behind the ruling, as well as the vigor of the arguments of the lawyers, is going to be based on a reading of whatever the new rule is that's under consideration, the plain reading. Or it might not be a plain reading. In the name of vigorous advocacy, it could be a tortured reading borne of a desire to capitalize on a perceived change in the legal landscape. Uncertainty is bad for business, but it's good for legal arguments, and we're about to enter a period where lawyers perceive a disturbance in the force. If that's true, we will almost certainly see creative arguments, and there's no way to predict them all.

More experienced judges are going to have a stronger sense of what the restyled Rules meant in the old days than less experienced judges. A newer judge, perhaps one recently appointed from a state



court, won't necessarily have the history to fall back on if there's some new ambiguity. But all judges are going to do what judges do all the time, which is try to do the right thing. They'll try to do the fair thing, and they'll apply the Rules as best they understand them.

So probably the transcript will not read like this: "The rule is different now, so I'm going to sustain (or overrule) the objection. Counsel, I understand what you are saying, but these changes aren't supposed to be substantive, so I will not be treating them as such." And there's your record, but it will be unknowable whether the restyling made a difference.

Now, I think the restyling will make a difference, but in a good way. It's a rare judge who has a perfect handle on all the Rules. For example, the rule when extrinsic evidence of a prior inconsistent statement is to be allowed. I'm still a little peeved about a ruling that I received on this years ago when I was trying a case in front of a really good judge. One purpose of going through this whole restyling exercise was to make it more and not less likely that proper rulings will be made.

Future transcripts are probably not going to read: "Counsel, here's my ruling. I would have made a contrary ruling under the old rule, but because I've never been able to make heads or tails out of the old rule, I would probably have gotten it wrong." But just because nobody's going to say that does not mean that it won't be true. So I hope it improves, but in answer to the question about what we're going to do, I think we're going to do the best we can.

PROFESSOR BROUN: Thank you, Judge. The next panelist is Katharine Schaffzin from the University of Memphis, who has written an excellent article that appeared in the *Tennessee Law Review* that's included in your material on dealing with sacred phrases.<sup>66</sup>

PROFESSOR SCHAFFZIN: All right. Thank you.

When Dan Capra first called me and asked me to speak, it was a week before my article in the *Tennessee Law Review* came out in hard copy, and it occurred to me after I got off the phone and was discussing it with my husband that he may not have read my article

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66. Katharine Traylor Schaffzin, *Out with the Old: An Argument for Restyling Archaic "Sacred Phrases" Retained in the Proposed Amendments to the Federal Rules of Evidence*, 77 TENN. L. REV. 849 (2010).

yet. And I said to my husband, “He knows I’m a critic, right?” I wasn’t sure if he would still want me to speak. But he made it clear that, yes, he knew I was a critic and that I would be speaking on a topic that was very sensitive to the Advisory Committee: sacred phrases and how they would be treated in the restyling process.

Before I get to the issue of sacred phrases, I want to start from the basic premise that I think that the restyled Rules are a huge improvement. As an evidence professor, I think it will make my job so much easier to explain certain concepts to law students, so I greatly appreciate the work of the Advisory Committee, and I’m very fortunate to be the beneficiary of that work.

After reviewing the Rules and while criticizing them, I decided to survey my evidence class on the restyled Rules. I intentionally, last spring semester, taught the current Rules without any mention of the restyled Rules until the end of the semester, and then I gave my students an excerpt of the Rules with the current rule and the proposed rule side-by-side. I included only the three rules that I thought were most altered from the position of an evidence professor. Those were Rules 404(a), 609, and 801.

I then surveyed the students on their opinions of those rules, the current rule versus the restyled rule and, specifically, as to whether the stated goals of the Advisory Committee had been achieved in restyling those rules. I asked whether or not they found inconsistency in the current rule or the restyled rules, repetition, redundancy, ambiguity, or archaic language—the five stated goals of the Advisory Committee. I also asked them about the broader goals of the Advisory Committee: Is the restyled version an improvement over the current rule? Is it formatted to achieve a clearer presentation of the rule? And finally, is it more easily understood?

First of all, I did ask the students if they had been exposed to the restyled Rules before taking the survey because I wanted to be able to properly discount those students who already knew about the restyled Rules when they were learning the current Rules, and 75 percent of students strongly disagreed that they had any familiarity with the restyled Rules whatsoever. Seventeen percent disagreed that they had any familiarity with the Rules, and less than eight percent either agreed or strongly agreed that they had familiarity with the Rules.

Apparently some of my students were actually going out on their own and had found the restyled Rules on their own, but the vast majority didn't even know they were out there. So these comparisons really were the students' true views of the rule, having seen the restyled Rules for the first time. I could go into great detail about the results of the study, but I won't at this time. Generally, the students overwhelmingly found the restyled Rules to be an improvement. Over 90 percent found the restyled Rules to be an improvement over the current Rules.

The students' biggest complaints were not regarding inconsistency, repetition, or redundancy. Their biggest complaints about the current Rules were ambiguity and archaic language. The vast majority of students found all of these problems resolved in the restyled Rules. I asked the students to be specific when criticizing the current rule or noting an improvement in the restyled rule, and the phrases that were repeatedly cited by students as being either ambiguous or archaic, which probably won't surprise you: "action in conformity therewith," "trait of character," "shall," "herein," "therefrom," "assertion," "admission by a party-opponent," "manifested in adoption," and "servant."

And as you all know, of that list, the only word or phrase remaining in the restyled Rules from that list is "assertion," which still remains in Rule 801. For the most part, the concerns of students were resolved, although evidence professors will still have to work hard to explain what an assertion is to our students, and that's fine. We have practice with that.

The students were overwhelmingly pleased with the results of the restyling. I am extremely pleased. I can't wait to teach evidence next spring using the new Rules; I think the students will be able to understand them more readily. But that being said, and knowing that I absolutely think that the restyled Rules are a great improvement and am very thankful to the Committee for its work, I do have a criticism regarding the treatment of sacred phrases.

The Advisory Committee resolved not to make any substantive changes, as all of the prior rules Committees had done in their restyling efforts, and defined as a substantive change would be the alteration of a sacred phrase. The Committee defined a sacred phrase as any phrase that is so familiar in practice that to alter it

would create an undue disruption.<sup>67</sup> I broke that down into three elements constituting a sacred phrase: (1) a phrase that's so familiar in practice; (2) that to change it would create a disruption; (3) and that disruption would be undue.

The problem is that the Advisory Committee didn't necessarily follow that definition in identifying sacred phrases. Now, the caveat is, I have no idea what the Advisory Committee deemed a sacred phrase because there's no list. So I had to guess that the Committee deemed phrases which remained unchanged that could nonetheless have been improved stylistically sacred. I am guessing here, so please forgive me.

To determine which phrases were familiar in practice, I decided, why don't I do a little research and see which phrases were around pre-1975? The reason I looked before 1969 and 1975 is because all phrases in the Federal Rules of Evidence have gained familiarity in practice post-1975. I think it's unfair to make a distinction among the phrases post-1975 because every phrase has been discussed in appellate decisions post-1975.

I looked to the historical significance of phrases in existence pre-1975 and pre-1969, and I found discrepancies in how the Committee treated these phrases. Some phrases that were historically significant pre-1975 and pre-1969 were nonetheless amended, so clearly the Advisory Committee deemed these phrases, which are familiar in practice, to be less than sacred. And then there were phrases with no historical significance pre-1969 that nonetheless were maintained, although they could have been amended to achieve the goals of the restyling efforts.

For example, "admission by a party opponent" had extreme historical significance before 1969. That was a phrase that existed at common law and was used and, therefore, familiar in practice pre-1975 and pre-1969, but nonetheless, that phrase was amended to "an opposing party statement" in the restyled Rules. The phrases "unfair prejudice," "substantially outweighs its prejudicial effect," and "outside influence brought to bear" are all phrases that, to me, ring as archaic, but which had no significance prior to 1969. There was no mention of them at common law or in the Model Code. Nonetheless, they were retained in their current state in the

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67. *Id.* at 875.

restyled Rules, so my assumption is that they were deemed sacred phrases.

I found inconsistencies, which led me to believe that the determination of what was a sacred phrase and what was not a sacred phrase was somewhat an arbitrary decision. Then I looked to whether or not the changes to any sacred phrase, any phrase familiar in practice, would create a disruption or whether that disruption would be undue. Clearly, the Advisory Committee had plenty of work to do and could not have conducted empirical studies to determine which phrases, if altered, would create undue disruptions. So it was left to its own gut instinct as to what would create an undue disruption if the Committee were to change it.

I came to the conclusion that any revision is going to create a disruption. The entire restyling of the Rules is creating a disruption. I had a hard time understanding why holding back on certain phrases would create less of a disruption. There was one published comment by Thomas McCutchen, who's a Fellow of the American College of Trial Lawyers, who said, "In the area of rules, it is important to know them and it is not nearly as important that they be changed constantly.... Stability is a great thing. Relearning the wheel every year is a negative."<sup>68</sup>

Mr. McCutcheon didn't want the Committee to make any changes if you read the full context of his comments, but he did urge the Committee: if you're going to make your changes, do them now. Don't continue the amendment process beyond this restyling and have attorneys and judges relearning the Rules every time there is a new amendment.

I came to the conclusion that because the determination of which phrases were sacred and which were not was arbitrary, perhaps the Committee should have just gone all the way. If the disruption is already occurring, why not include in the disruption amendments to the sacred phrases? Arguably some sacred phrases have already been restyled and are included in the restyled Rules.

The Committee did an excellent job in making those changes. Getting rid of "admission by a party opponent" is a wonderful thing

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68. Letter from Thomas E. McCutchen to Peter G. McCabe, Sec'y, Comm. on Rules of Practice & Procedure (Nov. 2, 2009), *available at* <http://www.uscourts.gov/RulesAndPolicies/rules/2009%20Committee%20Folders/EV%20Comments%20/2009/09-EV-006-Comment-McCutchen.pdf>.

in my opinion as far as educating new lawyers, and I wish that the Committee had gone further and revised all of the sacred phrases that were retained which were capable of improvement.

The one caveat to amending a sacred phrase is “unfair prejudice.” It is a sacred phrase. I don’t think it’s capable of improvement, so that one I think the Committee was right to leave in. There’s no better way to say “unfair prejudice.”

So thank you very much. I really look forward to using these new Rules in the classroom next semester.

PROFESSOR BROUN: Thanks, Kate. I call next on Professor Roger Park from Hastings Law School. Roger is a long-time friend and colleague in the teaching of evidence, and he’s going to talk some about his students and some about some other possible revisions. Roger.

PROFESSOR PARK: Thank you. I teach evidence twice a year at U.C. Hastings, and this fall is the first time I’ve used the restyled Rules. I think they’re a great improvement. I got a little jolt when I heard Judge Hartz describe his dream about rules that were so clear you didn’t need law professors, but I think we’re probably safe from that.

I thought the Rules—at least the Rules that I taught—succeeded magnificently in avoiding substantive changes. Now, I didn’t think of the more subtle kind of substantive change that Ed Cooper described, the inevitable one, but in terms of changes that would lead to different results because of the change in language in these Rules, I didn’t think that was a problem with any of the Rules that I taught. So I didn’t ask students to compare the restyled Rules with the original Rules. I just gave out a handout that had the side-by-side comparison and told them to read only the restyled Rules when a rule was assigned in the syllabus. After hearing this morning’s talks, I might ask students to compare them not for purposes of trying to see whether there are any different shades of meaning, but just for purposes of saying that you can really improve the drafting of rules by using these principles. But then again, I may just focus on evidence principles.

My favorite change is the change in the admissions rule. It removes the implication that an admission has to be some kind of concession against interest when made. I also like taking “business” out of the business records rule.

I hadn't thought of the possible problem that Judge Hartz mentioned: when you take the "unless" out from in front of the "trustworthiness," that might be interpreted as shifting the burden of proof. There's a case in the casebook I use that says that the opponent has the burden of proof of showing untrustworthiness, and I guess I'll emphasize that a little bit more.

I didn't do an attitude survey, but I did attempt to determine whether it affected the students' interpretation of the Rules by asking them questions about the Rules using hypotheticals. I use an audience response system when I'm teaching most of my classes, and so I display something on PowerPoint, and the students use clickers to answer the questions. I wait until I have a sufficient number of answers, and then I comment on it. It gives me a few breaks during the class that I didn't have before.

One improvement that I thought the Rules made was to Rule 609(a)(1), which deals with the prior convictions for crimes punishable by more than a year. It used to be one long, involved sentence that started with the phrase, "evidence that a witness other than an accused has been convicted of a crime shall be admitted," and I had noticed that a lot of students tended to think that meant that the only thing that section of the Rule dealt with was evidence of convictions of people other than the accused. So I tried a question in fall 2009 about that on the clickers, and I found that only 29 percent of the students realized that that part of the Rule went beyond witnesses other than the defendant.

I think that the breaking down of the Rule in the two sections, so that you can easily find that it also deals with the defendant, is helpful. Eventually, when they read the cases and so forth, students would have to realize that there's a rule that deals with convictions of the accused, but they don't necessarily find it by leafing through the Rules. And so I asked the same question this semester, and 86 percent of them got the right answer this time, realizing that the Rule did cover both the defendant and witnesses other than the defendant.

I wish the same thing had been done for the former testimony rule. Intuitively, you'd think the exception for former testimony would be a broad one because the hearsay rule seems to be mostly satisfied. There's been cross-examination. The witness testified under oath in a courtroom, but the Federal Rule, as a result of a

revision by Congress, is relatively narrow. It requires not only that the person who cross-examined during the testimony have a similar motive as the present person against whom it's presently offered but also that it be the same person, the same party, or in a civil case, a predecessor in interest. Well, that's all expressed in one sentence in the restyled Rule, as it was before. Look at the document entitled "Handout From Roger Park."<sup>69</sup> The result I was describing just now about Rule 609 is in Part II. In Part III, you'll see that I gave them a question about the former testimony exception, and after they answered, I told them to talk to their neighbors—the other students—and then re-answer. And even after doing that, only 47 percent of them realized that it had the same-party or predecessor requirement. They tended to read it as just having the same-motive requirement.

Now, there could be various explanations for that other than the one I'm giving, but I think it would help there if it were broken down so that the same-party requirement and the same-motive requirement were stated in different subsections. After hearing Judge Ericksen and Judge Raggi, I don't know if you want to incur the transaction costs of doing that just for this, but maybe if you're going to revise the Rules for some other reason, it might be worth considering breaking that Rule down into two sections as was done before.

I have a couple of points at which I did like something in the old rule better than the restyled rule. I'm an outsider, so I wasn't privy to the discussion about the restyling, but one instance is Rules 104(a) and 104(b), the rules about judicial findings of prerequisite facts. Students find those hard to understand, and I think there's an improvement with the existing rules. But one thing that the old Rule 104(a) did was establish that the trial judge makes the decision about foundation facts that have to be found in order to decide whether evidence is admissible. Then it said that the conditional relevancy situation was an exception to that. And in a conditional relevancy situation, the jury decides the fact issue, and all that's required is evidence sufficient to support a finding.

Well, the restyling took out the phrase saying it was an exception, so it seems to me students might think that both Rules apply to the

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69. See *infra* Appendix C.



same piece of evidence. They might think you've got to have evidence sufficient to support a finding, plus the judge decides the fact, and that's not true in a conditional relevancy situation. So I suggested at the top part of my handout that the word "exception" be stuck back in.

The other thing I had some doubts about is Rule 408, compromise offers. Many of our rules, from the hearsay rule to the character evidence rule to subsequent remedial measures, start by saying that a certain use is prohibited, but other uses are permitted. And in those cases the permitted uses are not exceptions to the prohibited use. It's not that you can use it for a prohibited purpose because of an exception. Permitted uses are something different from the prohibited use. Well, that's what Rule 408 used to say. It used to say the prohibited use was proving the validity of the claim, and the permitted use was showing bias or prejudice or negating undue delay. Now it says that proving bias, and so on, is an exception. Well, if it's really an exception, does that mean that the lawyer can say, not only does this show bias, but why would he have made that offer unless he realized his claim was weak? The rule allowing use of compromise offers to show bias is not an exception to the rule against using those offers to prove invalidity of the claim. It gives permission to use the evidence for a purpose other than proving invalidity.

I see I'm supposed to end at 11:34, so I'm not going to explain my final suggestion, but I urge you to read my great improvement of the rule about methods of proving character.<sup>70</sup> Thank you.

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70. The material omitted from the oral presentation concerned a suggested amendment to Rule 405. In his handout, Professor Park proposed that Rule 405 specify that the limitation of character evidence to reputation and opinion testimony applies only to evidence of character offered "to prove that on a particular occasion the person acted in accordance with the character or trait." As Rule 405(b) recognizes, evidence of specific instances of conduct may be used when character is an essential element. But that is not the only situation in which specific instances can be used to show character. Specific acts may be used to show character when, though character is not an essential element, the ban on character evidence does not apply because character is not being used to show action in conformity with character. An example is evidence in a wrongful death action showing that the decedent was a good provider or, in contrast, that he was worthless and dissolute. Character is not an essential element, but it can still be proven, and it can be proven with specific acts. Another example is when the bad character of an employee is offered not to show that he behaved in accordance with character but to show that the employer was at fault in giving him responsibilities.

PROFESSOR BROUN: Thanks a lot, Roger. We appreciate it. The next speaker is Deborah Merritt from The Ohio State University, Moritz College of Law, and she's going to talk about one other possibility of a substantive change.

PROFESSOR MERRITT: Thank you. I want to start, like many other people, by applauding the new Rules. I think that the restyled Rules greatly enhance readability. I'm looking forward to teaching the new Rules for the first time to students; I know how much they will appreciate the more readable language. I also want to acknowledge the unbelievable amount of work that went into the restyling project. The quantity of work is clear when you look at the final product, but it is even more apparent if you look through the Committee materials and listen to today's comments. An extraordinary amount of time, very valuable professional time, went into this project. I know we will reap many rewards from that work, and I thank everybody who participated in the restyling.

I am going to talk about what may be the most boring, yet most important, Rule of Evidence: Rule 1101. That Rule tells us when the rest of the Rules apply. Many students are surprised to learn that the Rules of Evidence don't govern everything that happens in a courtroom. The Rules apply to the main event of trial, but they don't govern sentencing proceedings, bail hearings, and other courtroom events. Nor do the Rules apply to grand jury hearings. This is a surprising concept for people learning about the Rules, but it makes a big difference in the courtroom.

Think, for example, about the rule against hearsay. If a party can present affidavits and other statements from outside the courtroom, that ability changes the nature of a hearing substantially. The power to present hearsay may be tremendously valuable to one party, but disadvantageous to the other. There are also questions of judicial efficiency, of how much time is taken in the courtroom. So it's important to know when the Rules of Evidence apply.

Take a look now at Rule 1101 in the rule booklet or—if you have the Rule memorized—click it up in your brain. Rule 1101 begins by telling us that the Rules of Evidence apply to civil, criminal, and contempt proceedings. The Rule then gives a list of exceptions, proceedings that fall outside the Rules. These exceptions appear in section 1101(d).

1101(d) tells us first that the Rules do not apply in preliminary determinations, when the judge decides whether or not to admit evidence. Of course, that makes sense: The judge must look at the evidence while deciding whether to admit it. 1101(d) also confirms that the Rules don't apply to grand jury proceedings. Finally, section 1101(d) offers a provision called "Miscellaneous Proceedings," which specifies other situations in which the Rules do not apply.

The version of that "miscellaneous" provision in force through the end of November tells us that the Rules "do not apply" to a list of very specific proceedings like bail hearings and sentencing determinations. This current version of the miscellaneous provision reads as an exhaustive list. In fact, to underscore the exhaustiveness of the list, the final entry ("Proceedings With Respect To Release on Bail") is modified by the phrase "or otherwise." That wording suggests that the reference to bail-release hearings includes other analogous proceedings. But the absence of those words elsewhere in the list suggests that the section exhaustively enumerates other "miscellaneous proceedings" excepted from the Rules.

The restyled Rule reads differently in that "miscellaneous proceedings" subsection. The new Rule says that the Rules of Evidence do not apply to "miscellaneous proceedings such as," and then the Rule recites almost the same list of specific proceedings as the one in the current Rule. So we have a shift from an exhaustive list to an illustrative list. Now, anyone who's finished their first-year legal method course might say, "That's clearly a substantive change." How did that occur?

The story gets more complicated at this point. The Committee, as you've seen quite clearly from this morning, was hardly a group of people uneducated in how the Rules work. They knew a lot about how the Rules of Evidence work, and they faced a real challenge here. Despite the very strict language of Rule 1101, and despite policies favoring widespread application of the Rules of Evidence, it was clear that district judges recognized more exceptions than the ones specifically enumerated in Rule 1101. It was also clear that appellate courts routinely affirmed these district court actions, often without any discussion.

This happened most notably in class action fairness hearings. If the defendants in a class action settle with the named plaintiffs, the parties must bring their proposed settlement to the judge. The judge

decides whether the settlement is fair. That determination frequently rests on affidavits and other types of hearsay; judges, in other words, often conduct these fairness hearings without applying the Rules of Evidence. But judges rarely even discuss application of the Rules to these hearings. They simply handle fairness hearings without applying the full Rules of Evidence, and appellate courts affirm the decisions—again, without even mentioning the Rule 1101 issue.

Faced with this situation, the Committee said, “We’re trying to make things more clear. We want people to understand how the Rules of Evidence work. Shouldn’t we tell practitioners who might otherwise fall into a trap for the unwary that this list of miscellaneous proceedings in Rule 1101(d) is not really an exhaustive list?” I’m paraphrasing here, based on the deliberations reported in the Committee’s materials; I wasn’t part of the restyling project. But from reviewing the written reports, it seems that the Advisory Committee purposely altered Rule 1101(d) to make the list of “miscellaneous proceedings” illustrative rather than exhaustive. The Committee did this because judges had treated the Rule that way.

I’ve written in more detail about this change; that article will appear a bit later this fall.<sup>71</sup> As I point out in that article, judicial interpretations of Rule 1101(d) have been more varied than the Committee perceived. A few courts have explicitly addressed the exhaustiveness of the “miscellaneous” provision, and those courts split over the outcome.

The Ninth Circuit, for example, held that the Rules of Evidence govern hearings on motions to suppress evidence.<sup>72</sup> Those hearings, the court observed, “are not enumerated in the exceptions to Rule 1101(b).”<sup>73</sup> Therefore, the court concluded, all of the evidentiary rules must apply to those hearings. A few district courts reached similar results, finding that the Rules of Evidence govern any proceeding not specifically named in Rule 1101.<sup>74</sup>

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71. Deborah J. Merritt, *Social Media, the Sixth Amendment, and Restyling: Recent Developments in the Federal Law of Evidence*, 28 *TOURO L. REV.* (forthcoming 2012).

72. *United States v. Brewer*, 947 F.2d 404 (9th Cir. 1991).

73. *Id.* at 408.

74. *See, e.g., United States v. Vaccaro*, 719 F. Supp. 1510, 1515-16 (D. Nev. 1989) (applying the Rules to a hearing on bond forfeiture); *United States v. Veon*, 538 F. Supp. 237, 249-50 (E.D. Cal. 1982) (applying the rules to a hearing on a criminal forfeiture restraining order); *see also United States v. Honken*, 378 F. Supp. 2d 1010, 1023 (N.D. Iowa 2004)

Other courts reached the opposite conclusion, one that supports the Committee's change. These courts held that Rule 1101's list of "miscellaneous" exceptions was *not* exclusive; the courts excepted other proceedings from the Rules.<sup>75</sup> Many courts, as I've noted, reached this conclusion implicitly—without even acknowledging the issue. The practice was so common that the authors of one prominent treatise bluntly concluded that, despite Rule 1101's apparently exhaustive enumeration, its miscellaneous provision was "not a complete list of the situations in which the Evidence Rules are inapplicable."<sup>76</sup>

So the Advisory Committee faced a difficult situation. Courts followed a common practice that conflicted with the Rule's strict language. A few opinions enforced that strict language, but most courts seemed unaware even of the issue. Did the Advisory Committee follow the right course in adjusting the Rule language to track common practice? Or was that a substantive change?

In the end, I don't think the answer to that question matters. What matters is that the restyling project brought this issue to our attention. Other speakers in the first panel talked about how issues like this one came to their attention during the restyling, and they were able to deal with the problem directly. The meaning of Rule 1101 has not been fully addressed, but perhaps we haven't seen the end of this issue.

The restyled language of Rule 1101 certainly will affect the way that district judges approach exceptions for miscellaneous proceedings. The restyled Rule more strongly favors excepting proceedings from the Rules of Evidence. Judges will feel less compelled to say, "No, I can't make an exception for this proceeding." We'll have to see how that plays out over time.

But, as others have talked about this morning, I rely upon our wonderful common law system—backed up by the Advisory

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(confirming that the language at the end of subsection (d) "does *not* create a 'catchall' category of 'miscellaneous proceedings' to which the Rules of Evidence do not apply. Rather, that language modifies only conditions of release."); *id.* at 1018 (applying Rules to hearing about whether to shackle defendant charged with capital murder).

75. See, e.g., *UAW v. Gen. Motors Corp.*, 235 F.R.D. 383, 386-87 (E.D. Mich. 2006), *aff'd*, 497 F.3d 615 (6th Cir. 2007).

76. 31 CHARLES ALAN WRIGHT & VICTOR JAMES GOULD, *FEDERAL PRACTICE & PROCEDURE* § 8077 (2000).

Committee—to pull us out of any morasses. If the decisions of district and appellate judges don't clarify the scope of Rule 1101's exceptions, or if those decisions lead to a policy result that some litigants oppose, I assume we'll have further evaluation by the Advisory Committee.

Congratulations again to all of you who took part in the restyling project, and thank you for inviting me to the celebratory party.

PROFESSOR BROUN: Thanks very much, Deborah. It's my very great pleasure to introduce Vice Chief Justice Andrew Hurwitz of the Arizona Supreme Court. Not only is he a learned evidence scholar and teacher, but he was also a member of the Rules of Evidence Advisory Committee for six years and an extremely valuable member, both on the restyling project and many other things. And Justice Hurwitz is going to talk to us about whatever he wants to talk to us about, but I think also restyling efforts in Arizona.

JUSTICE HURWITZ: Thank you, Ken. I really appreciate the last part of the introduction because there's something else I want to talk about. I want to talk about sacred phrases so that all of you understand how this process actually worked. The way it worked was that virtually every member of the Committee, largely led by Judge Ericksen, believed *every* phrase in the old Rules was sacred. Professor Kimble believed that *no* phrase in the old Rules was sacred. And therefore on each issue, as we normally did on technical evidentiary matters, we ended up relying on Professor Capra to tell us which ones were sacred and which ones were not, and that worked out pretty well, I think. So whether or not the system was perfect, it wasn't arbitrary at all. It was quite predictable.

With that, let me turn to the topic that I was asked to discuss today, and it's the Arizona restyling efforts. Arizona, like many states, adopted in the 1970s the model of the Federal Rules of Evidence. Why did we do that? I think we did it for two reasons. First, although it may come as a surprise to some people in the audience who focus almost exclusively on federal litigation, almost all trials occur in state courts. State court is where evidence rules are most often applied, and we didn't want our lawyers to have to keep two sets of rules in mind. Whether one was better than the other is an issue you can put aside. You've heard today that evidence rules are emblazoned into the DNA of lawyers. And think about emblazoning two different sets of evidence rules in your DNA.

It struck us as a bad idea. And, of course, the other great virtue was that we got the benefit of federal decisions on issues that came up that might not have come up in our state, and the benefit that other states following the Federal Rules model gave us precedent to use. So it was a good idea.

As always, because we're Arizona, we had some exceptions. For example, we didn't need a Rule 302, which is an *Erie* rule, because we already knew that in state courts, state law applied. We did not adopt the limited cross-examination rule in 611, both because our state had always allowed wide-open cross-examination, and because the observation of lawyers who practiced in both state and federal courts was that no matter what the Rule said, the federal judge generally said, "She's on the stand already. Let's finish this up and get it over with." Rule 403 presented enough of a mechanism to cut off cross-examination in cases of abuse. And we had adopted our own analogue to Rules 412 through 415 in Arizona Rule 404(c) after a long debate, so we did not adopt the federal rules in this area.

So those are some of the notable preexisting substantive differences between the Arizona and Federal Rules. But why was the federal restyling important? Why am I talking about these substantive differences in the context of the restyling? Because as of December 1 of this year, we were going to have two different sets of rules in light of the federal restyling. You can explain to lawyers until the cows come home that under each federal rule, there's a little note that says this wasn't a substantive change. By and large, I think the Advisory Committee accomplished that goal, although I'm sure there are some inadvertent substantive changes along the way, or nuances, as Professor Cooper suggested.

But we were going to have two different sets of rules in about a month from now. And we thought that was not going to be a tolerable situation. The purpose of having rules modeled under the Federal Rules is that lawyers only have to learn one set of rules. Whether or not the federal restyling was a good idea, it placed us in jeopardy of departing from the whole reason of state conformity with the Federal Rules.

So we put together a committee, which unfortunately I was asked to chair, which was asked to look not only at the restyling but also

at a separate topic that I think plagues many of the states.<sup>77</sup> We are not blessed in Arizona with a standing committee on the Rules of Evidence. So whenever a change is made in the Federal Rules of Evidence, sometimes the state rules are changed, but only if somebody brings it to the court's attention. Our court is a plenary rule-making court. We don't have to ask the state legislature to approve rules. We have the constitutional primacy to approve rules. But those things don't happen automatically.

After we promulgated Rule 502 at the federal level, something many of us spent a lot of time and effort on, I realized a year later that we didn't have it in our state rules. What do you do? Well, I called Patricia Refo, whom many of you remember as a member of the Evidences Rules Committee, and she made a rules proposal, which we unanimously adopted very quickly.

But this pointed out that our rules had departed from the Federal Rules in a number of respects as the Federal Rules had been amended over the years, and so we undertook not only to look at the restyling, but also to look during this process at where our rules were different than the Federal Rules, why they were different, and whether or not we should conform in restyling and substance in the places where our rules were different.

So what the restyling effort at the federal level did was force us to go back and take a look at our rules substantively—even though that wasn't the goal at the federal level. You've heard other people talk today about what a wonderful committee the Evidence Rules Committee has been over the years. I echo those sentiments. If you think about eight or nine or ten evidence wonks in a room arguing about stuff that they are interested in, it's a wonderful process. It's a terrific thing.

At the state level, what we did was go through rule by rule, appoint a subcommittee to look at each rule to see whether or not there was a disconnect between the state and federal rules, and if so, why there was such a disconnect, and whether or not we wanted to keep it. By and large, we concluded that where there were

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77. See Order Establishing the Ad Hoc Committee on the Rules of Evidence, Admin. Order No. 2010-42 (Ariz. 2010), available at <http://www.azcourts.gov/Portals/20/Ad%20Hoc%20Evidence%20Committee/AO201042.pdf>. See generally *Ad Hoc Committee on Rules of Evidence*, ARIZ. JUD. BRANCH, <http://www.azcourts.gov/rules/AdHocCommitteeonRulesofEvidence.aspx> (last visited Mar. 2, 2012).



disconnects between the two sets of rules, they were inadvertent. We just had not amended our rules to keep up with the Federal Rules. So, we suggested in most of these cases that we amend our rules and adopt the federal restyling.

In some circumstances, however, I think we improved on the federal product. For example, Rule 801(d)(1) requires that when a witness is on the stand and has made a prior statement, that statement may be introduced for the truth of the matter only if it were sworn. None of us could figure out why that was there. So I called Dan Capra. And Dan said, “We didn’t want it either. Congress forced that on us some time ago.”

So we didn’t adopt that. We thought about it, and if there’s no doubt that the statement was made but there was some doubt about *when* the statement was made, the judge may exclude it under the 401 through 403 analysis. But if, in fact, you have a written statement signed by somebody who says, “Yes, I said that and signed it, but I no longer believe it,” not admitting it for the truth of the matter simply because the police didn’t bring in a notary at the time, struck us as probably not a useful exercise, so we didn’t do that.

With apologies to the Department of Justice, we didn’t adopt that part of Rule 408(a)(2) which allows compromise offers to be used by them—and only by them—against the compromiser. I didn’t like it when our committee adopted it, and Patricia Refo didn’t like it either, so we decided it just wasn’t worth sticking into our rules. So on a couple of occasions we just decided not to adopt things that had been changed substantively at the federal level, because we thought not only were they inconsistent with unique Arizona practice but just because for one reason or another the committee hadn’t thought through those things—as in the case of the congressional issue—or the changes did something which a number of the members of the committee disagreed with.

We confronted also the wonderful note to restyled Rule 608, which recognizes that although Rule 608 limits the use of certain evidence to cross-examination, it is trumped by Rule 607.<sup>78</sup> The Advisory

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78. See FED. R. EVID. 608 advisory committee’s note (“The Committee is aware that the Rule’s limitation of bad-act impeachment to ‘cross-examination’ is trumped by Rule 607, which allows a party to impeach witnesses on direct examination. Courts have not relied on the [phrase] ‘on cross-examination’ to limit impeachment that would otherwise be permissible

Committee restyling note recognized that but said that because we're not allowed to make substantive changes during the restyling, we're going to leave this inconsistency in the Rules. What do you do then if you're a state that has that inconsistency in the rules? Do you fix them, thereby making our rules different than the Federal Rules but consistent with the federal case law? Or do you just sit around and wait for the Federal Rules Committee to make the change?

We ducked the issue in a similar fashion by saying that our committee was put together simply to decide whether or not to conform to the Federal Rules both in restyling and substance, and if there were problems in the existing Federal Rules, we would take them up separately and not at this time.<sup>79</sup> But for those of you who've read the report carefully—and I hadn't really focused on it until we spent some time on it—the note to Rule 608 is just wonderful. It said, "This rule means nothing. We recognize it means nothing, but we're powerless to change it at the moment. And most people don't really have to screw around with it very much, so we may never change it in the future either." If it ain't broke badly, don't fix it.

The thing that we spent most of our time on, a topic on which the Federal Committee spent almost no time at all, is Rule 702. Recall what happened with Rule 702, because of the interesting difference between judicial decision rulemaking and committee rulemaking. The Supreme Court decided *Daubert* under the old version of Rule 702 and Arizona still had the old version of Rule 702.<sup>80</sup> Our rule had never been amended.

The Supreme Court made a decision in *Daubert*, about what Rule 702, I think, should mean, as opposed to what it actually said. The

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under Rules 607 and 608. The Committee therefore concluded that no change to the language of the Rule was necessary in the context of a restyling project.”).

79. In December 2011, the Arizona Supreme Court received a petition to amend Arizona Rule 608 to eliminate the facial inconsistency. See Petition to Amend the Arizona Rules of Evidence at 2 (Dec. 20, 2011), available at [http://azdnn.dnnmax.com/Portals/0/NTForums\\_Attach/11220164359671.pdf](http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/11220164359671.pdf).

80. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588 (1993) (“Rule 702, governing expert testimony, provides: ‘If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.’”).

Committee dutifully—because the Committee is a branch of, or subject to, the Supreme Court after all—then changed Rule 702 to conform to the Supreme Court’s *Daubert* opinion.<sup>81</sup>

Our supreme court, years before I got on it, in a three-to-two decision said in effect, “No, we still like *Frye*,<sup>82</sup> and our rule reads the same way the Federal Rule read when the Supreme Court thought it required the *Frye* test. The fact that several Justices of the Supreme Court have changed their minds doesn’t mean we should interpret our rule differently.”<sup>83</sup>

But this process required us to look at Rule 702 and see whether we wanted to conform, and we did something, which I think fans of the rule-making process will probably regard as a better thing to do than judicial decision rulemaking. We had a three-two decision, which you could have reversed. There were different people on the court then and now. But then we would have been subject to only the arguments made to us by the two lawyers that showed up in front of us in that case.

So we went through a rule-making process on Rule 702. We had public hearings. We had professors come in. We had practitioners come in. We had hearings around the state. We asked for comments, and we got lots of detailed comments on both sides of the issue about whether the *Frye* rule was better to keep, whether the *Daubert* rule was where we should go. And it’s the one issue in which my committee couldn’t reach a single conclusion.

A small minority favored keeping the *Frye* rule. Another small minority favored going to *Daubert*, and a couple of people, prompted again by one of those pesky evidence professors, Professor Mauet from the University of Arizona, said, “You know, Federal Rule 702 is really pretty good, but what’s 702(3) about?”<sup>84</sup> Doesn’t that get

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81. STAFF OF H. COMM. ON THE JUDICIARY, *supra* note 24, at IX (“Additional amendments were adopted by the Court by order dated April 17, 2000, transmitted to Congress by the Chief Justice on the same day, and became effective December 1, 2000. The amendments affected Rules 103, 404, 701, 702, 703, 803, and 902.” (citation omitted)).

82. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (articulating the “general acceptance” test to govern admissibility of scientific evidence).

83. *Logerquist v. McVey*, 1 P.3d 113 (Ariz. 2000).

84. See FED. R. EVID. 702 (amended Dec. 1, 2011) (“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert ... may testify thereto ... if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and

abused too much by federal judges who say, ‘Yes, you’re an expert, and yes, these are reliable methods. I just think you’ve done a terrible job applying them to the facts of the case’ and taking away from the jury what’s essentially a credibility determination?”

So his suggestion was we adopt 702(1) and (2) but not (3). At the end of the day, the Supreme Court decided that uniformity was probably a better thing than experimentation.<sup>85</sup> But we added a note to our 702, which said, essentially, “Look, Judges, remember, your job is not to pick the better expert. Your job is not to say, ‘I hear what he’s saying, but I don’t believe it.’ Your job is only to keep out unqualified expert opinions, and we think there’s been some overemphasis on this notion of gatekeeping, of keeping away from the jury an expert fully qualified just because you think his opinion is not a good one.”<sup>86</sup> So that’s one place where we did depart a little from the federal commentary.

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methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”).

85. Arizona Rule of Evidence 702 was amended on September 8, 2011. Arizona Rule 702 now applies the four-pronged federal analysis to determine whether a witness may offer an expert opinion. The fourth element mirrors the text of current Federal Rule 702(d). *See* ARIZ. R. EVID. 702(d) (“[T]he expert has reliably applied the principles and methods to the facts of the case.”); *see also* FED. R. EVID. 702(d).

86. The note to Rule 702 states as follows:

The 2012 amendment of Rule 702 adopts Federal Rule of Evidence 702, as restyled. The amendment recognizes that trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury’s determination of facts at issue. The amendment is not intended to supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony, nor is the amendment intended to permit a challenge to the testimony of every expert, preclude the testimony of experience-based experts, or prohibit testimony based on competing methodologies within a field of expertise. The trial court’s gatekeeping function is not intended to replace the adversary system. Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

A trial court’s ruling finding an expert’s testimony reliable does not necessarily mean that contradictory expert testimony is not reliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Where there is contradictory, but reliable, expert testimony, it is the province of the jury to determine the weight and credibility of the testimony.

ARIZ. R. EVID. 702 comment to 2012 amendment.

The last thing we did—and the most useful thing we did—was decide we would appoint a standing committee on the rules of evidence on which, thankfully, I will not serve, partly because the court is the final arbiter of the rules. It's sort of silly to have one of the final arbiters putting together the recommendations. Each year it will look at any changes that were made at the federal level, any other proposals made at the state level, and report back to the court with the kind of expertise the Federal Rules Committee has brought to it about what a change might mean.

And I think that's something, at the state level, that's not very expensive to do. People will volunteer to do it. Evidence professors love to do this. They volunteer to do it at our level, and they'll volunteer to do it if you only meet once or twice a year at the state level. And I think that may be the most useful thing we did at the end of the process. So the federal restyling process, although meant not to be substantive, led us to look at the Arizona rules substantively, and that was, I think, a very large thing. Thanks.

PROFESSOR BROUN: Thanks, Justice. The next speaker is Jeremy Counsellor from Baylor Law School who's here to talk to us about the restyling efforts in Texas.

PROFESSOR COUNSELLER: Well, thank you. First of all, I'd just like to say I find it wonderful and very, very strange that I'm here on this panel. My own evolution on the restyling has gone from critic to optimistic acceptance. Now I am actually restyling in Texas, and I think that's a strange evolution. But the moment that I went from critic to acceptance and optimistic acceptance of the restyling was when the Federal Rules of Civil Procedure were about to go into effect. I also teach civil procedure. I taught the restyled and the then-current Rules of Civil Procedure together, and there was a day when I was going to ask the class informally, not as scientifically as you do, but informally, which did they prefer, the former Rules or the restyled Rules. Then I was going to have a little Judge Raggi-type response; I was going to give them my criticisms. When I said, "Which do you prefer?" every single student in that classroom raised their hand for the restyled Rules.

And it was at that point that I realized I either need to accept these Rules or spend the rest of my career as the crazy guy at the front of the classroom who keeps going on and on about the "re-styled" Rules, and the students whisper to each other, What does he

mean “the restyled Rules?” He means “the Rules.” So that was a fork in the road, a pivotal moment in my career, and I have become somewhat of a cheerleader for the success of the restyled Rules, despite early reservations.

I wanted to talk to you about specifically the Texas effort at restyling. Our rules are modeled on the Federal Rules but not as closely, it sounds like, as the Arizona rules. About 85 to 90 percent of our rules are the same or virtually the same as the Federal Rules, but we also have significant differences in our rules. We have some rules where there is simply no federal analogue.

We have been restyling in earnest for the better part of a year, and we hope to be done by the end of next year. Now, all of this, of course, is just at the Administration Rules of Evidence Committee level, which is our version of the Advisory Committee on the Rules of Evidence. Ultimately, what happens is up to our Supreme Court Advisory Committee in the Texas Supreme Court, and everything I say here today is with the caveat of “unless Chief Justice Wallace Jefferson back there disagrees with anything that I say.” He is the Chief Justice of our Texas Supreme Court.<sup>87</sup>

But there are some lessons that we’ve learned as we are restyling these rules in Texas. I don’t claim that they’re universal truths that will translate to everyone’s state restyling efforts, but there are certainly things that we’ve learned.

The first lesson we’ve learned is that restyling opposition at the state level to the federal restyling project is really no predictor of support or lack thereof at the state level. We, and our committee, have been following with interest the style project for a number of years, particularly the Evidence project as you would expect. And I would say that the feelings about the style project on our committee ranged from no strong opinion one way or the other to opposition. It is interesting though that when the issue of whether or not to restyle the Texas rules was broached at the Evidence Committee level, there was no controversy about whether or not Texas should follow suit. That was a noncontroversial, easy decision for the Evidence Committee.

Earlier, Judge Raggi talked about transaction costs. At the federal level the decision is between whether or not to incur them.

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87. Chief Justice Jefferson was present at the Symposium.

Should we incur the transaction costs and get the benefits, or not? At the state level, when you have rules like the Texas rules that are very similar but have some significant differences, you're choosing *between* transaction costs. On the one hand, you have the work that you must do to restyle the state rules. On the other hand, you have the costs of not doing anything.

But what was of paramount concern in our committee was, as Justice Hurwitz said, the cost of having different words in the rulebooks. If we had different words in the Texas rules and the Federal Rules, eventually, inevitably, that would lead to different meaning, and that would reduce the quality of the practice in our state and federal courts in Texas. So for that reason, it was a noncontroversial decision for us, at least at the Evidence Committee level, to go ahead and work to bring our rules to the extent possible into consistency with the Federal Rules.

The second lesson that we have learned, again, not all of our rules are the same as the Federal Rules. Many of them are different. Many of them are Texas-only. One of the first things that we did in our process was we divided all the rules into essentially one of four categories: same as the federal rule; similar to the federal rule, which means almost the same; different; and no federal rule. So this is one that just exists in Texas.

Obviously, the real work for us is in that third and fourth category. We do not intend in any comprehensive way to second-guess the drafting efforts of the federal committee where the current Texas rule and, at least for another month, current federal rule is the same. You have all heard about all of the tremendous effort that went into restyling the Rules trying to avoid substantive changes. We do not have a desire to do that, and I do not think we have the capacity to do that if we had the desire.

The reaction to the restyled Federal Rules on our committee, as we've seen them, has been, "Hey, this is pretty good," to, on the other end, "Well, it's not exactly the way I would do it, but I'm okay with it." To the extent that there's any substantive criticism on that end, the desire for uniformity trumps that criticism.

And the last thing that I would say, and I do think this translates to those people who may be working on state restyling efforts that have rules like Texas (where there's a lot of similarity but also significant difference): do not underestimate the scope of the project.

Our restyling effort will be a fraction of the federal restyling effort, a fraction, and yet it is still a monumental task.

It is a mistake to simply say, “Well, our rules are modeled on the Federal Rules. This will be easy.” It won’t be. So just account for that. That is, I think, perhaps the most important lesson that I can say from the current Texas restyling effort.

PROFESSOR BROUN: Thanks very much, Jeremy. Our last panelist to speak is Paula Hannaford-Agor, who’s the Director for the Center of Jury Studies here at the National Center for State Courts. She’s the only local member of any of these panels. We’re delighted to have her.

Just a very brief aside, it’s good to have local people involved in this. The lack of local people to take us from the hotel explains why I arrived this morning in a police car. I had *not* been arrested. Rest assured. I walked out of the hotel and walked the wrong direction. Instead of walking to the right, I walked to the left, and I stopped and asked a very nice police officer directions to the law school, and she said, “Hop in.” So I hopped in the police car, and she drove me to the door of the Law School. I had *not* been arrested. She did *not* move my head down when I got in the car. Paula.

PROFESSOR HANNAFORD-AGOR: Thank you, and welcome to Williamsburg! I’m delighted to be here, and I’m especially delighted that Dan and the people who are putting the Symposium together were interested in asking about what the likely impact of the restyling efforts is going to be on state courts. Justice Hurwitz just talked about what potentially could be a monumental impact—the sheer volume of cases in state courts. Our best estimates—and it’s really hard to count jury trials, believe it or not, because the definition of what a jury trial is differs from state to state—but our best estimate is that approximately 148,000 to 150,000 jury trials take place annually in state courts as compared to between 4500 and 5000 in federal courts.<sup>88</sup> And so if state courts are where the Rules of Evidence will be used most often, they will have a tremendous impact.

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88. GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, NAT’L CTR. FOR STATE COURTS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 7 (2007).



In addition to the volume of cases, the litigant base is very different. We heard some references to pro se litigants here. In federal courts, the number of pro se litigants is increasing. They are already appearing in federal court, but probably not in most cases. In state courts, on the other hand, 80 to 90 percent of family court cases have one side or both pro se. On civil dockets, upwards of 50 to 60 percent of the defendants' side is pro se. And easily 30 percent of the plaintiffs' side is pro se.<sup>89</sup> Any effort that improves the clarity of rules for these litigants makes it easier for trial judges to manage the proceeding. When people don't know what the rules are, anything that provides a reasonably coherent explanation has got to be an improvement. And that's part of the reality of state courts. So the potential impact of the restyling efforts are just tremendous.

When Dan called me and said, "Would you do this?" I was a little bit taken aback because it was the first time that I actually had to wade into anything involving the Rules of Evidence since my second year in law school. I started looking through the changes and said, "Oh, I wish we had had these when I was in law school because then I might actually have gotten something better than a B-minus in that class." They really are very well done, and I think they will be a tremendous help in that sense.

I'm glad that Justice Hurwitz and Professor Counsellor talked about the Texas and Arizona models, because my charge was to summarize what's likely to happen in the rest of the state courts in ten minutes or less. They described a trickle-down effect. That will be the case in some but not all states. How quickly and how effectively the Rules are implemented will largely be a function of the organizational structure of state courts, which differ not only from the federal courts in many respects but also differ from each other.

Justice Hurwitz mentioned that Arizona has a standing committee on evidentiary rules. Arizona also has plenary rulemaking under its judicial branch, which means that the judicial branch—the supreme court—can actually enact the rules. That's not the case in a lot of the state courts. Roughly half the states actually have to take proposed rules to the state legislature and have the legislature

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89. Nat'l Ctr. for State Courts, Number of Pro Se Litigants per State (March 2011) (unpublished manuscript) (on file with the *Law Review*).

approve them. Many state judiciaries are reluctant to do that because it encourages legislative tinkering with the state judiciary. Some states will be reluctant to provide the legislature with opportunities to make changes that the courts don't necessarily want to have enacted. That's one of the issues.

Another is just the difference between a standing committee and a special committee—that is, a committee formed to accomplish a specific task. Once the task is complete, the committee sunsets. The rules of evidence in many states were created by a special committee that was formed for that purpose. After the rules were enacted, the committee had no further maintenance, review, or updating role. In those states, the state supreme court would have to appoint members to a new special committee to undertake the task of reviewing the restylized rules and making recommendations about their adoption.

Roughly forty-one states and Puerto Rico have evidentiary rules that, if not identical to the Federal Rules, are based substantially on the Federal Rules of Evidence. That leaves nine states that either do not have any formal evidentiary rules or the rules do not closely resemble the Federal Rules of Evidence. Actually, Virginia—just last month, for the first time ever—got approval from the Virginia Supreme Court to adopt rules of evidence.<sup>90</sup> I've been looking through them over the last month, and they look like the current Federal Rules, but it took a twenty-year effort to overcome the resistance in Virginia. We have an old joke here: How many Virginians does it take to change a light bulb? Ten: one to change the light bulb and nine to talk about how good the last one was. We don't enthusiastically embrace change here.

So it's been a monumental effort just to get these rules approved by the Virginia Supreme Court. Now they will go to the General Assembly for enactment. I suspect, knowing what I know about Virginia politics, that the Virginia Supreme Court will not want to revisit the issue of restyling any time soon after expending the effort it's taken to come this far. There are many other states that are like this, certainly at least ten of them, that took a monumental effort

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90. The Virginia Rules of Evidence were approved and promulgated in September 2011 and are available to download at [http://codecommission.dls.virginia.gov/rules\\_of\\_evidence/Virginia\\_Rules\\_of\\_Evidence.pdf](http://codecommission.dls.virginia.gov/rules_of_evidence/Virginia_Rules_of_Evidence.pdf)

just to get their own rules of evidence adopted and they are very protective of their respective state variations. They're not going to immediately adopt the restyled Rules simply because they've been restyled.

Another issue that I think is very germane right now in state courts is the resource issue. Jeremy talked about the monumental task that was involved in reviewing the restyled Rules, comparing them to the existing state rules, trying to determine if any differences are substantive or stylistic, and if substantive, if the state should make that change. Even if a given rule is identical to the federal rule, the committee would still have to see whether the courts in that state has interpreted the identical language the same way as the federal courts, and whether they would continue to do so using the restyled Rules.

And if the state does have a different rule, will the restyling even apply? What if the state has a completely new rule that doesn't have a corollary in the Federal Rules? As you can see, the process can become quite expansive and potentially quite resource intensive. Due to the current economic condition, state courts are really hurting. Most states have imposed travel restrictions; court staff have been cut; hiring freezes have been imposed. Some states have had as much as 40-percent reductions in their entire state judiciary budget.<sup>91</sup> Even though much of the work of reviewing the restyled Rules is done on a pro bono basis—law professors are volunteering their time, judges are volunteering their time, and distinguished lawyers from the bar associations are volunteering their time—many states just don't have the financial or organizational capacity to undertake this effort right now. They are too busy trying to hold on to paperclips and pencils, to keep the courthouse doors open. That's another issue that's going to impede the adoption of the restyled Rules.

I don't wish to sound overly pessimistic, but I think that the process of formally revising the rules is going to be fairly long in the states. Some, like Arizona and Texas, are taking it up immediately. Others, I would predict, are probably going to be ten to twenty years

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91. NAT'L CTR. FOR STATE COURTS, BUDGET SURVEY RESPONSES (2011), *available at* <http://www.ncsc.org/information-and-resources/~media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/budget%20survey%20narratives%2011%2030%2011.ashx>.

in making this change. That said, I do think that the restyled Rules will have an effect, but it will be a more diffuse, sideways effect.

Judge Ericksen talked earlier about neural maps—how judges and lawyers learn the Rules so well that they raise evidentiary objections, respond to their opponents' objections, and rule on those objections almost instinctively. I suspect what will happen over time as lawyers and judges are using the restyled Rules in actual trials is that they will first consciously, and later unconsciously, incorporate the restyled Rules into their neural maps, including any nuanced differences in interpretation between the Federal Rules and the state rules.

So it will be a very diffuse impact. It will take a while, but ultimately, I think, it will have a tremendous impact in state courts, where the vast majority of jury trials actually take place.

PROFESSOR BROUN: Thank you very much, Paula. And that concludes our panel. Let me call on Judge Fitzwater again to close the proceeding.

JUDGE FITZWATER: Thank you. In conclusion, I want to thank Professor Capra and Professor Broun for coordinating and moderating our panels. I want to thank our panelists for their important contributions to this Symposium.

I also want to particularly thank William & Mary Law School for hosting us so graciously and the *Law Review* for publishing this Symposium, which I believe will make an important contribution to legal literature as it explains the difficult choices that were faced in the process and serves as a testament to the important work of those who were involved.

Any program of this type cannot be carried on or carried out without support of the Administrative Office of the United States Courts. Peter McCabe, Jon Rose, and Ben Robinson, thank you for your support as well.

This Symposium has exceeded my hopes for what it would accomplish. I think that the insights we received will be helpful, particularly to the Evidence Committee, as our work goes forward and we consider what should be done in the future, if anything, about problems that may have been identified. I do believe this is a real testament to the work of Judge Hinkle and of the Standing Committee members and the Evidence Committee members who came before us to accomplish this.

APPENDIX A  
Restyling Choices and a Mistake<sup>1</sup>

I. RESTYLING WITHOUT CHANGING SUBSTANCE: AN EXAMPLE

Participating in the restyling of the Federal Rules of Evidence was an eye-opener for me, since I never dreamed it would be so difficult to change the language and organization of the Rules while assuring that no substantive changes were made. As it turns out, the meaning of some words found in the Rules is more ambiguous than one would suppose upon first reading, and when two individuals can read a rule to mean different things, however small the difference, a problem arises for restylers.

A good example is Rule 801(d)(2), particularly subdivision (B). The original version of the Rule, enacted in 1975, provides that:

- (d) Statements which are not hearsay. A statement is not hearsay if— ...
- (2) Admission by party-opponent. The statement is offered against a party and is ...
- (B) a statement of which the party has manifested an adoption or belief in its truth.

The restyled Rule reads:

- (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay: ...
- (2) *An Opposing Party's Statement*. The statement is offered against an opposing party and: ...
- (B) is one the party manifested that it adopted or believed to be true.

Although the language is slightly changed, the word “manifested” remains in the restyled Rule even though most members of the Committee working on the project preferred something that had a more distinct meaning. The problem we ran into was that some members thought that the Rule meant that a party had to adopt the

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1. Stephen A. Saltzburg, Wallace and Beverley Woodbury University Professor, George Washington University Law School.

statement or indicate that it was true, which is what many common-law expressions of adoptive admissions required. Essentially, a party could manifest adoption explicitly,<sup>2</sup> by action,<sup>3</sup> or even by silence.<sup>4</sup>

But Rule 801(d)(2)(B) arguably does not require an actual adoption. It is sufficient that the party against whom a statement is offered *manifested* (whatever that means) that it adopted or believed the statement to be true. In other words, if the party acted in some way to indicate adoption of the statement or belief that it is true, that is sufficient to satisfy the Rule even if the party did not in fact adopt that statement or believe it was true. The difference, subtle as it may be, could be important because the trial judge should be deciding the admissibility of a Rule 801(d)(2)(B) statement under Rule 104(a). This means that the judge is a fact-finder who should not admit the statement unless the judge finds that the proponent has demonstrated by a preponderance of the evidence that Rule 801(d)(2)(B) is satisfied. Although some courts mistakenly conclude that the judge is only to decide whether a jury could find the Rule satisfied,<sup>5</sup> it is clear from Rule 104(a) that is a decision for the judge.<sup>6</sup>

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2. See, e.g., *United States v. Warren*, 42 F.3d 647 (D.C. Cir. 1994) (holding that the government adopts a sworn statement contained in a criminal complaint); *United States v. Morgan*, 581 F.2d 933 (D.C. Cir. 1978) (holding that statements by the government in a search warrant application were adopted).

3. See, e.g., *United States v. Tocco*, 135 F.3d 116 (2d Cir. 1998) (adoption by nodding head in apparent agreement); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3d Cir. 1994) (trade association adopted articles by publishing them in its journal); *Wagstaff v. Protective Apparel Corp.*, 760 F.2d 1074 (10th Cir. 1985) (adoption of newspaper articles by distributing them).

4. See, e.g., *United States v. Basic Constr. Co.*, 711 F.2d 570 (4th Cir. 1983) (silence on part of corporate officer in bid-rigging meeting an adoption); *United States v. Williams*, 577 F.2d 188 (2d Cir. 1978) (adoptive admission by silence in face of coconspirator's statement).

5. See, e.g., *Carr v. Deeds*, 453 F.3d 593 (4th Cir. 2006).

6. See *United States v. Harrison*, 296 F.3d 994, 1001 (10th Cir. 2002) (whether person manifested an adoption is question of law for the court). *United States v. Lafferty* appears to have gotten the law right, as it quoted from the district court's ruling: "The Court's ruling on this matter specifically is that there exists sufficient evidence to support a jury finding that an adoptive admission exists after considering this preliminary question of admissibility under [Rule] 104(a)." 503 F.3d 293, 306 (3d Cir. 2007). Ultimately, the court of appeals disagreed with the district court but did not question the analysis that court used. The twist the district court identified is that a judge could find by a preponderance of inadmissible evidence that a person manifested an intent to adopt or a belief in a statement, because Rule 104(a) permits the judge to consider anything—except for privileged information. But, there

The judge therefore has to know what Rule 801(d)(2)(B) actually requires in order to make a decision. It could be important for a judge to focus on the fact that the Rule does not require a finding that the party actually adopted or believed the statement as long as the party did something to manifest that it adopted or believed the statement to be true. If asked to describe the difference between manifesting and actually adopting or believing, I am unsure that I could give a good answer. But I am sure that there might be a difference, and that was enough for the Committee to decide that it could not rid the Rule of the word “manifested” regardless of the fact that no one is certain what the Rule means.

## II. THE LARGER ISSUE

I have no quarrel with the choice to retain a word that I cannot adequately explain, because those of us who have lived with and used the Federal Rules of Evidence for thirty-six years have confronted the word “manifested” the entire time. Ambiguous it may be, but in truth it probably does little harm, since I suspect most judges ask themselves whether a party adopted whatever statement is offered against it and do not struggle to parse the wording of the Rule as the Committee was called upon to do.

I do quarrel, however, with a greater decision made by the Committee that I believe is almost certain to do more harm than good. That quarrel arises from the general approach to Rule 801(d)(2), not to any particular subdivision. The original version of the Rule was entitled “Admission by party-opponent.” The restyled version is entitled “An Opposing Party’s Statement.” Why the change? The Committee concluded that the word “admission” is confusing and inaccurate, because any statement offered against a party who made it or who is responsible for it under the Rule may be admitted against the party whether or not the statement admitted anything.

From my perspective, the judgment not to continue to use the word “admission” to describe Rule 801(d)(2)(D) statements is a mistake and compounds an earlier mistake made when the Rules

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might not be sufficient admissible evidence for a jury to find adoption, in which case the judge might well exclude the evidence.

were first enacted. The earlier mistake was bad enough, and there was no sound reason to compound it.

### III. THE EARLIER MISTAKE

There is little doubt that the relationship between Rule 801(c) of the Rules, which defines hearsay, and Rule 801(d), which states that certain statements are not hearsay, is unnecessarily confusing. 801(c) establishes that a statement offered for the truth of the matter asserted is hearsay. 801(d) statements are offered for their truth—or there is no need to rely on the Rule—and yet they are deemed nonhearsay. The result is that we have an oxymoron: nonhearsay hearsay.<sup>7</sup>

The truth is that 801(d) statements are exceptions to the general rule (Rule 802) that hearsay evidence is inadmissible. The original Advisory Committee apparently thought that, because the rationales for admitting 801(d) statements were different from the rationales for more typical hearsay exceptions, 801(d) statements should not be classified as hearsay exceptions. After explaining the Advisory Committee's analysis, I shall explain why it made no sense.

The original Advisory Committee observed as to 801(d)(1) that “[c]onsiderable controversy has attended the question whether a prior out-of-court statement by a person now available for cross-examination concerning it, under oath and in the presence of the trier of fact, should be classed as hearsay.”<sup>8</sup> Ultimately the Committee adopted the following view:

The position taken by the Advisory Committee in formulating this part of the rule is founded upon an unwillingness to countenance the general use of prior prepared statements as substantive evidence, but with a recognition that particular circumstances call for a contrary result. The judgment is one more of experience than of logic. The rule requires in each

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7. Although we have gotten used to this, it has caused problems from time to time. *See, e.g., United States v. Dotson*, 817 F.2d 1127 (5th Cir. 1987), *amended*, 821 F.2d 1034 (5th Cir. 1987) (originally holding that an 801(d)(1)(B) statement was not hearsay for purposes of Rule 805 (hearsay within hearsay) and later correcting the error).

8. 4 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL §801.04[1], at 801-303 (10th ed. 2011).



instance, as a general safeguard, that the declarant actually testify as a witness, and it then enumerates three situations in which the statement is excepted from the category of hearsay.<sup>9</sup>

Congress agreed with the approach, although it modified (d)(1)(A) to limit prior inconsistent statements to those made under oath at a formal proceeding and deleted (d)(1)(C) before restoring it.<sup>10</sup> The original Advisory Committee chose to reject the strict common law approach that all statements made out of court were hearsay if offered for their truth and to permit some statements to be admitted where the declarant was a trial witness who was subject to cross-examination. The original Advisory Committee stated as to (d)(2), which it referred to as admissions, that “[a]dmissions by a party opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule.... No guarantee of trustworthiness is required in the case of an admission.”<sup>11</sup> The Advisory Committee’s rationale was that individuals are responsible for their own statements and may be held responsible for the statements of others under certain circumstances.

So, the Committee concluded that most true hearsay exceptions were established because courts deemed the circumstances under which statements were made to assure adequate guarantees of trustworthiness or reliability. This was not true of all (d)(1) statements<sup>12</sup> which were deemed admissible mainly because the opportunity for in-court cross-examination provided a mechanism to evaluate the out-of-court statements that is often unavailable when a hearsay declarant is not present at trial to testify. The Committee reasoned that admissions were deemed admissible, not because they are reliable but because a party could be held responsible for certain statements.

Thus, Rule 801(d)(1) and (d)(2) statements were not deemed admissible because the circumstances in which they were made

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9. *Id.* at 801-304.

10. *Id.* at 801-305.

11. *Id.* at 801-305 to -306.

12. It could well have been true of prior statements made under oath in formal proceedings, as the current form of 801(d)(1)(A) now requires.

suggested reliability, and the Committee concluded that they therefore did not qualify as hearsay exceptions. In reaching this conclusion, the Committee created a test for exceptions that was unnecessary. It should have been sufficient for the Committee to have explained that there are different reasons for creating hearsay exceptions just as there are different reasons for believing that some categories of statements are reliable. There was nothing to prevent the Committee from creating two additional hearsay exceptions, which could have been numbered separately from Rules 803 and 804.<sup>13</sup> The Committee could have called one exception “prior statements of a testifying witness”<sup>14</sup> and the other “admissions.”

Recognizing that all 801(d) statements are exceptions from the general rule that out-of-court statements offered for their truth are hearsay would have avoided the oxymoron and the tongue-twisting associated with it. Many lawyers and judges still call 801(d) statements “exceptions” despite the Committee’s placement of the Rule in 801 rather than in Rules 803 and 804. After all, calling them exceptions avoids talking about nonhearsay hearsay, and avoidance of an oxymoron is usually a good thing. I find myself calling 801(d)

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13. For a suggestion that the 801(d) rules be moved, see Sam Stonefield, *Classifying Admissions and Prior Statements: Alternatives to Rule 801(d)’s Confusing and Misguided Use of the Term “Not Hearsay”* (Aug. 2010) (unpublished manuscript), available at [http://works.bepress.com/sam\\_stonefield/3](http://works.bepress.com/sam_stonefield/3). See also Sam Stonefield, *Rule 801(d)’s Oxymoronic “Not Hearsay” Classification: The Untold Back Story and a Suggested Amendment*, 5 FED. CTS. L. REV. 1 (2011), <http://www.fclr.org/fclr/articles/html/2010/Stonefield.pdf>. The Reporter to the Advisory Committee discussed Professor Stonefield’s recommendations in a September 2010 memorandum to the Committee. See *infra* Appendix B. The Advisory Committee rejected the suggestion. See Minutes, Meeting of the Advisory Comm. on Evidence Rules in San Diego, Cal. (Oct. 12, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV10-2010-min.pdf>. The minutes reveal the Committee’s thinking:

Committee members concluded that courts and litigants have become comfortable with referring to, e.g., statements of party-opponents as not hearsay, and therefore any marginal benefit in the proposed amendment would be outweighed by the disruption that such an amendment—that any amendment—would cause. The Committee determined unanimously that it would not propose an amendment to change the designation of Rule 801(d) statements.

*Id.* at 8.

14. If this were ever to be done, Rule 803(5) (past recollection recorded) would probably be a strong candidate for movement into the new Rule. This would involve its own costs, given the substantial experience with it as part of Rule 803. Moving Rule 801(d) into two new rules would involve additional complications. These are explored in detail in the September 2010 memorandum from Professor Capra, *infra* Appendix B.

statements “exemptions” from the hearsay rule or simply 801(d) statements—any description to avoid having to say nonhearsay hearsay.

In the end, the undeniable truth is that the Federal Rules of Evidence adopt a hearsay rule that makes out-of-court statements hearsay if offered for their truth (Rule 801(c)), provide that hearsay is generally inadmissible (Rule 802), and recognize that the Rules and other authorities may override the general inadmissibility (Rule 802). In short, there was no reason for the Committee to assume that only one justification could support the creation of an exception when, as drafters of the rules, the Committee was free to recognize that more than one rationale could support a hearsay exception.

In the restyling effort, the decision was made to leave 801(c) and 801(d) largely alone and to continue the mistaken approach of making us all suffer with nonhearsay hearsay. As part of restyling, we could have moved 801(d) into one or two new hearsay exceptions without changing their substance. But, such a move would have been a mistake given the thirty-six years of decisions using the numbering system adopted by the original Advisory Committee. Moving 801(d) into one or more new rules would have complicated and confused legal research and required trial lawyers and trial judges to learn a new numbering system that would have had no substantive impact. In the end, we retain nonhearsay hearsay because we have lived with it for almost four decades and the costs of reconfiguring the rules outweigh the benefits.

#### IV. THE CURRENT MISTAKE

The decision to leave Rule 801 where it was placed when the Rules were enacted into law in 1975 makes sense because there is no good reason to make a change that lacks substantive impact and that might create problems in legal research and require lawyers and judges to learn a new numbering system. The decision to change the title of Rule (d)(2) from “Admission by party-opponent” to “An Opposing Party’s Statement” is a very different one, one that makes no sense in my view and represents one of the few poor judgments made in the restyling effort.

The only reason to make the change is to recognize that an admission need not actually admit anything. But, this has been

clear at common law and it is clear under the Federal Rules of Evidence. An admission is any statement made by or attributable to a party and offered against it. Yes, it is true that some lawyers, judges, and opinions mistakenly speak of *admissions against interest*,<sup>15</sup> a term that seemingly combines or confuses admissions with declarations against interest. But the restyling effort uncovered no reason to believe that any occasional sloppy use of language meant that the distinction between admissions and declarations against interest was one not readily grasped by anyone who takes a course in the law of evidence or even bothers to read the Federal Rules of Evidence.

The question that arises is whether the choice to avoid the word “admission” will have any negative impact. My answer is that it probably won’t in most cases, but there is nonetheless mischief in the change. I say it probably won’t in most cases because I intend to call 801(d)(2) statements “admissions” and to tell my students (1) that these statements were called “admissions” at common law and throughout the entire life of the Federal Rules of Evidence, and (2) it is likely that many, if not most, lawyers and judges will continue to refer to them as “admissions” for the foreseeable future. This is the only solace I draw from the change: lawyers and judges will pretend it is not there.

So, where is the mischief? It has five aspects. First, there will be sticklers for language, including (and perhaps especially) evidence professors,<sup>16</sup> who will avoid the term “admission” simply because the restylers rejected it. Students may be misled into thinking that cases discussing admissions are either inapplicable now that we have a restyled rule or that they have been rejected. There is a danger of confusion.

Second, there is also a danger that, when a hearsay objection is made at trial and the proponent of evidence responds saying only that it is an admission, a judge might reject the response as no longer corresponding to Rule 801(d)(2). That would be unfair, and one might argue that only paranoia would warrant worrying about

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15. Even the Supreme Court does this. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1, 12 (1996); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982); *Kremens v. Bartley*, 431 U.S. 119, 132 n.13 (1976).

16. *See* Edward J. Imwinkelried, *Restyled Evidence Rules on Expert Testimony Coming*, NAT’L L.J., Sept. 26, 2011, at 12.

such an unlikely prospect. But one has to think about the following reasoning: (1) the restylers thought that the term “admission” was confusing and did not want to include it in the Rules; (2) since it has been excluded from the Rules, lawyers should no longer be using it; and (3) its use no longer is an accurate description of any escape from the general hearsay ban.<sup>17</sup> Unlikely? Maybe. But why take the risk? I would not.

Third, every time a lawyer writes a brief, a law professor writes a book, or a judge writes an opinion and quotes from a case discussing Rule 801(d)(2) that arose before the restyled Rules took effect on December 1, 2011, a question will arise: Do I need to drop a footnote every time I quote from an opinion that refers to 801(d)(2) statements as “admissions” to indicate that the use of the term does not reflect any substantive difference from 801(d)(2) as restyled? The fact that the restylized Rule does not use the word “admission” that was the shorthand for all 801(d)(2) statements for the pre-restyling life of the Rules may suggest that some explanation is in order. Even a single footnote, let alone the many I expect to see as the years go by, is one too many.

Fourth, the new title of Rule 801(d)(2) is misleading and actually incorrect. Admissions need not be statements of party opponents. It is well established that an admission may occur by silence in the face of an accusation that a reasonable person would deny if it were not true.<sup>18</sup> Silence is not a statement.<sup>19</sup> Moreover, the discussion above about the use of the word “manifested” in Rule 801(d)(2)(B) is a reminder that it is not at all clear how a person actually manifests adoption or belief—but there is no requirement in the Rule that

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17. *See id.* (“[I]t will be critical for practitioners to learn the new wording. To begin with, in the modern textualist era the adoption of new statutory language can effect unintended changes.”).

18. “[T]acit admissions occur when a statement is made to a person under circumstances that would cause a reasonable person to deny or indicate some disagreement with the statement but none is made.” 2 STEPHEN A. SALTZBURG, LEE D. SCHINASI & DAVID A. SCHLUETER, *MILITARY RULES OF EVIDENCE MANUAL* § 801.02[10][b], at 8-31 (7th ed. 2011).

19. Rules 803(7) and 803(10) recognize that the absence of an entry in a business record or a public record may be used to prove that an event did not occur. These hearsay exceptions are arguably unnecessary, because they simply remind us that the business or public record is a statement that all relevant events are recorded. Thus, Rules 803(6) and 803(8) should be sufficient, even if Rules 803(7) and 803(10) were eliminated to support an inference that an unrecorded event did not occur. Silence is different.

manifestation occur by a statement.<sup>20</sup> No one can doubt that the title does not completely fit the Rule whereas the previous title certainly did—“admission by party-opponent” covered every type of admission, whether in the form of a statement or otherwise.<sup>21</sup>

Finally, law schools will have to teach current and future students that the change in language in the title of 801(d)(2) did not change substance and that the term “an opposing party’s statement” means the same thing as *admission* so that they will not be confused when they do legal research into cases relying on the Federal Rules of Evidence as written prior to December 1, 2011, and the common law cases that preceded codification of the Evidence Rules. It seems rather silly to have to teach every current and future student of evidence that the restyling changed the title of Rule 801(d)(2) without changing the substance and that it is important that they know that “admissions” mean the same thing as an opposing party’s statements so that they can make sense sense of decisions rendered during all the years that courts freely used the word “admission.”

#### CONCLUSION

I began by pointing out how difficult it was to change the language and organization of the Rules while assuring that no substantive changes were made. The various participants in the restyling process did an outstanding job. The efforts made to assure that a substantive change did not inadvertently occur as a result of restyling was heroic, and I feel fortunate to be able to play a role in such an historic effort. I support the restyling generally, admire the end product in almost every respect, and am grateful to those who worked so tirelessly at a task that was at times tedious and demanding.

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20. Suppose, for example, A accuses B of stealing \$100 from A, and B responds by handing over \$100. This action could be taken as *manifesting* a belief in the accuracy of A’s charge. Yet, B would not be making a statement.

21. Sticklers for accurate titles might argue that a more accurate title would be “admissions by or attributable to a party opponent.” This would recognize that Rules 801(d)(2)(C), (D), and (E) are not actually statements by the party against whom they are offered. The restylized version of Rule 801(d)(2) also does not reflect the fact that vicarious admissions are actually not *an opposing party’s statement*.

I have identified the single misjudgment that I sincerely regret was made in the restyling. My hope is that it will not result in the mischief I have anticipated. But if it does, it would be rather simple matter to change the title to once again include the word “admission.” Indeed, the title of the subdivision could simply be “admissions” and no harm would result.<sup>22</sup>

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22. Using the word “admissions” would be more accurate because it would encompass everything that constitutes an admission: statements, silence, and action—whether made by a party or attributed by a party.

## APPENDIX B

**FORDHAM**

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Memorandum To: Advisory Committee on Evidence Rules  
From: Daniel Capra, Reporter  
Re: Suggestion to Change Rule 801(d) "Not Hearsay" Designation  
Date: September 16, 2010

Attached is an interesting article<sup>1</sup> from Professor Sam Stonefield, which he submitted to me as a formal proposal to amend the Federal Rules of Evidence. Professor Stonefield raises an anomaly in the treatment of hearsay: Rule 801(d) treats two categories of statements as "not hearsay" when in fact statements fitting under that Rule definitely fit within the definition of hearsay. Essentially the Rule says that statements that are clearly hearsay are "not hearsay" in the same manner as someone saying that an elephant is "not an elephant." Professor Stonefield analyzes, in painstaking detail, the reasons for the anomaly of the Rule 801(d) categories of hearsay statements. The basic explanation is as follows:

Subdivision (d) technically provides an exemption from, rather than an exception to, the hearsay rule. The Advisory Committee determined that the statements covered by subdivision (d) should be categorized as "not hearsay" rather than as "hearsay subject to an exception" because the basis for admitting these statements is different from that supporting the other standard hearsay excep-

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1. At least for Evidence professors.



tions, such as excited utterances and dying declarations, which are found in Rules 803, 804, and 807. Statements falling within these latter exceptions are admitted because they are made pursuant to circumstantial guarantees of reliability that substitute for the in-court guarantees of oath, cross-examination, etc.<sup>2</sup> For example, excited utterances are made while the declarant is under the influence of a startling event and for that reason is less likely to be able to lie.

In contrast, prior statements of testifying witnesses (Rule 801(d)(1)) are admitted not because they were reliable when made, but because the person who made them is testifying at the trial or hearing under oath and subject to cross-examination. And statements of party-opponents (Rule (d)(2)) are allowed not because they are reliable, but because the adversary or his agents made them — if a party happens to make an unreliable statement, it is not up to the Judge to protect him from use of the statement by the adversary; it is up to the party to try to explain the statement or to diminish its importance. The drafters of the Federal Rules thought that it would be confusing to lump prior statements of testifying witnesses and statements of party-opponents together with reliability-based exceptions under a single label of “hearsay exceptions.” As Professor Stonefield describes the original Advisory Committee’s rationale, the hearsay statements in Rule 801(d) presented a “poor fit” with the standard hearsay exceptions.

Professor Stonefield does not dispute the validity of the reason for breaking out the Rule 801(d) statements from the other hearsay exceptions. He agrees that they are a poor fit with Rules 803 and 804. He objects, however to the “not hearsay” designation, because it is simply confusing. Statements that clearly fit the definition of hearsay are labeled, *ipse dixit*, “not hearsay.” His further objection is that it makes no sense to group prior statements of testifying

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2. The exceptions to the circumstantial guarantee of reliability-basis for admission are: 1) Rule 803(5), past recollections recorded, which are admissible because the witness who prepared the record must be produced and subject to cross-examination; and 2) Rule 804(b)(6), where admission is the result of misconduct by the party against whom the hearsay statement is offered. (As to the latter exception, it should be noted that it was added years after the decision was made to create the “not hearsay” categories of Rule 801(d)).

witnesses with statements of party-opponents because the reason for admitting the former set of statements (the ability to cross-examine the declarant) is completely different from the reason for admitting the latter (the adversary theory).

Professor Stonefield proposes that Rule 801(d) statements be redesignated as hearsay but subject to an exception. He concedes that his proposal will not change any evidentiary result as a practical matter, because there is no practical difference between an exception to the hearsay rule and an exemption from that rule. If a statement fits either an exemption or an exception, it is not excluded by the hearsay rule, and it can be considered as substantive evidence if it is not excluded by any other Rule (e.g. Rule 403). Professor Stonefield also concedes that courts have had no problem with the anomalous designation of Rule 801(d) statements as not hearsay — they know it makes no difference and so don't get hung up on any distinction between “not hearsay” and “hearsay subject to an exception.”<sup>3</sup>

The question for the Committee is whether the costs of an amendment — disruption of settled expectations, necessary adjustment, possible inadvertent changes, etc. — is outweighed by the benefit of a more logical approach to the hearsay rule and its exceptions. In the end, the major argument against the proposal is that the existing Rule 801(d), however logically flawed and perhaps confusing to novices, has not appeared to result in any practical problems of application.

Assuming the Committee were to decide to more fully consider an amendment to designate Rule 801(d) statements as hearsay

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3. One example of courts coping with the anomaly is in the application of Rule 805 — hearsay upon hearsay. That rule says that there is hearsay upon hearsay, each part of the combined statements must conform “with an exception to the rule.” Technically, conforming with one of the Rule 801(d) provisions would not satisfy Rule 805 because these are not an “exception” to the hearsay rule. But courts have had no problem finding, for example, that statements of party-opponents satisfy one of the steps in a multiple hearsay problem. *See, e.g., United States v. Dotson*, 821 F.2d 1034, 1035 (5<sup>th</sup> Cir. 1987) (“For the purposes of the hearsay-within-hearsay principle expressed in Rule 805, nonhearsay statements under Rule 801(d) \*\*\* should be considered in analyzing a multiple hearsay statement as the equivalent of a level of the combined statements that conforms with an exception to the hearsay rule.”).

exceptions, the question remains how that could be done. Professor Stonefield essentially provides two alternatives, which he refers to as “minimalist” and “thorough-going.” The minimalist approach includes moving the exception for past recollection recorded into the exception for prior statements — which is more than minimalist. So really there are three alternates, all set forth below. Generally speaking, the less drastic the approach, the less cost of disruption, but also the less benefit provided:

***1. Minimalist Alternative — Simply Redesignating Rule 801(d) Statements, No Change to Past Recollection Recorded.***

***(d) Statements That Are Not Hearsay Exceptions to the Rule Against Hearsay [- Prior Statements of Testifying Witnesses and Statements of Party-Opponents].*** A statement that meets the following conditions is not excluded by the rule against hearsay:

***(1) A Declarant-Witness’s Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant’s testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

***(2) An Opposing Party’s Statement.*** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

***Reporter's Comments:***

1. This proposal is obviously simple and accomplishes the limited objective of calling something what it really is. These really are hearsay exceptions and they are so designated.

2. It could be thought somewhat odd to have a separate rule for "hearsay exceptions" when there are already other rules providing hearsay exceptions, specifically 803, 804 and 807. Perhaps it would be useful to elaborate in the heading, as in the bracketed material: "Hearsay Exceptions for Prior Statements of Testifying Witnesses and Statements of Party-Opponents."

3. The alternative of moving these exceptions into Rules 803 and 804 is not viable for at least two reasons. First, prior statements of testifying witnesses don't fit under either rule: they are not admissible regardless of whether the declarant is unavailable, because the declarant's testifying is the major requirement for

admissibility; and of course the declarant is not unavailable so they don't fit under Rule 804. Party-opponent statements could technically fit under Rule 803, but including them there would have a negative impact on the residual exception. Rule 807 requires a statement to have circumstantial guarantees of trustworthiness that are equivalent to those found in the exceptions in Rules 803 and 804. Party-opponent statements are not admitted because they are reliable. Adding party-opponent statements to Rule 803 would thus result in a lowering of the equivalency standard for reliability of Rule 807 statements. More fundamentally, statements of party-opponents are simply a poor fit for Rule 803, which is based on circumstantial guarantees of reliability.

3. What remains from this proposal is the illogic of lumping together two separate exceptions under a single designation. The exceptions really have nothing to do with each other, as one is based on reliability (cross-examining the declarant) while the other has nothing to do with reliability but is rather based on the consequences of the adversary system (if you or your agents say it, it is your problem, not the court's). But perhaps the lack of logical connection in the grouping of exceptions is a tolerable cost — because any other change will result in disruption to electronic searches and settled expectations.

4. An alternative that would uncouple the two exceptions would be to create separate subdivisions, as follows:

**(d) ~~Statements That Are Not Hearsay~~ Exceptions to the Rule Against Hearsay — A Declarant-Witness's Prior Statement.** A statement that meets the following conditions is not excluded by the rule against hearsay:

**(1) ~~A Declarant-Witness's Prior Statement.~~** The declarant testifies and is subject to cross-examination about a prior statement; ~~and the statement:~~

**(2) The statement**

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

~~—(2)(e) ***Exceptions to the Rule Against Hearsay — An Opposing Party's Statement.*** The A statement is not excluded by the rule against hearsay if it is offered against an opposing party and:~~

~~(A 1) was made by the party in an individual or representative capacity;~~

~~(B 2) is one the party manifested that it adopted or believed to be true;~~

~~(C 3) was made by a person whom the party authorized to make a statement on the subject;~~

~~(D 4) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or~~

~~(E 5) was made by the party's coconspirator during and in furtherance of the conspiracy.~~

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

The problem with the alternative is obvious — it alters numeration and upsets electronic searches. The Committee would have to determine whether the benefits in promoting the internal logic of the hearsay exception outweigh the disruption that would be caused by the change.

5. Any change in designation — either the simple approach or the renumeration set forth above — *would require a conforming change to Rule 806*. Rule 806, providing for the impeachment of hearsay declarants, provides as follows:

#### **Rule 806. Attacking and Supporting the Declarant's Credibility**

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

The reason for the special designation of Rule 801(d)(2) is that under current practice statements falling within that rule are not technically hearsay statements — so without the specification, an agent-declarant's credibility could not be attacked by the opponent. If an amendment is adopted that makes Rule 801(d) statements exceptions to, rather than exclusions from, the hearsay rule, that would of course mean that a statement falling within the hearsay rule is then a "hearsay statement" within the meaning of Rule 806. Thus, the special designation under Rule 806 needs to be struck as unnecessary (and confusing). As follows:

When a hearsay statement ~~— or a statement described in Rule 801(d)(2)(C), (D), or (E) —~~ has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Note that any change to Rule 801(d)(1) raises an anomaly in relation to Rule 806. An amendment that makes all Rule 801(d) statements hearsay means that all statements thereunder are covered by the term "hearsay statement" in Rule 806. But Rule 806 does not mesh with all of the statements that are admissible under Rule 801(d) — which is why Rule 806 only specifies statements that fall under Rule 801(d)(2)(C)-(E), i.e., statements of agents of party-opponents. Rule 801(d)(1) statements are not included because it is not necessary to do so — the declarant is by definition testifying and so of course his credibility can be attacked like any other witness. Rule 801(d)(2)(A) and (B) statements are not included because those statements are made by the party himself, who obviously has no incentive to attack his own credibility.

The result of amending Rule 801(d) to designate *all* statements covered therein as hearsay statements is to make Rule 806 a redundancy for some of those statements (those within Rule 801(d)(1)) and a useless device for others (party statements and adoptive statements). Thus, it could be a bit problematic if an amendment designed to bring logical coherence to the hearsay rule ends up resulting in some incoherence.

## ***2. Minimalist Plus — Redesignation and Moving Past Recollection Recorded.***

Professor Stonefield recommends moving the exception for past recollection recorded to the exception that will be created for prior



statements of testifying witnesses. He notes that logically, past recollection recorded belongs there because it is an exception dependent on the in-court testimony of the declarant who prepared the record.<sup>4</sup>

The current location for the past recollection recorded exception makes little sense. It's located in Rule 803, where availability of the declarant is supposed to be irrelevant, but in fact a statement cannot be admitted as a past recollection recorded unless the declarant who prepared the record *testifies at trial*. Under the terms of the Rule, the record must be on a matter that “the *witness* once knew about but cannot recall well enough to testify fully and accurately.” So past recollection recorded is to say the least a poor fit for Rule 803. Notably, it is a bad fit for Rule 804 as well. A witness doesn't have to be unavailable within the meaning of Rule 804 for a past recollection recorded to be admissible. While lack of memory is a ground for unavailability, the past recollection recorded declarant need not have an absolute lack of memory of the underlying event. It is enough that the declarant “cannot recall well enough to testify fully and accurately.”

The historical record indicates that the original Advisory Committee was not sure about where to put the past recollection recorded exception — so it decided to put it in the grouping of records exceptions in Rule 803. While that grouping is useful, the fact remains that past recollection recorded does not belong in a rule in which the availability of the declarant is irrelevant.

If the exception for past recollection recorded is included in a “minimalist” amendment to Rule 801(d), it might look like this:

**(d) ~~Statements That Are Not Hearsay~~ *Exceptions to the Rule Against Hearsay* [*– Prior Statements of Testifying Witnesses and Statements of Party-Opponents*].** A statement

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4. As his article notes, the Hawaii Rules of Evidence have a separate exception for prior statements of testifying witnesses, and past recollection recorded is included in that exception.

that meets the following conditions is not excluded by the rule against hearsay:

**(1) *A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; ~~or~~

(C) identifies a person as someone the declarant perceived earlier; or

(D) is in a record that:

(1) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(2) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(3) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

**(2) *An Opposing Party's Statement.*** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Of course, a conforming amendment would be required in Rule 803 — striking Rule 803(5). Also, the above changes could be broken out into two separately numbered subdivisions (i.e., 801(d) and 801(e)) as shown in one of the alternatives above.

***Reporter's Comment:***

1. Moving past recollection recorded out of Rule 803(5) resolves an anomaly, but it comes with the cost of disruption of electronic searches. The change would be disruptive and carries no real practical benefits, as the exception works just fine now despite its misplacement.

2. There is also some tension in the new grouping of Rule 803(5) with the other prior statements of testifying witnesses. The statements currently in Rule 801(d)(1) are considered reliable because the witness is subject to cross-examination. Rule 803(5) is

considered reliable because the proponent must show that the record was accurate when made; one of the ways to prove that is through testimony of the declarant who prepared the record, *but that is not the only way*. See, e.g., *United States v. Porter*, 986 F.2d 1014 (6<sup>th</sup> Cir. 1993) (past recollection recorded admissible even though the declarant who made the statement denies its accuracy; the government established circumstantial guarantees that indicated the trustworthiness of the statement). Thus, the fit is not perfect — though it's significantly better logically than Rule 803.

**3. “Thorough-going” alternative: Renumeration.**

The more aggressive proposal is to house each category of hearsay exception under a separate rule number. The Federal Rules on hearsay would be renumbered from Rule 803 to the end, as follows:

**Rule 803: Exceptions to the Rule Against Hearsay — Prior Statements of Testifying Witnesses.**

- (a) Inconsistent Statement
- (b) Consistent Statement
- (c) Statement of Identification
- (d) Past Recollection Recorded

[The language of the rule would be the same as alternative 2, above]

**Rule 804: Exceptions to the Rule Against Hearsay — Statements of Party-Opponents.**

- (a) Party Statement
- (b) Adopted Statement
- (c) Statement of Authorized Agent

**(d) Statement of Agent About a Matter Within Scope of Authority**

**(e) Statement of a Coconspirator**

**Rule 805: Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness.**

**(a)<sup>5</sup> Present Sense Impression.**

**(b) Excited Utterance.**

**(c) Then-Existing Mental, Emotional, or Physical Condition.**

**(d) Statement Made for Medical Diagnosis or Treatment.**

**(e) [Transferred to Rule 803(d)]<sup>6</sup>**

**(f) Records of a Regularly Conducted Activity.**

**[The reference in Rules 902(11) and 902(12) to Rule 803(6) would have to be changed.]**

**And so forth.**

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5. It would be possible to make this a number, e.g., Rule 805(1). But as the Rule itself is being renumbered — thus already disrupting electronic searches — it can be argued that you might as well go the whole way and use the style convention of letters after numbers. Substituting letters for numbers could be argued to be a collateral benefit of the proposed change. On the other hand, it could be argued that the numbers should be retained so that the change is not so jarring. Those who know the 803 exceptions think of business records as Exception 6, and will probably continue to do so even if the Rule itself is renumbered.

6. This will be an argument, much like the fight in restyling over retaining the gap created when Rule 804(b)(5) was moved. It makes sense to retain the gap here — it will help users in figuring out where the past recollection recorded exception went, for one thing. It also avoids the disruption of changing the renumbering (or relettering) of all the subsequent exceptions.

**Rule 806. Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness.**

**(a) Criteria for Being Unavailable.**

And so forth— note that internal citations in subdivision 5 would have to be renumbered.

**(b) The Exceptions.**

And so forth.

**Rule 807. Residual Exception.**

**[The reference in the residual exception to “Rule 803 or 804” would have to be changed to “Rule 805 or 806”]**

**Note:** You could move all the remaining rules up in the same order they are now. So existing 805 would become Rule 807, etc. But it is clearly better to keep Rule 807 where it is and move current 805 and 806 to the end of the line. First, the residual exception is best placed in a grouping with all the other exceptions. The only reason it isn't currently so placed is because it was added well after the original Rules were adopted — the Advisory Committee wanted to avoid the disruption that would have been caused by making the residual exception Rule 805 and moving all the other rules up one number. Given that the proposed amendment would already be renumbering, it would make sense to now group all the hearsay exceptions together. It also makes sense to retain the residual exception as Rule 807 so as to avoid disrupting electronic searches of residual hearsay cases.

**Rule 808. Hearsay Within Hearsay.**

**Rule 809. Attacking and Supporting the Declarant's Credibility.**

***Reporter's Comment:***

This is a disruptive change. And after the dust settles, it won't change any evidentiary result or fix any practical problem. But it does have some virtues, including: 1. Treating hearsay exceptions as what they are — exceptions — and thus avoiding any possible confusion; 2. Grouping all hearsay exceptions together numerically; 3. Separating prior statements of testifying witnesses and statements of party-opponents into their own exceptions, thus fixing the illogical grouping that currently exists; and 4. Putting the exception for past recollection recorded in the most logical, if not perfect, place.

Of course it is for the Committee to determine whether the benefits in propounding a logical and coherent system are worth the disruption. If the Committee decides to more fully consider any of the above options, a proposed amendment and Committee Note will be drafted for the next meeting.

## APPENDIX C

## HANDOUT FROM ROGER PARK

**I. SUGGESTED REVISIONS.****Rule 14. Preliminary Questions<sup>1</sup>**

(a) ~~In General.~~ **General Rule.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) **Exception to General Rule: Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

**Rule 405. Methods of Proving Character**

(a) **By Reputation or Opinion.** When evidence of a person's character or character trait is admissible to prove that on a particular occasion the person acted in accordance with the character or trait, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) **By Specific Instances of Conduct.** When evidence of a person's character or character trait is an essential element of a charge, claim, or defense, admissible for a purpose other than proving that on a particular occasion the person acted in accordance with the character or trait, the character or trait may also be proved by relevant specific instances of the person's conduct.

**Rule 408, Compromise Offers and Negotiations<sup>2</sup>**

(a) **Prohibited Uses.** Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

- (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and

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1. Idea from John-Mark Stensvaag.

2. Idea from Dale Nance.



(2) conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

**(b) Exceptions. Permitted Uses.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

**Rule 804 Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness**

**(b) The Exception.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

**(1) Former Testimony.** Testimony that:

- (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
- (B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity to examine the witness when the former testimony was given; and
- (B)(C) ~~is now offered against a party who had—or in a civil case, whose predecessor in interest had—an opportunity and that~~ party or predecessor in interest had a similar motive to develop that testimony by direct, cross, or indirect examination

**II. STUDENT ANSWERS TO QUESTIONS ABOUT RULE 609**

Question: Rule 609(a)(1) applies only to witnesses other than the defendant. T or F

Correct answer = F

	Old (Fa 2009)	Restyled (Fa 2011)
T	42	7
F	<u>17</u>	<u>43</u>
Total	59	50
Pct Correct	29%	86%

$X^2 = 35.76$

$p = 0.000$

### III. STUDENT ANSWERS SHOWING CONFUSION ABOUT THE REQUIREMENTS OF THE FORMER TESTIMONY EXCEPTION

Rule 805(b)(1), the former testimony exception to the hearsay rule, contains a “same party or predecessor” requirement. In a criminal case, the party against whom the testimony is offered in the present proceeding must have had an opportunity to question the witness in the prior proceeding in which the testimony was given. In a civil case, the party or its predecessor in interest must have had the opportunity to question the witness.

In the current rule, the “same party or predecessor” requirement is stated in the same sentence as the “similar motive” requirement. Students have trouble untangling these two requirements and often think that only a similar motive is required.

Student answers to the following question illustrate student confusion about the requirements of the exception under both the original and restyled version of the rule. I posed the question to the students by displaying it on a screen. I asked the students to review the language of Fed. R. Evid. 804(b)(1) before answering the question.

Students signalled their answers with an Audience response system. Under both the original and restyled rules, most students got the answer wrong. I then asked them to discuss the answer with their neighbors and try again. The answers improved, but there were still many wrong answers.

Note that the answers below were given after the students were asked to reconsider, discuss and re-answer. There were a greater number of incorrect answers before the students reconsidered.

There were a larger proportion of incorrect answers under the restyled rule than under the original rule, but the difference was not statistically significant at the .05 level.

The students answered the question before there was any class discussion of Fed. R. Evid. 804(b)(1) or the former testimony exception. The syllabus assignment for the class required the students to read Fed. R. Evid. 804(b)(1) and a state civil case in which the state court held that the former testimony exception applied when a party in the prior action had a similar motive to

cross-examine, even if the party was not the same. The question was asked before we had reached the Confrontation Clause materials.

**Compilation of student answers to a question about former testimony offered against an accused who was not represented in the previous action**

Question: (The federal rules apply.) In a robbery case, the state claims that X committed the robbery and Y drove the getaway car. X and Y are tried separately. In State v. X, the defendant cross-examined the victim in an attempt to show that she was mistaken in identifying him as the robber. In State v. Y, Y also claims that the victim mistakenly identified X. If the victim is unavailable, the state may use the victim's former testimony as evidence against Y. T or F

Correct answer = F

	Old (Spr. 2009)	Restyled (Fa. 2011)
T	17	25
F	<u>32</u>	<u>22</u>
Total	49	47
Pct. Correct	65%	47%

$X^2 = 3.354$

$p = 0.067$