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Symposium on Federal Government Simplification Experiences

Simplification of the Appellate Rules of Civil Procedure

Carol Ann T. Mooney*

The first thing I need to do is thank Judge Keeton who, along with Professor Charles Wright, was the moving force behind the style project for the Federal Rules. Many thanks for all the work that he and Professor Wright have done to date and will continue to do.

The major point I want to make is pretty simple. To call these projects "style" or "simplification" projects in some way understates what is done and what is at stake. I read a recent article by Professor Linda Berger in the *Journal of Legal Education* on new rhetoric. I do not know much about new rhetoric and I do not pretend to really understand it. But there were a few things that Professor Berger said in that article that made me reflect on the process I had been involved in when we were rewriting the appellate rules. One thing she said is that new rhetoric teachers believe that what writers do is how they come to know. Second, she stated that it is not until we are forced to reread and rewrite what we have read and what we have written that we come to any clear understanding. And third, the process of writing creates situations in which students can learn to think.

I. Interrelationship Between Substance and Style

My main point is that you cannot separate content or substance from style. You cannot separate them from knowing or understanding. Being clear is a matter not only of style, but it is also a matter of understanding and knowing.

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Our aims in rewriting the federal appellate rules were to use words and phrases consistently throughout the set of rules, to make the rules simpler to read and understand and, when necessary, to clarify the meaning of the rule. Another stated objective was to revise without making substantive changes.

The dividing line between style and substance is probably even more illusive and ephemeral than that between substance and procedure. When one undertakes to rewrite a rule or a statute to make it clearer and more coherent, the process inevitably transforms what had been previously written. It transforms the rule. So, in many ways, it is true that content cannot be separated from the words used. But, at the pragmatic operating level, our aim was to rewrite without changing existing practice, without changing what a court does, or without changing what the lawyer who practices before the court is required to do.

II. The Appellate Rules Process

The rewriting process for the appellate rules took five years from beginning to end, and the Federal Rules of Appellate Procedure are not a big body of rules. The first chair of the style subcommittee was Professor Charles Wright. One of the committee members was Judge Keeton. Among the first things that Professor Wright and Judge Keeton did was hire Bryan Gardner, a legal writing expert. Bryan took the first crack at the rewrite. He spent six months of intensive work and rewrote the rules from beginning to end. He then turned his draft over to the style committee headed by Professor Wright. That committee looked at the draft for both style and substance, again believing that they could not exist one without the other. Then the revised draft came to the Advisory Committee on Appellate Rules, which initially worked in subcommittees, and then came together as a committee of the whole and talked endlessly. One of the staffers who works with all the rules committees said that those meetings (which tended to be very long and fairly tedious and, at times, very contentious) had a higher probability of causing headaches than any other rule committee meetings. That comment should be considered in light of the fact that the appellate rules, and amendment of them, are relatively non-controversial. Clearly, one of the reasons that the style revision process initially became public with the appellate rules is that a change in the appellate rules is usually a far less traumatic undertaking than amendment of the civil or criminal rules.

It became clear that calling this project a process of "restyling" was, as I said before, understating the process. Not only are rules subtly transformed by things such as creating subdivisions and headings, but the rewriting process inevitably uncovers ambiguities and, at least in the appellate rules which are not often the subject of litigation, ambiguities which had never been litigated and never been resolved. When one uncovers an ambiguity and aims to bring clarity, one must choose among the many possible readings of the existing rule. All instances in which the committee was confronted with the task of clarifying a pre-existing ambiguity were highlighted in the committee notes. Even though we did not intend to change substance, some such changes were an inevitable result of the process.

III. Judge, Lawyer and Court Clerk Representation

One thing that was helpful in our process is that the rules obviously have two primary audiences: practitioners and judges. The presence on the Advisory Committee of both groups was invaluable.

A third important audience for rules, of course, is court clerks. They are the people on the ground who administer many of the rules. The Advisory Committee on Appellate Rules has, for a long time, had a circuit clerk sitting as advisor to the committee and the clerk's presence was extremely useful. So, one recommendation I would make is to include in any drafting process all the major audiences, the major users of the end product.

IV. Principles, Conventions and Guidelines

We had broadly stated *principles* that guided our redrafting. Those principles included things like: be clear; make it readable; and be brief, as brief as you can be and still be clear.

We had *conventions* that we followed such as: singular nouns rather than plural nouns; use present tense rather than past or future; and use active voice rather than passive.

We also had very specific *guidelines* on things like structure; that is on the internal organization of a rule. Again, the guidelines included obvious things like stating the broadly applicable portion of the rule before the more than narrowly applicable portions. The general principle should procede any exceptions. Contemplated events should appear in chronological order. All these guidelines were written. We also had an agreed upon structure for subdividing the rules. Such regularization is necessary so that the rules do not

inconsistently use a, b, c and 1, 2, 3 or otherwise abuse the structure in ways that would create confusion. When redrafting resulted in new subparts, every effort was made so that the numbering of oft-cited rules would not change. For example, one would not want to change Civil Rule 12(b)(6) and make it rule 12(b)(14). That would be counterproductive and difficult for practitioners. In short, we had very specific guidelines as well as general principles.

V. Time for Model "Guidelines & Principles"—Impact on Teaching

I think it is time to develop model rules for drafting. A wealth of experience has been accumulated. Various groups have worked on their own guidelines and principles. If the various sets of guidelines and principles can be put together into a coherent set of model guidelines, that would be extremely useful. Substantively these "guidelines and principles" would have a very strong impact on my classroom teaching. When I teach, one of the things that I try to do is impart the way I think about and come to understand the law. Lately, my thinking about and understanding the law has become much more intertwined with how it is written and structured. When I do not understand something, now my first impulse is to try to redraft it. I think that is a lesson that I will bring more and more into the classroom.