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NEWSPEAK IN COURT RULES: "RESTYLED" CIVIL PROCEDURE RULES NEED FURTHER REVIEW

by
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Largely unnoticed by either the public or the legal profession, the federal procedural rulemaking committees have been embarked for the past fifteen years on a project to "restyle" all of the federal rules of procedure. This year's product is an entirely new set of "restyled" Federal Rules of Civil Procedure that will take effect on December 1, 2007, unless Congress enacts postponing legislation before that date. The pending rules may be viewed at http://www.uscourts.gov/rules/supct1106/Excerpt_CV_Style.pdf.

What is "restyling"? It purports to be an innocuous project to "clarify" the texts of the rules, under style arbiters engaged by the committees from the "plain language" movement. It is being sold under the slogan of "clarity without change," i.e., that the words of the rules can be changed without altering their meaning. *See* http://www.uscourts.gov/rules/Cooper_Style.pdf. But, in fact, "restyling" bids to create disarray in the procedural system. "Clarity without change" is a dangerous illusion, and the entire "restyling" project is wrongheaded. It imposes enormous transitional costs on the entire system, for little or no benefit. Ultimately, the idea of "clarity without change" is untenable, because it denies the fundamental principle that the meaning of a rule must be taken from its words.

These points were brought out during the process, but were discounted by the rulemakers. In particular, an ad hoc group of 21 practitioners and professors, and the Civil Litigation Committee of the U.S. District Court for the Eastern District of New York, both opposed the Civil Rules "restyling" on the grounds that predictably large costs far exceeded any potential benefit, and pointed out that ambiguities of meaning had been introduced by restyling. *See* http://www.uscourts.gov/rules/proposed0206.htm, Civil Rules Amendments, Comments 05-CV-008 and -022.

The main response from the rulemakers was the assertion that their previous "restylings" of the Appellate and Criminal Rules had not caused similar problems. *See* http://www.uscourts.gov/rules/congress0407.htm, Controversial Report. However, this assertion is unaccompanied by any study of the rules' performance. There is already evidence of new ambiguity introduced by previous "restylings." The first item on the list for the upcoming year is an amendment to "eliminate ambiguity arising from the 1998 restyling of the Appellate Rules" http://www.uscourts.gov/rules/newrules1.htm.

Given the enormous costs imposed on the system, we should resist the temptation to ignore "restyling" as another exercise in bureaucratic trivia. We also should ask how our federal judicial committees became enmeshed in such a project, which wastes both public and private resources. Either they have nothing worthwhile to do, in which case they should be abolished or curtailed, or they are

"restyling" in lieu of addressing real problems. Either way, there is serious dysfunction in the rulemaking process.

In a communication addressed to the House and Senate Judiciary Committees, I have urged Congress to postpone this year's amendments, in order to permit study of both the product and the process. *See Postponing the 2007 "Restyling" Amendments to the Federal Rules of Civil Procedure: A Letter to Members of the Judiciary Committees of the House and Senate*, at http://www.law.gmu.edu/faculty/papers/docs/07-33.pdf.

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