

FEDERAL RULES OF CIVIL PROCEDURE RESTYLING PROJECT

Ad Hoc Committee of Academics and Practitioners

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Restyling Project Comments

Restyled Rule 1. Introduction of “and proceedings” may support an argument for expansion of the rules’ applicability. To be sure, the Committee disclaims such a purpose. But the decision in *SEC v. McCarthy*, 322 F.3d 650 (9th Cir. 2003), to which the Note refers, placed some emphasis on the statutory distinction between “actions” on the one hand and “applications” and summary proceedings on the other. Including “proceedings” in the definition of the scope of the civil rules may suggest a different answer in a future case. That would not necessarily be a bad thing, but it may go beyond restyling.

To be sure, the word “proceedings” appears in various jurisdictional statutes, nicely summarized in Professor Cooper’s article (79 NOTRE DAME L. REV. 1761). It also appears in many of the provisions of existing and Restyled Rule 81. But then Rule 2’s proclamation (“There is one form of action – the civil action”) may leave the reader wondering what Rule 1 means by “proceedings”. As the forms of action recede into history, Rule 2 may take on greater significance for the interpretation of Rule 1’s reference to “civil actions”. Perhaps Restyled Rule 2 should face that likelihood squarely, and declare that all civil actions and proceedings within the scope of the rules will be referred to generally as civil actions.

Restyled Rule 2. See our comment above about Rule 2’s relevance to Rule 1.

Restyled Rule 4(e). It may make sense to drop the old formulation “dwelling house” in favor of “dwelling”. But Restyled Rule 4(e)(2)(B) may introduce a new uncertainty. It retains alternative references to “dwelling” and “usual place of abode”. In the existing rule, “usual place of abode” serves as an alternative to “house”, in recognition that some may abide in an apartment or other structure that would not qualify as a “dwelling house”. Dropping “house” from the restyled rule means that “usual place of abode” will now operate as an alternative to “dwelling”. Of course, some readers may regard these terms as defining one another. Others may contend that the restyled rule contemplates two alternative places where substituted service might be permissible. Current law provides some support for an alternative reading already, and a leading treatise endorses that view. See 4A Wright & Miller, *Federal Practice and Procedure* § 1096, at 530-31 (2002). Restyled Rule 4(e)(2)(B) may encourage this alternative reading.

Restyled Rule 4(m). The word “initiative” has been deleted from the phrase "on its own initiative". In this context “on its own initiative” is a widely used term of art (equivalent to "sua sponte"), and its deletion from the text may cause confusion, as we note elsewhere as well (*e.g.*, Rule 11(c)(3)). In a sense, even when a motion is made, a court issues or refuses to issue an order "on its own". Suggestion: insert "initiative" after "on its own".

Restyled Rule 5(b)(2)(B)(ii). See comment on “dwelling” instead of “dwelling house” in response to Restyled Rule 4(e)(2)(B).

Restyled Rule 5(b)(2)(D). The change from “the person ... has no known address” to “the person’s address is unknown” may suggest a lower burden on the party. Suggestion : restore “if the person has no known address”.

Note: The Restyling Project submits these comments on Proposed Style Forms 5 and 6 at the suggestion of one of the Committee’s consultants. We have not examined the other proposed style forms.

Proposed Style Form 5 substitutes for existing Form 1A. The drafters should change Restyled Rule 4, which continues to refer to Form 1A. The second paragraph speaks of a duty to avoid “costs”, which reflects the language of the existing rule but not the references to “expenses” in Restyled Rule 4(d) . “Expenses” may in any event better communicate the risk to a lay person. The third paragraph declares that the “action will then proceed”, in keeping with the existing rule, instead of stating, as does Restyled Rule 4(d)(4), that the rules will apply. The fourth paragraph refers to formal service, a reference possibly lost on a lay person. This paragraph also refers to “costs” instead of “expenses”. Suggestion: substitute “I will arrange to have the summons and complaint served on you and ask the court to require you, or the entity you represent, to pay the expenses of making service”. The fifth paragraph requests that the party read the enclosed statement. Its phrasing should more closely track Restyled Rule 4(d) and the heading of the attachment to Proposed Style Form 6 (where, however, “costs” should be “expenses”). Suggestion: substitute “duty to avoid unnecessary expenses” for “duty to waive service”.

Restyled Rule 7(a)(7). Given the wording of restyled Rule 7(a)(6), specifically including "an answer to a third party complaint", and in light of the intent expressed in the Committee Note, the phrase "or a third party answer" in Rule 7(a)(7) is redundant and raises the question of why other answers (*e.g.*, to a counterclaim or crossclaim) are not also specifically referred to. Suggestion: delete the phrase "or a third party answer". In any event, we do not understand how this proposed change can be thought not to change the meaning of Rule 7 and therefore suggest that it be included in the style/substance track

Restyled Rule 7.1(a). The heading of this provision, like that of the existing provision, is incomplete. Suggestion: change the heading to read: "Who Must File; Contents".

Restyled Rule 8(a)(3). The restyled provision deletes the words "judgment for". The present forms appended to the rules use the word "judgment" in complaints for money damages but not for equitable relief, but given the provisions of Rules 58-60, as well as the nature of adjudication, the existence of a judgment is surely an integral part of the relief sought in any action. Suggestion: insert "judgment for" after "a demand for".

Restyled Rule 8(b). The heading of this provision, both in the existing and in the restyled rule, is incomplete, since the provision refers to admissions as well as to defenses and denials. Suggestion: change the heading to read: "Responding to a Pleading".

Restyled Rule 8(d)(3). The deletion of the reference to Rule 11 here may cause difficulty for courts and practitioners because, despite the disclaimer in the Committee Note, the specific authorization of inconsistent claims or defenses may be read (especially in view of the deletion) as overriding the general limitations imposed by Rule 11. Suggestion: begin this provision with the phrase "Subject to the obligations set forth in Rule 11", and explain in the Note the special reason for retaining the Rule 11 reference at this point.

Restyled Rule 9(a)(2). The word "denial", which does not appear in the existing provision, seems inappropriate, since there has presumably not been any allegation (at least none is required), and the word "denial" is used in the pleading rules only to refer to a response to an allegation. Suggestion: substitute "specific statement setting out [or 'setting forth']" for "specific denial, which must state".

Restyled Rule 9(h)(1). For ease of reading, restore the comma after "Rule 82".

Restyled Rule 10(a). The phrase "that names the parties" in the first sentence of this provision is redundant, since the second sentence makes (and adds to) the point by stating that: "The title of the complaint must name all the parties". Suggestion: delete the phrase in the first sentence. In the second sentence, the phrase "may name the first party on each side" changes the meaning of the rule, which presently *requires* the naming of at least the first party on each side. Suggestion: change "may name the first party on each side and refer generally to other parties" to "must name the first party on each side and may refer generally to other parties".

Restyled Rule 10(c). Restyled Rule 10(c) eliminates use of the word "exhibit(s)". This deletion may cause confusion because documents are frequently enclosed with (or even physically attached to) a pleading as filed that are not intended to be incorporated as part of the pleading – for example, a transmittal letter, a case information form, a request for a summons, and a filing fee check. Labeling a document as an exhibit clarifies the pleader's intention. Suggestion: restore the prior heading, "Adoption by Reference; Exhibits", and insert the words "as an exhibit" after "attached" in the second sentence.

Restyled Rule 11(b)(1). This provision raises an issue that recurs in the restyled rules (*see also* Restyled Rule 26(g)(1)(B)(ii)). The existing phrase "cost of litigation" is changed to "litigation costs" in Restyled Rule 11(b)(1). "Cost of litigation" and "litigation costs" often do not mean the same thing. "Cost of litigation" is inclusive of attorney's fees, but the phrase "litigation costs" is a technical phrase that many times does not. "Litigation costs" is sometimes used in statutes as distinct from attorneys' fees (*e.g.*, False Claims Act, 31 U.S.C. § 3730(h) ("litigation costs and reasonable attorneys' fees") — even Restyled Rule 68 uses the lone word "costs" in this sense to mean statutory costs, as in 28 U.S.C. § 1912. This, then, is potentially a substantive change. If intended, it should be included in the style/substance track; if change is not intended, the existing language should be retained.

Restyled Rule 11(c)(2). This provision also raises an issue that recurs in the restyled rules (*see also* Restyled Rules 37(b)(2)(A)(i) and 50(e)). Introduction of the phrase "the

prevailing party” is confusing. That phrase usually refers to the winner of the case, as it does in both existing and Restyled Rule 54(d)(1). What Restyled Rule 11(c)(2) is referring to is the party prevailing on the motion. Suggestion: substitute the former phrase, “the party prevailing on the motion”, for “the prevailing party.”

Restyled Rule 11(c)(3). The word “initiative” has been retained in the heading of the restyled rule but deleted in the text. “On its own initiative” in this context is a widely used term of art (equivalent to “sua sponte”), and its deletion from the text may cause confusion. In a sense, even when a motion is made, a court issues or refuses to issue an order “on its own”. Suggestion: insert “initiative” after “on its own”.

Restyled Rule 11(c)(5). For the reasons stated in connection with Restyled Rule 11(c)(3), the word “initiative” should be inserted after “on its own”.

Restyled Heading to Rule 12. For reasons stated below (see comments on Restyled Rule 12(g)), the phrase “Consolidating and Waiving Defenses” (added to the heading of the existing rule) is incomplete. Suggestion: change “Consolidating and Waiving Defenses” to “Consolidation and Waiver”.

Restyled Rule 12(a)(1)(A). Although the use of more than three lettered or numbered sets of subdivisions in a single rule (going down to (i), (ii), (iii), etc.) may occasionally be warranted by the complexity of a rule, we believe it is usually not required for clarity and should be used sparingly if at all. To simplify citation and to avoid confusion, we therefore propose that use of more than three subdivisions should generally be avoided. Two methods of avoidance are (1) the use of bullets (as in Restyled Rule 8(c)(1)), and (2) combination of the subdivisions. Suggestion: substitute bullets for (i) and (ii), or combine the two subdivisions into one, turning Rule 12(a)(1)(A) into a single sentence. For practical reasons, our preference is the latter (How does one deal with bullet points in quoting a rule in a sentence? Are ellipses required? Must the bullet point appear?).

Restyled Rule 12(f)(1). Suggestion: for reasons stated in the discussion of Restyled Rule 11(c)(3), insert “initiative” after “on its own”.

Restyled Rule 12(g). The heading “Consolidating Defenses” seems inapt, since 12(e) and 12(f) motions don’t necessarily involve defenses. Suggestion: change the heading of Rule 12(g) to “Consolidating Defenses and Objections” (and correspondingly, change the heading of (g)(1) to “Consolidation”).

Restyled Rule 12(h)(1)(B). For reasons given above (see discussion of Restyled Rule 12(A)(1)(a)), use of subdivisions (i) and (ii) seems unnecessary. Moreover, the reference to Rule 15(a) would be clearer if it were changed to a reference to Rule 15(a)(1). Suggestion: change Restyled Rule 12(h)(1)(B) to read: “failing to make it by motion under this rule or to include it in a responsive pleading or an amendment allowed by Rule 15(a)(1) as a matter of course”.

Restyled Rule 12(h)(2). Given the reference to “Rule 19” in Restyled Rule 12(b)(7), the reference to Rule 19(b) in this provision leaves a gap with respect to 12(b)(7) motions based on Rule 19(a). We assume this gap is not intended. Suggestion: change “Rule 19(b)” to “Rule 19”.

Restyled Rule 12(h)(3). The restyled rule preserves the wording of the prior rule (requiring dismissal), and in doing so may cause difficulty under existing law. The problem is that under present law, defects of subject matter jurisdiction may require not dismissal but remand in removed cases, and may be correctable (for example by dismissal of a party or claim) in original or removed cases. This matter may call for consideration in the substance/style track. Alternatively or in addition, the words “and if the case is not remanded and the defect cannot be cured”, could be added after “jurisdiction.”.

Restyled Rule 13(b). As presently worded, the restyled rule includes all counterclaims as "permissive", even those defined as "compulsory" under Rule 13(a). Whether or not this will cause difficulty, and it might, it makes little sense and is easily corrected. Suggestion: change Restyled Rule 13(b) to read: "A pleading may also state as a counterclaim against an opposing party any claim that is not a compulsory counterclaim under Rule 13(a)".

Restyled Rule 14(a)(6). In contrast to the existing rule, the first sentence of the restyled rule implies that in rem jurisdiction is automatically available if the third party complaint is admiralty or maritime. If the qualifications in the existing rule are inherent in an in rem action in admiralty, this is perhaps not problematic. If not, the implication could be removed by making the sentence conditional.

Restyled Rule 15(b). The heading for 15(b)(2) (“After Trial”) seems inapt, since (b)(2) applies to amendments that can be made at any time, including during trial. Moreover, the principal difference between (b)(1) and (b)(2) is not between amendments made during and after trial. Instead, the distinction is between (1) amendments based on trial evidence that was met with an objection that the evidence was not within issues raised in the pleadings and (2) amendments based on new issues that were tried by consent. Suggestion: change the headings of 15(b)(1) and (b)(2) to “Evidence Objected to at Trial” and “Issues Tried by Consent”, respectively.

Restyled Rule 15(c)(1). The word "May" in the new heading of this provision is incorrect, since the amendment *must* relate back if the conditions of the provision are met. Suggestion: change the heading to read: "When an Amendment Relates Back".

Restyled Rule 15(c)(1)(C). For the reasons stated in connection with Restyled Rule 12(a)(1)(A), substitute bullets for, or combine, (i) and (ii) in this provision (and correspondingly, change the reference in Restyled Rule 15(c)(2) from "Rule 15(c)(1)(C)(i) and (ii)" to "Rule 15(c)(1)(C)").

Restyled Rule 15(c)(1)(C). The restyled provision preserves what is generally recognized as an error in the existing rule. When the earlier rule was revised to change the result in *Schiavone v. Fortune*, 477 U.S. 21 (1986), the revision (inadvertently?) provided that relation back was precluded when the party to be brought in by the amendment has received notice after the time for service under Rule 4(m) but within the limitations period. This problem could readily be resolved by inserting, after "the period provided by Rule 4(m) for serving the summons and complaint", the phrase "or the period of the applicable statute of limitations, whichever is longer.". This issue might be referred for consideration in the style/substance track.

Restyled Rule 16(b)(3)(B). The first three items in the existing Rule 16(b) have been condensed into a single sentence in Restyled Rule 16(b)(3)(A), but the next three, in (B), have not. For reasons stated in connection with Restyled Rule 12(a)(1)(A), we suggest that they should be, or that bullets should be used instead.

Restyled Rule 16(c)(1). Since the word "may" in the second sentence confers discretion, it is not clear whether the words "If appropriate," at the beginning of the sentence, are redundant or are intended to add to or qualify this discretion. We assume the words are redundant. Suggestion: delete "If appropriate,".

Existing and Restyled Rules 16(d) and (e). The order of these provisions has been reversed in the restyled rules. Although this makes sense as a matter of logic, the change may cause confusion for purposes of citation and research. Suggestion: consider returning to the existing order.

Restyled Rule 16(e). The words "an order issued after a final pretrial conference" could be read to refer to *any* order issue after the final conference, whether or not it is the order that is issued to embody the results of the conference (especially since the word "order" is not previously used in the text of the provision). Suggestion: change the last sentence to read: "The court may modify an order reciting any action taken at the final pretrial conference only to prevent manifest injustice".

Restyled Rule 16(f)(1). For reasons stated in connection with restyled Rule 11(c)(3), insert the word "initiative" after "on its own".

Restyled Rule 17: Title. We recommend against changing the title of Rule 17. The change to "the plaintiff and defendant" eliminates a clear statement that the rule applies to all parties, not just the original plaintiff(s) and defendant(s), and suggests a two-party model of litigation.

Restyled Rule 17(a),(c). Subdividing these sections adds words, numbers and subtitles without increasing clarity. The first sentence in existing Rule 17(a) is more understandable than when it is broken down into two paragraphs, one with seven subparagraphs. The added formalism makes the list in Rule 17(c) seem exclusive rather than, as the present wording seems clearly to imply, flexible and inclusive. We recommend against these changes.

Restyled Rule 18(a). The change from "an original claim" to "a claim" is inconsistent with Restyled Rule 8(a) and may be read to imply that a "claim" is different from a "counterclaim", a "crossclaim", or a "third-party claim", an interpretation that could have numerous unfortunate consequences. Suggestion: change "a claim" to "an original claim".

Restyled Rule 19(b)(2). We recommend against breaking Rule 19(b)(2) into subparts. The sentence is clear and easily understood without them, and the subparts imply rigidity rather than flexibility and discretion.

Restyled Rule 21. We note a possible ambiguity: Might the change from "at any stage of the action" to "at any time" imply that Rule 21 can be used after judgment? Further, the word "initiative" has been deleted from the phrase: "on its own initiative". As noted in connection with other restyled rules, the phrase "on its own initiative" is a widely used term of art

(equivalent to "sua sponte"), and the deletion of the word "initiative" may cause confusion. In a sense, even when a motion is made, a court issues or refuses to issue an order "on its own". Suggestion: insert "initiative" after "on its own".

Restyled Rule 23(a). We recommend against the proposed change to "class claims and defenses" in (a)(3). One could read the proposed language to direct the court to match the putative class representatives' claims only against the common questions, and not against all of the questions, both common and individual, involved in the class members' claims.

Restyled Rule 23(b)(1). We recommend against the change from "individual members of the class" to "individual class members". There is a subtle difference in meaning; the proposed language could be confusing by juxtaposing "individual" and "class", and the existing language is familiar and incorporated in much case law.

Restyled Rule 23(b)(1)(B). We recommend retaining "would, as a practical matter, be dispositive" because it is more clear, idiomatic, and accurate than the proposed rewording, and saves adding a "would" later in the sentence. We suggest that adding "or" at the end of (b)(1)(B) might help to keep the alternative nature of the categories clear.

Restyled Rule 23(b)(3). We recommend retaining "common to members of the class". This wording emphasizes the individuality of the members of the putative class, while the proposed wording emphasizes that they are part of a class. The risk of changing the meaning of an important rule outweighs the stylistic benefit of replacing "of" with a possessive. Similarly, we recommend against changing "the interests of members of the class" in (b)(3)(A) to "the class members' interests," "litigation . . . by or against members of the class" in (b)(3)(B) to "litigation . . . by or against class members," and "members of the class" to "class members" in (c)(3)(B).

Restyled Rule 23(c). For reasons given elsewhere we recommend against the extent of subdivision in Restyled Rule 23(c)(2)(B). We also recommend changing the placement of the commas in Restyled Rule 23(c)(3)(B) to "to whom the . . . notice was directed and who have not requested exclusion, [added comma] and whom the court finds." The group that is eligible to be bound by the judgment is the group to whom notice was directed *and* who didn't request exclusion. Not requesting exclusion is not just part of a list. And the group that the court declares is bound by the judgment is that group. We also note a possible ambiguity in Restyled Rule 23(c)(4): Eliminating "brought or" in "brought or maintained" might imply that one must bring a class action as a "whole" and then have the court determine that it can be "maintained" only "with respect to particular issues". *Cf.* debates about the propriety of seeking (only) partial summary judgment under existing Rule 56. Suggestion: restore "brought or".

Restyled Rule 23(d). For reasons given elsewhere we recommend against the extent of subdivision in Restyled Rule 23(d)(1)(B).

Restyled Rule 25(a)(1). Replacing "the action shall be dismissed" with "the action . . . may be dismissed" appears to be a substantive change. Suggestion: unless there is unanimous agreement in the case law that the existing language confers discretion — in which event the matter should be discussed in the Committee Note — transfer this change to the style/substance track.

Restyled Rule 26(a)(1)(A)(iv). The deletion of the phrase “which may be entered in the action” arguably mandates disclosure of insurance agreements that are irrelevant to the pending action. Suggestion: insert “in the action” following the phrase “all or part of a possible judgment.”

Proposed Deletion of Rule 26(a)(5). Elimination of redundancy is a commendable goal, but existing Rule 26(a)(5) actually settles some disputes. It dispels the argument, for example, that requests for admission are not discovery devices. *Joseph L. v. Conn. Dep’t of Children & Families*, 225 F.R.D. 400, 402, 403 (D. Conn. 2005). Or that a Rule 45 subpoena duces tecum is not a discovery device. *Parker v. Learn the Skills Corp.*, 2004 U.S. Dist. LEXIS 21498, at *8 n.4 (E.D.Pa. 2004). In the real world, these issues come up with some frequency as parties try to elude discovery cutoff dates. A quick LEXIS search found more than a dozen cases using 26(a)(5) to deal with such arguments over the past 5 years. Deletion of this provision is, therefore, undesirable. Suggestion: retain (and restyle) existing Rule 26(a)(5).

Restyled Rule 26(a)(2)(B)(vi). Restyled Rule 26(a)(2)(B)(vi) is problematic because it omits information that is currently required to be disclosed. Existing Rule 26(a)(2)(B) requires each retained expert’s report to disclose “the compensation to be paid for *the* study and testimony....” Restyled Rule 26(a)(2)(B)(vi) limits the disclosure to “a statement of *the witness’s* compensation for study and testimony in the case”. The problem is that “*the witness’s* compensation for study and testimony” may be far less than “the compensation to be paid for the study and testimony”. An economic expert, for example, is frequently an academic. The mass of data is crunched by a separate, non-testifying consulting firm (*e.g.*, Cornerstone, Analysis Group, FTI). The witness’s “study” includes supervising, working with, and analyzing the work product of, the consulting firm, but the consulting firm is doing a great deal on its own. The current disclosure requirement captures everything done by the expert as well as the back-up firm because disclosure is not limited to the expert’s individual compensation — it applies to “the compensation to be paid for *the* study and testimony”, as opposed to limiting the disclosure to “*the witness’s* compensation for study and testimony”. (A similar problem arises when a PricewaterhouseCoopers (or other Big Four) partner is the retained expert and his/her firm does the backup work — disclosure should not turn on the question whether the testifying expert retention agreement is with the firm, rather than the individual.) Suggestion: retain the existing language.

Restyled Rule 26(b)(1). The restyling highlights, but does not cure, inconsistent terminology in the existing version of Rule 26. Thus, Restyled Rule 26(b)(1) encompasses “documents or other tangible things” while Restyled Rule 26(b)(5) encompasses “documents, communications, or things”, even though the items as to which privilege is claimed under 26(b)(5) must be producible under Rule 26(b)(1). The restyling should rectify this inconsistency, which extends to other rules as well. *See, e.g.*, Restyled Rules 34(a) (“documents” and “tangible things”); 34(c) (same); 45(a)(1)(A)(iii), (b)(1) and (c)(2)(A) (same); 45(c)(2)(B) (“designated materials”); 45(d)(2) (which appears to be misnumbered as the second 45(c)(2)) (“documents, communications, or things”).

Restyled Rule 26(e). Deleting the phrase “to include information thereafter acquired” is problematic. According to the Note, the change was made because “[t]his apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial

disclosure or response. These words are deleted to reflect the actual meaning of the present rule”. This analysis confuses the duty to supplement with the duty to correct. The words “or corrective” in the existing rule are confined to changing an answer based on information acquired after the original response was made. They are not a license to withhold information and provide it later through Rule 26(e). Currently, there is no limitation on the right to amend a prior discovery response. When parties amend discovery responses to correct an erroneous response based on information that they had at the time the original response was made, the correction is not based on Rule 26(e) but on their duty to the court to correct a false certification — the same duty that gives rise to the duty (and right) to correct in Rule 11(c)(1)(A). Compare amending and supplementing pleadings under Rule 15(a) vs. Rule 15(d). Suggestion: retain the existing language.

Restyled Rule 26(g)(1)(B)(ii). This provision raises an issue that recurs in the restyled rules (*see also* Restyled Rule 11(b)(i)). The existing phrase “cost of litigation” in Rule 26(g)(2)(B) is changed to “litigation costs” in Restyled Rule 26(g)(1)(B)(ii). “Cost of litigation” and “litigation costs” often do not mean the same thing. “Cost of litigation” is inclusive of attorney’s fees, but the phrase “litigation costs” is a technical phrase that many times does not. “Litigation costs” is sometimes used in statutes as distinct from attorneys’ fees (*e.g.*, False Claims Act, 31 U.S.C. § 3730(h)(“litigation costs and reasonable attorneys’ fees”) — even Restyled Rule 68 uses the lone word “costs” in this sense to mean statutory costs, as in 28 U.S.C. § 1912. This, then, is potentially a substantive change. If intended, it should be included in the style/substance track; if change is not intended, the existing language should be retained.

Restyled Rule 26(g)(2). The last paragraph of existing Rule 26(g)(2) provides that, “[i]f a request, response, or objection is not signed, ... a party shall not be obligated to *take any action* with respect to it until it is signed”. The restyled rule provides that, “[u]ntil the signature is provided, the other party has *no duty to respond*”. If the unsigned item is an objection, no response is due. If the concept is that the unsigned paper is inoperative, the verb “respond” does not capture all scenarios covered by the rule. Suggestion: change “to respond” to “to take any action with respect to it”.

Restyled Rule 29(b). The existing rule requires a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), 36(a)(3), 59(c)).

Restyled Rules 30(a)(2)(A) and (b)(4). The existing rules (30(a)(2) and 30(b)(7)) require a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (29(b), 31(a)(2)(A), 33(a)(1), 33(b)(2), 36(a)(3), 59(c)).

Restyled Rule 30(b). This provision is inconsistent in substituting “audio” for “sound” in Restyled Rule 30(b)(3)(A) (vs. existing Rule 30(b)(2)) but then using “sound” again in Restyled Rule 30(b)(5)(B). There is no apparent reason for the inconsistency.

Restyled Rule 30(f)(1). There is a discrepancy between Restyled Rule 30(f)(1) and Restyled Rule 31(b)(3), both governing the reporter’s delivery of transcripts. This discrepancy exists in the existing rules and is not corrected. Rule 30(f)(1) requires that the

transcript/recording be delivered to “the attorney who arranged for the transcript or recording”, while Rule 31(b)(3) requires that it be delivered to “the party”. It is suggested that they be identical and, perhaps, that they be drafted in terms of parties, rather than lawyers, to deal with *pro se* litigants. Further, the “notice of filing” subsection of this rule (Rule 30(f)(4)) and of Rule 31 (Rule 31(c)), should be deleted. Parties no longer file deposition transcripts with the clerk of court in the ordinary course — indeed, Rule 5(d) bars this practice. If transcripts are filed in connection with motion practice or similar events, other provisions of the rules cover the notice requirements. Suggestion: Refer these issues to the style/substance track.

Restyled Rule 31(a)(2)(A). The existing rule requires a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (29(b), 30(a)(2)(A), 30(b)(4), 33(a)(1), 33(b)(2), 36(a)(3), 59(c)).

Restyled Rule 31(b)(3). As noted in connection with Rule 30(f)(1), there is a discrepancy between Restyled Rule 31(b)(3) and Restyled Rule 30(f)(1), both governing the reporter’s delivery of transcripts. This discrepancy exists in the existing rules and is not corrected. Rule 30(f)(1) requires that the transcript/recording be delivered to “the attorney who arranged for the transcript or recording”, while Rule 31(b)(3) requires that it be delivered to “the party”. It is suggested that they be identical and, perhaps, that they be drafted in terms of parties, rather than lawyers, to deal with *pro se* litigants. Further, the “notice of filing” subsection of this rule (31(c)), like the notice provision of Rule 30 (Rule 30(f)(4)), should be deleted. Parties no longer file deposition transcripts with the clerk of court in the ordinary course — indeed, Rule 5(d) bars this practice. If transcripts are filed in connection with motion practice or similar events, other provisions of the rules cover the notice requirements. Suggestion: Refer these issues to the style/substance track.

Restyled Rule 31(c). In light of the 2000 amendment to Rule 5(d), the duty to file arises only when discovery is used in the proceeding or the court orders it filed, but in those circumstances there should be no need for separate notice. Suggestion: delete this provision, explaining why in the Note.

Restyled Rules 33(a)(1) and (b)(2). The existing rules (33(a) and (b)(3)) require a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (29(b), 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 36(a)(3), 59(c)).

Restyled Rule 33(a)(2). Pace Professor Cooper, the removal of “necessarily” from the phrase “not necessarily objectionable” is a substantive change. There are times when a request for an opinion or contention may be objectionable — *e.g.*, an interrogatory addressed to a non-expert that seeks an opinion “based on scientific, technical, or other specialized knowledge”. Counsel should not have to quarrel about whether this is really a relevance objection or whether it is precluded by the elimination of the right to object to opinion or contention requests on that basis. Suggestion: retain “necessarily”.

See the Restyling Project Comment regarding Rule 26(b)(1) and inconsistent terminology in various rules — “documents and tangible things”, “designated materials”, and “documents, communications, or things”.

Restyled Rule 36(a)(3). The existing rule requires a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (29(b), 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), 59(c)).

Restyled Rules 36(a)(5)-(6). There is no apparent need to separate Restyled Rules 36(a)(5) and (6), both of which deal with objections. Fewer subdivisions would be desirable.

Restyled Rule 37(b)(2)(A)(i). This raises an issue that recurs in the restyled rules (*see also* Restyled Rules 11(c)(2) and 50(e)). Introduction of the phrase “the prevailing party” is confusing. That phrase usually refers to the winner of the case, as it does in both existing and Restyled Rule 54(d)(1). What Restyled Rule 37(b)(2)(A)(i) is referring to is the party prevailing on the motion. Suggestion: substitute “the party obtaining the order” for “the prevailing party”.

Restyled Rule 37(c)(1). The restyling fails to address the principal drafting flaw in the existing text — namely, that the word “disclose” in the first dependent clause refers to mandatory disclosure, while the word “disclosed” later in the same sentence means revealed via disclosure or discovery. *See* Restyled Rule 26(e)(1)(A). The ambiguity should be clarified.

Restyled Rule 38(e). Existing Rule 38(e) refers to “an admiralty or maritime claim within the meaning of Rule 9(h)”. Restyled Rule 38(e) refers to “a claim designated as an admiralty or maritime claim under Rule 9(h)”. The latter description seems open to a narrower interpretation than the language in the existing rule: “Designated” claims could be taken to refer only to claims—in the language of existing Rule 9(h)—that “[a] pleading or count . . . identif[ies] . . . as an admiralty or maritime claim”, and not to claims that, though not so identified, are considered admiralty claims because they are “cognizable only in admiralty”. Indeed, Restyled Rule 9(h)(1) contrasts claims “designated” as admiralty or maritime claims with “claims cognizable only in the admiralty or maritime jurisdiction . . . whether or not so designated”. Suggestion: retain the existing language, “an admiralty or maritime claim within the meaning of Rule 9(h)”.

Restyled Rule 39(a)(1). Existing Rule 39(a) refers to “an oral stipulation made in open court and entered in the record”. It is not clear that Restyled Rule 39(a)(1)’s omission of the reference to “open court” is merely a stylistic change. *See, e.g., Tray-Wrap, Inc. v. Six L’s Packing Co., Inc.*, 984 F.2d 65, 68 (2d Cir. 1993) (noting, but avoiding, “the question whether a conference call (made without a court reporter present) can fairly be regarded as ‘open court’”); *compare* BLACK’S LAW DICTIONARY (8th ed. 2004) (giving, as first entry for “open court”: “A court that is in session, presided over by a judge, attended by the parties and their attorneys, and engaged in judicial business. *Open court* usu. refers to a proceeding in which formal entries are made on the record. The term is distinguished from a court that is hearing evidence in camera . . .”). Although the issue may be of less practical significance due to the rule in at least some circuits that a party can waive a prior jury demand through its conduct, *see, e.g., Middle Tennessee News Co., Inc. v. Charnel of Cincinnati, Inc.*, 250 F.3d 1077, 1083 (7th Cir. 2000), the restyling arguably changes meaning. Suggestion: add the words “in open court” after “so stipulate on the record”.

Restyled Rule 41(c)(2). Existing Rule 41(c) provides that if no responsive pleading is served to a counterclaim, cross-claim or third-party claim, the claimant’s voluntary dismissal

pursuant to Rule 41(a)(1) “shall be made . . . before the introduction of evidence at the trial or hearing”. Restyled Rule 41(c)(2) changes “the” to “a” thus: “before evidence is introduced at a hearing or trial”. The restyled version could be interpreted to refer to a pretrial hearing at which evidence is introduced. The existing version, by using “the”, appears to denote the ultimate trial on the merits. (Although existing Rule 41(c) refers to “the trial *or hearing*”, “hearing” may have been used to denote trials on equitable claims.) Changing “the” to “a” may, in this context, effect more than a stylistic change.

Restyled Rule 43(a). Although existing Rule 43(a) requires both “good cause shown” and “compelling circumstances”, the restyled rule omits the “good cause” requirement. The latter might seem redundant, since compelling circumstances would seem to provide good cause. However, the phrase “good cause *shown*” appears to contemplate that a party has made the relevant showing (as distinct from a situation in which the court on its own reaches the conclusion that good cause exists). Moreover, the Advisory Committee Note to the 1996 Amendments repeatedly refers to both “good cause” and “compelling circumstances”, suggesting that the inclusion of both phrases was hardly inadvertent; rather, the repetition of both phrases suggests an intention to emphasize the stringent nature of the test. “Good cause” might also place particular emphasis on whether the requesting party is guilty of an oversight that led to the need for the request. *See* 1996 Advisory Committee Note (“A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances.”). Suggestion: add “For good cause shown” before “[i]n compelling circumstances”.

Restyled Rule 45(a)(3). Replacing “on behalf of” with “from” suggests that the attorney must obtain the subpoena from the identified courts. The entire point of this provision is just the opposite. Suggestion: retain the existing language.

Restyled Rule 45(b)(1). Eliminating the reference to Rule 5 at the end of the provision is not helpful. Because a subpoena is process, the reference to Rule 5 eliminates any confusion that service need be effected on a party pursuant to Rule 4. Suggestion: retain the reference to Rule 5.

Restyled Rule 45(c)(2)(B)(ii). Adding the new phrase “Inspection and copying may be done only as directed in the order” arguably precludes the parties from agreeing to production after an objection has been lodged. The existing rule provides that, once an objection has been made, a party “shall not be entitled . . . except pursuant to an order”. The lack of entitlement does not foreclose agreement between the parties. The proposed restyling seems to foreclose consensual resolution of the objection. Suggestion: replace “Inspection and copying may be done only as directed in the order” with “The serving party shall not be entitled to inspect or copy except as directed in the order”. *See also* the Restyling Project Comment regarding Restyled Rule 26(b)(1) and inconsistent terminology in various rules, including “documents and tangible things” (Restyled Rule 45(a)(1)(A)(iii), (b)(1) and (c)(2)(A)), “designated materials” (45(c)(2)(B)); and “documents, communications, or things” (45(d)(2), which appears to be misnumbered as the second 45(c)(2)).

Restyled Rule 48. The assertion that “[a] jury must have no fewer than 6” members is not strictly true. Although the jury must start out with at least six members, Rule 48 goes on to note that a verdict may be taken from a jury that has been reduced in size to fewer than six if the

parties so stipulate. The phrasing of the existing rule is more accurate. Suggestion: begin the restyled rule “The court must seat a jury of no fewer than 6”

Restyled Rule 49(a)(2). The restyling sacrifices clarity for brevity (What does “it” refer to? Is the jury supposed to enable or to be enabled?). In addition, the restyled version omits the existing reference to “explanation”. “Explanation and instruction” may convey a broader range of acts than “instruct” (the word employed in the proposed restyling). For example, “explanation” would appear to include explanations given by the court in response to jurors’ questions concerning the instructions or the special verdict form. Suggestion: substitute for the language in Restyled Rule 49(a)(2) “The court must give the instructions and explanations that are necessary to enable the jury to make findings on each submitted issue”

Restyled Rule 49(a)(3). A party waives its jury trial right on any issue not submitted to the jury unless, before the jury retires, the party demands submission of that issue. It is not necessarily true, however, that, as the restyled rule states, “[i]f *the* party does not demand submission, the court may make a finding on the issue”. If another party has properly demanded submission of the issue, then the court may not make such a finding. Suggestion: substitute for the third sentence of Restyled Rule 49(a)(3) “If no party demands submission, the court may make a finding on the issue”.

Restyled Rule 49(b)(1). The second sentence seems problematic for reasons similar to those discussed above with respect to Restyled Rule 49(a)(2). Suggestion : substitute for the second sentence of Restyled Rule 49(b)(1) “The court must direct the jury to answer the questions in writing and to render a general verdict, and must give the instructions and explanations that are necessary for it to do so”.

Restyled Rule 51(c)(1). Although existing Rule 51(c)(1) refers to objections “to an instruction”, Restyled Rule 51(c)(1) refers to objections “to a proposed instruction”. The latter is too narrow, because it does not encompass situations in which a party first learns of the offending instruction at the time that it is given by the judge. Suggestion: change “a proposed instruction” to “an instruction”.

Title of Restyled Rule 52. The restyled rule’s title refers to “Findings and Conclusions in a Nonjury Proceeding.” This seems too narrow, since Rule 52 also covers actions tried with an advisory jury. Suggestion; change “Findings and Conclusions in a Nonjury Proceeding” to “Findings and Conclusions by the Court.”

Restyled Rule 54(a). “Must” makes no sense here. “Should” better captures the sense and understanding of the existing “shall”. This sentence is advice to the court. There is no sanction for its violation, nor should there be. If a judgment includes extraneous matter, the judgment should still be given effect, according to Wright, Miller & Kane § 2652, at 17. Suggestion: change “must not include” to “should not include” in the second sentence.

Restyled Rule 54(b). The locutions “direct the entry of” (instead of “enter”) and “entry of” (instead of “court enters”), which are preserved in Restyled Rules 59(a)(2) and 54(d)(2)(B)(i), respectively, more accurately reflect that it is the clerk who actually enters judgment under Rule 58(b). Suggestions: change “the court may enter” to “the court may direct the entry of” in the first sentence and “the court enters” to “entry of” in the second sentence.

Restyled Rule 54(d)(1). The existing rule requires an express statute or rule. The case law indicates that this requirement is not surplusage, ensuring that the conflicting provision specifically treats costs in a contrary manner. See *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1413 (9th Cir. 1995) (“On its face, this subsection does not constitute an ‘express provision’ regarding ‘costs’; the word ‘costs’ is simply absent from this provision.”). In addition, changing “unless the court otherwise directs” in the existing rule to “unless ... a court order provides otherwise” in the restyled rule may be read to widen the exception to include a court’s standing order in the nature of a local rule. Even if “direct” and “order” are synonyms, the verb “direct” is more likely to be read as referring to a case-specific direction rather than a standing order. Suggestion: change the clause to read: “Unless a federal statute or these rules expressly provide otherwise or the court directs otherwise”. Finally, given the exception for a court order or direction, the existing rule’s “shall” should as a matter of logic be translated as “must,” not “should”. The restyled rule’s deletion of “as of course” also calls for the use of “must”, because that phrase was meant to create a mandatory presumption in favor of allowing costs in the absence of the court’s specific explanation to the contrary, according to 10 Moore § 54.101[1][a]. Suggestion: change “should be allowed” to “must be allowed”.

Restyled Rule 54(d)(2). Suggestion: add “or a magistrate judge” in the heading of Restyled Rule 54(d)(2)(D).

Restyled Rule 55(b)(2). The omission of “to the court” after the word “apply” creates an ambiguity. A clerk or the court can enter or direct entry of a default judgment. To whom should the party apply? The rest of the subrule is passive or permissive. The heading clarifies, but headings are not supposed to carry weight. Suggestion: reinsert “to the court” after “must apply”.

A hearing on the motion is required, as indicated by the reference in the existing rule and in the restyled rule’s third sentence to “the hearing”. An evidentiary hearing is not required, but an opportunity to appear before the judge is mandatory. The restyled rule’s fourth sentence has lost this sense and might be read to mean that, in ordinary cases, no hearing at all is necessary. Suggestion: insert the word “evidentiary” before “hearings”.

Restyled Rule 56(a). The existing rule says “after the expiration of 20 days”. This creates a dead zone of twenty days, a period of inaction that does not include either the day of commencement or the day of the motion. Without that phrase, the generally applicable Rule 6(a) on computation of time would create an ambiguity by including the last day of a counting period, so that an action could be taken on that day. With that phrase, however, existing Rule 56(a) clearly means that the claimant cannot move until Day 21. The restyled rule’s language is not as clear in prohibiting a motion on Day 20. Suggestion: insert “have passed” after “20 days” in Restyled Rule 56(a)(1). See Restyled Rule 62(a), another rule that establishes a dead zone of inaction, rather than the more commonly provided period within which an action must be taken.

Restyled Rule 56(d)(1). Federal courts claim power to enter summary judgment *sua sponte*. See Wright, Miller & Kane § 2720. But Rule 56 has never addressed it. Indeed, existing Rule 56(d) expressly limits this subrule to court action upon motion, as the other subdivisions in the existing and Restyled Rule 56 do. Notwithstanding the heading, the restyling of Rule 56(d) arguably creates a power of *sua sponte* partial summary adjudication. Suggestion: reinsert “on motion” after “If” in Restyled Rule 56(d)(1).

Restyled Rule 57. The replacement of "under the circumstances and in the manner provided in Rules 38 and 39" with "under Rules 38 and 39" may lead some litigants to argue that the restyled rule creates (or purports to create) a jury trial right in any declaratory-judgment action. Suggestion: restore the existing language.

Restyled Rule 59(a). The existing rule clearly conveys the sense of limiting the grounds to proper reasons for granting a new trial. The restyled rule suggests that any reason for a new trial that formerly survived in a single case authorizes a new trial today. Suggestion: replace "has" with "could have" before "heretofore", or insert "properly" before "granted", in Restyled Rule 59(a)(1)(A)&(B).

In addition, the existing rule's convoluted sentence structure implies an "or" between (1)(A) and (1)(B). The clear restyling makes the use of "and" more obviously illogical. Note that Restyled Rule 58(c) uses "or" in this circumstance. Suggestion: change "and" to "or" at the end of Restyled Rule 59(a)(1)(A).

Restyled Rule 59(c). The existing rule requires a written stipulation. Because a stipulation can be oral, this restyling is more than mere simplification or clarification of the existing text. The same omission appears in several other restyled rules (29(b), 30(a)(2)(A), 30(f)(3), 31(a)(2)(A), 33(a)(1), 33(b)(2), 36(a)(3)).

Restyled Rule 60(a). The restyled heading is unfortunately phrased and misleading. Suggestion: change the heading to "Correction of Clerical Mistakes and of Oversights and Omissions".

Restyled Rule 60(b). The restyled heading omits something covered by the rule's text, namely, a "final ... proceeding". If it is surplusage it should be omitted from the rule's text as well as its heading. In fact, the word "final" was added in 1948, when the Advisory Committee explained that this word "emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief". So it seems that the Committee meant to include "final proceedings" in the list, whatever they might be. Suggestion: add "or Proceeding" at the end of the heading.

Restyled Rule 60(d)(2). The use of the present tense is jarring and perhaps mischievous. Suggestion: change "is" to "was".

Restyled Rule 60(e). The restyled heading is incomplete. Suggestion: insert "Bills and" before "Writs".

Restyled Rule 61. The restyling here may affect meaning. The problem arises because existing Rule 61 addresses a matter of evidence law that is also addressed in Fed.R.Evid. 103 (and, for appellate purposes, 28 U.S.C. § 2111). Chief Justice Rehnquist made it clear that the Evidence Rules are not to be restyled because they are substantive, and this proposal reflects why. Existing Rule 61 and Fed.R.Evid. 103(a) and (d) consistently use the modifier "substantial", while the restyled rule deletes it from the first sentence ("justice", not "substantial justice") but retains it in the second ("substantial rights"). Any change may be interpreted as substantive. Moreover, Rule 61 is not entirely consistent with Rule 103. We urge that the Committee not restyle Rule 61 but rewrite it to incorporate the standards of Fed.R.Evid. 103 and place it on the style/substance track.

Restyled Rule 62(a). The court cannot order that a judgment be automatically stayed. Suggestion: delete “automatically”.

Restyled Rule 62(b). We note an inconsistency between the description of the nature of the Rule 52(b) motion in Restyled Rule 62(b)(2) (“findings”) and in Restyled Rule 58(a)(2) (“findings of fact”). *See also* Restyled Rule 59(a)(2).

Restyled Rule 62(c). Adding the word “order” is unnecessary in light of the definition of judgment in Rule 54(a) and might indeed cause confusion. Moreover, its addition does not conform to the phrasing used in Restyled Rule 62(a)(1). Suggestion: delete “order” after “interlocutory”.

The text of the restyled rule fails to limit the authority of the court to the period while the appeal is pending and does not make clear that the authorized injunction should last only as long as the appeal is pending. Suggestion: reinsert “during the pendency of the appeal” or, alternatively, insert “while the appeal is pending”, after “grant an injunction”.

Existing Rule 62(c) expresses the idea of proper security. The restylers express this same idea with “appropriate” in Restyled Rule 62(b), and they should do the same here. Suggestion: insert “appropriately” before “secure”, or change “on terms for bond or other terms that secure the opposing party’s rights” to “on appropriate terms for the opposing party’s security” (the formulation in Restyled Rule 62(b)).

Restyled Rule 62(d). The reference to the actions described in Rule 62(a)(1) or (2) rather than to the whole of Rule 62(a) may cause some to think that a stay is unavailable in those actions (rather than available only pursuant to a special court order). *See* Wright, Miller & Kane § 2905, at 519. Suggestion: change “except in an action described in Rule 62(a)(1) or (2)” to “subject to the exceptions contained in Rule 62(a)”.

Restyled Rule 62(f). The antecedent of “where the court sits” is ambiguous. This would leave “under state law” as possibly meaning any state’s law. Suggestion: change “under state law” to “under the law of the state”.

Restyled Rule 62(g). Under the existing rule, the qualifier of a pending appeal does not apply to the actions now included in clause (3) of the restyled rule. This is significant because of the appellate court’s powers under the All Writs Act to reach down into the district court before an appeal is actually taken. Moreover, the introductory qualifier of the restyled rule sounds a bit silly: the rule does not limit the appellate court’s powers, but only while an appeal is pending? In fact, the time-period qualifier should modify the appellate court’s order, not the rule’s effect. Suggestion: retain “during the pendency of an appeal”, or insert “while an appeal is pending”, in (1) and (2).

Restyled Rule 63. The restyling has inadvertently elided the situation of a presiding judge — who happened not to have commenced the hearing or trial but conducted part of it — being unable to proceed. Suggestion: replace “commenced” with “conducted” in the first sentence.

Restyled Rule 64(a). By omitting the specific limitations, “under the circumstances and in the manner provided” by state law, the restyled rule arguably allows a federal court to employ

the provisional remedies that are available in state practice without importing the accompanying state law limitations on those remedies. Suggestion: change the second part of the first sentence to read: “every remedy that provides for seizing a person or property to satisfy the potential judgment is available under the circumstances and in the manner provided by the law of the state where the court is located”.

Restyled Rule 64(b). We note that the use of bullet points raises irksome practical problems. When a lawyer quotes the text of a rule in a sentence, what does he or she do with a bullet? Are ellipses required? Must the bullet point appear?

Restyled Rule 65(a). The reference in the existing rule to “the hearing” is sometimes thought to imply that a hearing on an application for a preliminary injunction is required. *See* 11A Wright & Miller § 2947, at 126 (“Some type of hearing also implicitly is required by subdivision (a)(2)”); *see id.* § 2951, at 253 (noting that a TRO “is designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction”); *cf. id.* § 2949, at 225-31 (discussing the views of various courts as to when hearings are required). The proposed change from “the hearing” to “a hearing” makes the inference that a hearing is required somewhat less likely.

The need for a hearing, however, has also been inferred from the requirement of notice, which is retained in the proposed revision. *See* 11A Wright & Miller § 2949, at 229; *Sims v. Greene*, 161 F.2d 87, 88 (3d Cir. 1947) (“Notice implies an opportunity to be heard”); 13 Moore’s § 65.21 (stating that the notice requirement “necessarily implies the holding of a hearing”, but that no hearing is necessary when it would be a futile exercise).

We believe that some of the uncertainty evinced by courts and commentators reflects the common failure to distinguish between an opportunity to be heard, which need not include oral argument, let alone the submission of evidence, and a “hearing” before a judge. To the extent, however, that some courts have read the existing rule to require a “hearing” before a judge, the restyled rule may be thought to represent a change in meaning. Suggestion: include this proposed change in the style/substance track.

Restyled Rule 65(b)(1). The 1966 amendment was designed to “make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all”. 1966 Advisory Committee Note. *See* 11A Wright & Miller § 2941, at 36-37. By changing “without written or oral notice” to “without notice”, and deleting the reference the “party’s attorney” being heard in opposition, this point may be obscured. In particular, some might contend that the notice referred to in the restyled rule contemplates service rather than a telephone call to the attorney, who might be far more readily available than the party. Suggestion: add “written or oral” before “notice”.

Restyled Rule 65(c): security. Although the existing rule can be read as mandating that security be given whenever a restraining order or preliminary injunction is issued, courts have frequently concluded that they have discretion to waive the posting of security. *See* 11A Wright & Miller § 2954, at 292-93 (stating that “it has been held that the court may dispense with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant”).

Waiver of the bond requirement is common in public interest litigation and cases brought by indigents. The leading case states bluntly, “it is clear to us that indigents, suing individually or as class plaintiffs, ordinarily should not be required to post a bond under Rule 65(c).” *Bass v. Richardson*, 338 F. Supp. 478, 490 (S.D.N.Y. 1971). See 11A Wright & Miller § 2954 at 298 (describing *Bass* as “correct” and “followed by other courts”); *id.* at 300-03 (discussing approvingly cases that relax the bond requirement in public interest litigation); see also 13 Moore’s at § 65.52 (noting circumstances in which court “may waive security”).

The change from “[n]o restraining order or preliminary injunction shall issue except upon the giving of security” to “the court must require the movant to give security” would appear to remove the discretion that, correctly or incorrectly, courts have claimed under the existing rule. Such a change would be significant in cases where the movant lacks the resources to post security. Suggestion: if intended, this change should be included in the style/substance track; indeed, we recommend treatment there in any event, with language that better reflects existing practice.

Supersession. Some courts that have permitted injunctions without security have done so in reliance on the particular statute being enforced. See *Bass*, 338 F. Supp. at 491 (“If any difference exists between the language of Rule 65(c) and Congressional intent clearly embodied in the remedial statutes at issue, the federal statutes control.”); 11A Wright & Miller § 2954, at 302 (using this quotation from the *Bass* case to summarize the “thrust of the argument for a court exercising its discretion under Rule 65(c) in a permissive fashion”); *Van de Kamp*, 766 F.2d at 1325-26 (discretion to dispense with the security requirement when plaintiff cannot afford bond, particularly where Congress has provided for private enforcement of a statute); see also 11A Wright & Miller § 2954, at 300 (noting that waiving the security requirement for the indigent “is consistent with the purposes of actions permitted in forma pauperis”)

Valid rules supersede previously enacted statutes with which they are in conflict. The promulgation of the restyled rule thus might not only eliminate the discretion to waive a security bond that is frequently found under the existing rule. It might also eliminate the discretion to waive a security bond that is now based on federal statutes.

Restyled Rule 65(d)(2)(C): binding nonparties. The antecedent of the word “them” in the existing rule is ambiguous. It is not clear whether it refers to the parties to the action – binding those in concert with the parties – or refers to the entire preceding list – binding those in concert with the officers, agents, employees, and attorneys of the parties as well. Compare 11A Wright & Miller § 2947, at 126 (binds those “acting in concert with defendant”) with *id.* § 2956, at 337 (binds those “acting in concert with a named defendant or his privy”) and *id.* at 345 (binds a person who “acts in concert with a person who has been enjoined”). Compare *New York v. Operation Rescue*, 80 F. 3d 64, 70-71 (2d Cir. 1996) (upholding contempt citation of nonparty on basis of finding that he acted in concert with an agent of the defendant; respondent apparently challenged whether the person with whom he was in concert was an agent of the defendant, not whether acting in concert with an agent was sufficient) with *Paramount Pictures Corp. v. Carol Publishing*, 25 F. Supp. 2d 372, 374 (S.D.N.Y. 1998) (“Because a court’s power to enjoin is limited to the conduct of a party, it is the relationship between the party enjoined and the nonparty that determines the permissible scope of an injunction”). See also *Alemit Mfg. v. Staff*, 42 F. 2d 832, 833 (2d Cir. 1930) (Learned Hand, J.) (stating, in a pre-Rules decision, that a

nonparty “must either abet the defendant, or must be legally identified with him,” in order to be held in contempt).

The restyled rule would eliminate the ambiguity in favor of broader liability. Moreover, to the extent that the restyled rule broadened the power of a court of equity to bind nonparties, it might run afoul of the substantive rights limitation of the Rules Enabling Act. Suggestion: delete “or (B)” from Restyled Rule 65(d)(2)(C), or include this proposal in the style/substance track.

Restyled Rule 65(d)(2): notice. The text of the existing rule is also ambiguous regarding whether the notice requirement applies to the entire list of persons who might be bound by an injunction or restraining order or modifies only “those persons in active concert or participation”. Most commentators sensibly conclude that the notice requirement applies to all, so that even a party is not bound by an injunction or restraining order until he receives notice. *See* 13 Moore’s § 65.61[3] (“A party . . . or nonparty . . . who has not received ‘actual notice’ of an injunction or restraining order will not be bound by its terms.”); 11A Wright & Miller § 2956, at 337 (“Another prerequisite for binding a person to an injunction is that the person must have notice of the order.”); *id.* at 351-52 (“Of course . . . an officer . . . must have notice of the injunction to be held in contempt for acting in concert with the corporation.”); *id.* § 2960, at 381 (stating that contempt requires finding that “party to be charged had notice of the order”); *but see Dole Fresh Fruit Co. v. United Banana Co.*, 821 F. 2d 106, 109 (2d Cir. 1987) (noting the ambiguity and concluding that officers and agents, servants, employees and attorneys need not receive actual notice of the injunction, but vacating the contempt order on other grounds).

The restyled rule, however, places the notice requirement in subsection (2)(C), thereby limiting its application to those described in subsection (2)(C). By its terms, then, the restyled rule would hold parties, officers, agents, servants, employees, and attorneys bound by an injunction or restraining order – and subject to punishment for contempt – even when they lacked notice of the injunction or restraining order. Suggestion: insert “who receive actual notice of the order by personal service or otherwise” after “the following” (deleting it in Restyled Rule 65(d)(2)(C)). Alternatively, this proposal should be included in the style/substance track.

Restyled Rule 66: court of appointment. The existing rule governs actions involving receivers appointed by federal courts. As the Advisory Committee explained, the title was expanded to “make clear the subject of the rule, i.e., federal equity receivers”, while the “[c]apacity of a state court receiver to sue or be sued in Federal court is governed by Rule 17(b)”. 1946 Advisory Committee Note; *see also* 13 Moore’s § 66.08 (“A federal equity receiver’s capacity to sue in any district court contrasts with the capacity of state-appointed receivers.”). Moreover, the second sentence of the existing rule “deals with suits by or against a federal equity receiver”. 1946 Advisory Committee Note. *See also* 12 Wright & Miller § 2982, at 15-16 (“Rule 66 applies exclusively to equity receivers, and only to those that are appointed by federal courts”). As Judge Learned Hand once explained:

the phrase “appointed by the court”, is not at all appropriate to an appointment by a state court . . . ; the natural reading is that the practice of the federal court which appoints the receiver shall govern his administration under its supervision. Had the intent been to make the rule apply to all receivers, we should expect the indefinite participle: “appointed by a court.”

Bicknell v. Lloyd-Smith, 109 F.2d 527, 528-29 (2d Cir. 1940).

By deleting “appointed by federal courts” from the title, and changing “appointed by the court” to “court-appointed”, the restyled rule would appear to govern actions brought by or against receivers appointed by state courts. Indeed, the proposed language is quite similar to the phrasing that Judge Learned Hand stated would have been used if a broader meaning were intended. Suggestion: restore the deleted language in the title and change “court-appointed” to “appointed by the court” in the second sentence (moving it after “officer”).

Restyled Rule 66: practice and administration. The “practice” referred to by the existing rule has been understood to refer to the procedures by which a receiver obtains authority to act as an owner would, with “administration” understood to refer to the receiver’s dealings with the property. See 12 Wright & Miller § 2982, at 17; *Phelan v. Middle States Oil*, 210 F.2d 360, 363 (2d Cir. 1954). This “practice” has generally been thought to include the appointment of a federal receiver in the first place. See 12 Wright & Miller, § 2982, at 18 (noting the absence of clear authority on the point); *id.* § 2983, at 33-35 (explaining why it is “sound” to treat the question of whether to appoint a receiver in a diversity action as a matter of federal law); 13 Moore’s § 66.09 (“Federal law and federal practice govern the appointment of a federal equity receiver.”)

By requiring a receiver to “administer an estate according to the historical practice in federal courts”, the restyled rule obscures both of these points. Unlike the existing rule – in which “practice” describes the procedure by which the receiver gets various powers – the restyled rule appears to use the term “practice” to describe how the receiver is to administer the estate. As a result, the restyled rule undermines the use of traditional federal practice to govern the procedure by which the receiver gets various powers. In particular, it undermines the basis for using traditional federal practice to govern the appointment of receivers. Suggestion: restore the existing second sentence, changing “rules promulgated by the district courts” to “a local rule”.

Restyled Rule 67(b). The change from “or any like statute” to “and any like statute” could be argued to require that money be handled in accordance with all such statutes, not simply compliance with one or the other. Suggestion: change “and” to “or”.

Restyled Rule 68(a) and (c): timing. The existing rule requires the offer to be made more than 10 days before trial; the restyled rule requires the offer to be made at least 10 days before trial. The restyled rule, unlike the current rule, permits an offer to be made exactly 10 days before trial. In short, $x > 10$ is not the same as $x \geq 10$. If intended, this change should be included in the style/substance track; if change is not intended, the existing language should be retained.

The existing rule measures the 10 days explicitly from the day the trial “begins”, or, in the case of an offer after the determination of liability, from the “commencement” of the hearing. By deleting these terms, the restyled rule may increase ambiguity. See *Greenwood v. Stevenson*, 88 F.R.D. 225, 228-29 (D.R.I. 1980) (concluding that a trial begins for the purpose of Rule 68 “when the trial judge calls the proceedings to order and actually commences to hear the case,” not with jury selection). Suggestion: restore the deleted language.

Restyled Rule 68(a): conditional offers. It is unclear under the existing rule whether an offer can be conditioned on acceptance by all plaintiffs. *See* 13 Moore’s § 68.04[9] (describing this as the “most problematic multi-party situation”); *Amati v. City of Woodstock*, 176 F.3d 952, 958 (2d Cir. 1999) (finding it permissible for a defendant to impose such a condition, but leaving open question whether it is effectual to shift costs to plaintiffs who did accept). The proposed change from “judgment . . . for the money or property or to the effect specified in the offer” to “judgment on specified terms” would make it more difficult to contend that an offer cannot be conditioned on acceptance by all plaintiffs.

Restyled Rule 68(a): equitable relief, class actions, and judicial discretion. There is some question whether the existing rule applies to actions for equitable relief. *See* 12 Wright & Miller § 3001.1, at 79 (noting suggestions that the rule does not apply in actions for equitable relief but rejecting those suggestions); *Chathas v. Local 134 IBEW*, 233 F.3d 508, 511 (7th Cir. 2000) (“Rule 68 offers are much more common in money cases than in equity cases, but nothing in the rule forbids its use in the latter type of case.”) The proposed change from “judgment . . . for the money or property or to the effect specified in the offer” to “judgment on specified terms” would make it more difficult to contend that the rule does not apply to offers to accept a particular equitable decree.

There is also dispute whether the existing rule applies to class actions. *See* 13 Moore’s § 68.03[3] (noting “conflict in the few decisions addressing whether Rule 68 should apply to class actions” and stating that it is “questionable whether the offer of judgment rule should apply to cases such as class or derivative actions that require judicial approval of a settlement”); Preliminary Draft of Proposed Amendments, 98 F.R.D. 337, 363, 367 (1983) (proposed amendment to make clear that the rule does not apply to class or derivative actions); *Weiss v. Regal Collections*, 385 F.3d 337, 344 n.12 (3d Cir. 2004) (Scirica, C.J.) (“Courts have wrestled with the application of Rule 68 in the class action context, noting Rule 68 offers to individual named plaintiffs undercut close court supervision of class action settlement, create conflicts of interests for named plaintiffs, and encourage premature class certification motions”); *Schaake v. Risk Management Alternatives, Inc.*, 203 F.R.D. 108, 111 (S.D.N.Y. 2001) (“it has long been recognized that Rule 68 Offers of Judgment have no applicability to matters legitimately brought as class actions pursuant to Rule 23”).

If Rule 68 applies to equitable relief and class actions, the court under the existing rule retains authority to reject an accepted offer. *See* 12 Wright & Miller § 3005, at 109-10 (asserting that while Rule 68 offers “may include provision for a specified injunctive regime”, the “court cannot be compelled to enter the agreed judgment even though it emerged from a Rule 68 offer and acceptance” and that “Rule 68 cannot remove th[e] authority and duty” of a court to determine whether the settlement of a class action is acceptable). *See also Acceptance Indemnity Insurance v. Southeastern Forge*, 209 F.R.D. 697, 698-99 n.2 (M.D. Ga. 2002) (concluding that, in light of Rule 54, an accepted Rule 68 offer of judgment that does not include all claims and all parties does not result in a final judgment).

These concerns are related: one way in which the existing rule can be accommodated to equitable relief and class actions is through the availability of discretion to decline to enter an agreed judgment or decree. The proposed rule, on the one hand, strengthens arguments that it applies to equitable relief, while weakening arguments for discretion to decline to enter agreed judgments. Suggestion: change the last sentence of Restyled Rule 68(a) to: “Except in cases

where court approval of the judgment is required, the clerk must then enter judgment”.

Restyled Rule 68(a): mootness and supersession. There are conflicting decisions whether a Rule 68 offer to provide a plaintiff with the maximum he could recover individually moots a proposed class action. 12 Wright & Miller § 3001.1, at supp. 3; 3 Moore’s § 68.03[3]. See *Schaake*, 203 F.R.D. at 112 (noting that to permit such a tactic would “allow defendants to essentially opt-out of Rule 23”); *Weiss*, 385 F.3d at 348 (“Absent undue delay in filing a motion for class certification . . . where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint.”)

One basis for concluding that such an offer does not moot the class action has been that the statute being enforced contemplated class actions. *Id.* at 345 (stating that a “significant consideration” is that “Congress explicitly provided for class damages” and intended that the statute be enforced “by private attorneys general” and concluding that “[r]epresentative actions . . . appear to be fundamental to the statutory structure”). The promulgation of the restyled rule might make it more difficult to rely on such statutes, for reasons discussed in connection with Rule 65(c).

Restyled Rule 68(d): supersession. The existing rule’s mandatory requirement that “the offeree must pay the costs” has been viewed as “overridden by a contrary statutory provision”. 13 Moore’s § 68.08[1]; see *R.N. v. Suffield Bd. of Ed.*, 194 F.R.D. 49, 52 (D. Conn. 2000) (relying on a statute that invokes Rule 68, but includes an exception). The promulgation of the restyled rule might be viewed as superseding such statutory provisions, for reasons discussed in connection with Rule 65(c).

Restyled Rule 69(a)(1). The existing rule’s provision that proceedings “shall be in accordance with” state practice has been interpreted to require only substantial compliance rather than impose a “straitjacket”. 13 Moore’s § 69.03[3] (“common-sense should be applied to trump obviously technical state procedural requirements that would prevent enforcement of the judgment”). The restyled rule, by changing “shall be in accordance with” state procedure to “must follow” state procedure, threatens to eliminate some of that play and impose more of a straitjacket. There is no obvious solution to this problem, which implicates important issues of federalism and the limitations in the Rules Enabling Act. One possibility is to change the final clause to read “but the court need not follow state procedure that would prevent enforcement of the judgment, and a federal statute governs to the extent it applies”.

Restyled Rule 71. The existing rule authorizes enforcement of orders in favor of nonparties in a wide variety of situations, such as an order to deliver property to the purchaser at a judicial sale, or to pay fees to a witness or to pay costs to a special master. See 12 Wright & Miller § 3032, at 174; 13 Moore’s § 71.03. See also *In Re Employment Discrimination Litigation against Alabama*, 213 F.R.D. 592 (M.D. Ala. 2003) (declining to read “in favor of” to broadly reach incidental beneficiaries). The restyled rule changes “order . . . made in favor of” a nonparty to “an order [that] grants relief for a nonparty”. It is not obvious, however, that orders in favor of purchasers, witnesses, and masters constitute “relief”, as least as that term is used in Rule 8 (describing requirements of a “pleading which sets forth a claim for relief”). Suggestion: change “grants relief for” to “is made in favor of”.

Restyled Rule 71.1(c)(4). The restyled rule refers to “the deposit”, while the existing rule refers to “a deposit”. Since a deposit may not be required pursuant to Restyled Rule 71.1 (j), the change could cause confusion. Suggestion: change “the deposit” to “a deposit”.

Restyled Rule 72(a). Rule 72 was intended to track the Magistrate Judges’ Act (28 U.S.C. § 631 *et seq.*) (the “Act”), which uses “hear and determine” instead of “hear and decide”, the language in the restyled rule. Likewise, the restyled rule uses the word “decision” rather than the Act’s “disposition”. Given the history of this rule, we do not believe it is appropriate to change the statutory terms. Suggestion: change “decide” to “determine” and “decision” to “disposition”.

Restyled Rule 72(b)(1). The restyling changes the language of the Act and the existing rule, “recommendation for disposition”, to “recommended disposition”. Although the second paragraph of the existing rule does use “recommended disposition”, it does so only after having provided in the first paragraph that the “magistrate judge shall enter into the record a recommendation for disposition of the matter”. As with the previous section, we suggest that the Act’s language should be retained.

Restyled Rule 72(b)(3). The Act and the existing rule do not contemplate that the magistrate judge will make a “disposition”, but merely a recommendation for disposition. Suggestion: change “disposition” to “recommendation for disposition”.

Restyled Rule 73(a). The deletion of the phrase “any or all”, the language used in the Magistrate Judges’ Act (28 U.S.C. § 631 *et seq.*) and existing rule, could be interpreted to alter meaning. Suggestion: change “the proceedings” to “any or all proceedings”.

Restyled Rule 77(c)(2). Existing Rule 77(c) specifies that certain motions and applications are “grantable of course” by the clerk. This usage implies (1) that the clerk’s duty is ministerial, requiring that the motion or application be granted when properly presented, and (2) that the clerk may only take action in response to such an application or motion. Restyled Rule 77(c)(2) indicates that the clerk “may” perform the specified duty, with no mention made of a motion or application. This usage implies a degree of discretion on the part of the clerk, not present in the existing rule, in the decision whether to take the requested action. It also implies that the clerk could act *sua sponte*. Suggestion: change “the clerk may” to “the clerk shall as of course grant motions and applications to”.

Restyled Rule 78(a). Existing Rule 78 requires the district court to establish regular times for hearing motions, qualifying that duty only in the event that “local conditions make it impracticable”. The proposed restyling would convert an obligation that is subject to an express qualification into a matter entirely within the district court’s discretion. Suggestion: include this proposal in the style/substance track.

Restyled Rule 80. We recommend against the restyling for substantive and practical reasons. *First*, existing Rule 80(c) is an evidentiary provision that stands intact from the original, 1938 Federal Rules of Civil Procedure. The original rulemakers, aware of doubts about the propriety of treating evidence under the Rules Enabling Act of 1934, did so “lightly”. As noted elsewhere, Chief Justice Rehnquist opposed any restyling of the evidence rules; any change may be deemed to be more than stylistic; and there is a looming supersession issue — will any change

supersede relevant provisions in the Federal Rules of Evidence, most of which remain statutory? *Second*, the restyled rule doesn't work. The person who will have "recorded" a videotaped deposition — the video technician — is not a court reporter and is not qualified to certify any kind of writing. Compounding this problem, the technician is often, by stipulation, someone affiliated with one side's counsel. *Third*, under Fed.R.Civ.P. 26(a)(3)(b), the party offering a video- or audiotaped deposition already must provide a transcript of it to the court in advance of trial — so a transcript exists. *Fourth*, for practical reasons, videotaped testimony is often transcribed by the court reporter at trial (for financial reasons — more pages of transcript to sell). *Fifth*, it is common that videotaped testimony is simultaneously recorded stenographically, further rendering this a non-issue. Suggestion: refer the matter to the Evidence Rules Committee.

Restyled Rule 81(a)(6) Restyled Rule 81(a)(6) specifies that the rules "govern proceedings under the following laws, except as these laws provide other procedures". Rule 81(a)(6)(B) then identifies "9 U.S.C., relating to arbitration". Title 9 of the U.S. Code is not a law. Suggestion: substitute "All laws codified in 9 U.S.C. relating to arbitration".

Restyled Rule 81(d)(1). The proposed alteration of existing Rule 81(e) to reflect the Supreme Court's decision in *Erie R.R. v. Tompkins* is problematic. "[I]ncludes" does not necessarily mean "includes only", and the Committee Note implies that the change reflects actual practice. But the revised definition does not include court rules, which are mentioned in the Committee Note, and, more important, it does not include state constitutional provisions. Suggestion: abrogate this part of Rule 81 as unnecessary (and/or, unless further revised, potentially misleading).