COMMENTS CONCERNING

THE PROPOSED RESTYLED FEDERAL RULES OF EVIDENCE

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I. Introduction

The Proposed Restyling of the Federal Rules of Evidence represents a tremendous improvement to the current Rules. The Advisory Committee on Evidence Rules should be commended for its excellent work on such an overwhelming task with such far-reaching consequences. These Comments are intended to serve as a small contribution to this effort.

The stated goal of the restyling project undertaken by the Committee, like that of the projects to restyle the Rules of Appellate Procedure, the Rules of Criminal Procedure, and the Rules of Civil Procedure, is to amend the Rules of Evidence (the "Rules") to make them more easily understandable and to achieve consistency in style and terminology. The Committee endeavored to avoid any restyling that would result in a substantive change in the application of any rule.[2]

One type of alteration that the Committee deemed "substantive" was any amendment to a "sacred phrase." The Committee defined "sacred phrase" to mean any phrase that has "become so familiar in practice that to alter [it] would be unduly disruptive." Style improvements changing a "sacred phrase" were avoided.[3]

The Committee successfully restyled several clauses "familiar in practice." The restyled language of these not-so-sacred phrases is an improvement; they are more easily understandable and they more accurately reflect historic interpretations of the Rules.

The proposed amendments to the Rules do, however, maintain certain phrases the Committee implicitly deemed to be "sacred." Unfortunately, the preserved language of these "sacred phrases" is archaic and often unclear. In many cases, these phrases can be understood only through research of their meanings and experience in practice. The specific comments below suggest that the Committee should not maintain any phrase as "sacred" unless such a

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[2] *Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure, A Summary for Bench and Bar*, Administrative Office of the U.S. Courts (August 2009).

[3] Id.

change would truly disrupt legal practice. It should, instead, maintain only those phrases that are easily understandable and accurately reflect judicial application of the Rules.

II. Comments on Those Proposed Restyled Federal Rules of Evidence Affecting Sacred Phrases

The following comments address selected Rules concerning arguably "sacred phrases."

1. Rule 403: Unfair Prejudice

Proposed Rule 403 maintains the phrases "unfair prejudice" and "undue delay," although the remainder of Rule 403 has been restyled. Both phrases are "familiar in practice" and any change to this language would arguably disrupt legal practice, meeting the definition of a "sacred phrase" espoused by the Committee. Thus, no change to the language itself is appropriate.

2. Rules 404 & 406: Action in Conformity Therewith

In its draft, the Committee replaced the clause "for the purpose of proving action in conformity therewith on a particular occasion" in Federal Rules of Evidence 404 and 406 with "to prove that on a particular occasion the person acted in accordance with the character or trait." As currently written, "action in conformity therewith" is a phrase understood solely by those with experience in practice who have studied its application. To those studying the Federal Rules of Evidence for the first time, the phrase is nearly incomprehensible.

Few would disagree that the archaic phrase "action in conformity therewith" has, nonetheless, become "familiar in practice." In restyling Rules 404 and 406, however, the Committee successfully maintained the true meaning of the rules governing character and habit evidence. The proposed changes render Rules 404 and 406 more easily understandable, fulfilling the goals of this restyling effort.

3. Rule 603: Calculated to Awaken the Witness's Conscience

The proposed amendments replace the clause "a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so" with "a form designed to impress that duty [to testify truthfully] on the witness's conscience." The original language regarding the witness's "awakening" has certainly become "familiar in practice" and, in fact, dates back to at least 1969.[4] Nonetheless, the proposed change is an improvement. The new

[4] See United States v. Looper, 419 F.2d 1405, 1406–07 (4th Cir. 1969) (citing Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, March 1969, Rule 6-03 Oath or Affirmation).

language accurately reflects the law on the subject of a witness's oath,[5] while stating the Rule more succinctly and clearly than the current version of Federal Rule of Evidence 603.

4. Rule 606(b): Outside Influence Brought to Bear

In the proposed restyling of Rule 606(b), the Committee has maintained an archaic phrase "familiar in practice," which could be restyled without disrupting legal practice. Specifically, the Committee's proposal maintains the heart of the phrase "whether any outside influence was improperly brought to bear upon any juror[.]"[6] Like the reference to "awakening" a witness's conscience, which the Committee replaced in Proposed Rule 603, the phrase "brought to bear" is archaic and unnecessary. The Rule could be restyled to replace the phrase "brought to bear" with the word "imposed." Such a change is clear, succinct, and maintains the true meaning of the Rule.

5. Rule 609(b): Substantially Outweighs Its Prejudicial Effect

As restyled, Rule 609(b) maintains the phrase "substantially outweighs its prejudicial effect." The concept is "familiar in practice." The phrase "unfair prejudice," however, is often substituted for "prejudicial effect" in practice; federal courts have treated the two phrases as interchangeable since the time the Federal Rules of Evidence were first adopted.[7] Thus, replacing "prejudicial effect" with "unfair prejudice" could not disrupt an already existent legal practice. Because a stated goal of this restyling effort is to achieve consistency in style and terminology, the Committee should refer to "prejudicial effect" in Rule 609 as "unfair prejudice" as it does in Rules 403 and 412.

6. Rule 801(c): Truth of the Matter Asserted

In its restyling effort, the Committee boldly offered changes to the first half of the hearsay definition in Rule 801(c). Those changes enhance an extremely archaic and confusing Rule and constitute an improvement. However, the Committee maintained the latter half of the definition of hearsay in Rule 801(c), "to prove the truth of the matter asserted." Any attempt to change that definition which is so "familiar in practice" would no doubt lead to the outcry that a restyled Rule would "disrupt legal practice."

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[5] See United States v. Frazier, 469 F.3d 85, 92 (3d Cir. 2006) (stating that oaths are administered to remind witnesses of their obligation to testify truthfully); United States v. Saget, 991 F.2d 702, 710 (11th Cir. 1993) (holding that atheist's oath to God was permissible because he was cognizant of his solemn duty to tell the truth).

[6] Proposed Rule 606(b) alters the phrase slightly to "outside influence was improperly brought to bear on any juror" and renumbers the phrase as Rule 606(b)(2)(B).

[7] See e.g., United States v. Thomas, 914 F.2d 139, 143 (8th Cir. 1990); United States v. Sims, 588 F.2d 1145, 1149 (6th Cir. 1978); United States v. Mahler, 579 F.2d 730, 735 (2d Cir. 1978); United States v. Shapiro, 565 F.2d 479, 481 (7th Cir. 1977).

Nonetheless, those same members of the bench and bar who would argue to maintain the definition must necessarily admit that the definition is confusing and beyond the understanding of those lacking practical experience. While "the truth of the matter asserted" is perhaps the most sacred of phrases, I humbly propose the following change in an effort to bring an understanding of Rule 801(c) within the grasp of students of evidence: "to prove the truth of the statement made by the declarant" or "to prove the truth of the declarant's statement." Such a change does not affect the meaning of the Rule and, because it references the "statement" defined in the previous clause, this minor change should bring greater clarity to readers of the Rule.

7. Rule 801: Admission of a Party-Opponent

The Committee proposed replacing the phrase "admission of a party-opponent" with an "opposing party's statement" in Federal Rule of Evidence 801(d)(2), as well as in Rule 613. "Admission of a party-opponent" is undoubtedly a phrase that has become "familiar in practice," dating back to at least 1935.[8] Moreover, one should not be surprised if many a practitioner argued that a change to the phrase would be "unduly disruptive" to the practice of law. Nonetheless, the phrase has historically been a source of misunderstanding because, despite the plain language of the current Rule, it does not require that a statement admit anything[9] or that it be against the party's interest at the time it was made.[10] The change is a welcome one that removes the confusion by more accurately stating the applicability of the Rule.

8. Rule 901: Not Acquired for Purposes of the Litigation

The Committee also targeted Federal Rule 901(b)(2) governing a lay opinion on handwriting. Although the current language "based upon familiarity not acquired for purposes of the litigation" is "familiar in practice," the Committee proposed replacing it with the clause "based on a familiarity with [the handwriting] that was not acquired for the current litigation." The change is subtle, but nonetheless renders the Rule more accurate by specifying that the Rule

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[8] See WIGMORE, STUDENT TEXTBOOK ON EVIDENCE 199 (1935); Milton v. United States, 110 F.2d 556, 560 (D.C. Cir. 1940).

[9] United States v. Matlock, 415 U.S. 164, 172 (1974) (finding declaration of opposing-party admissible for any inference which trial court could reasonably draw from statement regarding any issue involved in case).

[10] See United States v. McDaniel, 398 F.3d 540, 545 n.2 (6th Cir. 2005) (noting that admissibility of statement under Rule 801(d)(2) does not hinge on whether or not statement is against party-declarant's interest); see also United States v. Turner, 995 F.2d 1357, 1363 (6th Cir. 1993); Marquis Theatre Corp. v. Condado Mini Cinema, 846 F.2d 86, 90 n.3 (1st Cir. 1988).

only refers to knowledge gained to advance the litigation currently before a court. This is both an accurate reflection[11] and a more concise statement of the Rule.

III. Conclusion

The Committee did an excellent job restyling several arguably "sacred phrases." Its proposed restyling of those sacred phrases is an improvement. Additional improvements could also be made by amending a few archaic and confusing sacred phrases to clarify language that historically has been misunderstood. Such changes can be achieved without altering their substance and without disrupting legal practice. The Committee should not let this rare opportunity to clarify the Federal Rules of Evidence pass by without addressing these sacred phrases.

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[11] See Strother v. Lucas, 31 U.S. 763, 766 (1832) (holding that evidence by comparison of hands is not admissible when witness has had no previous knowledge of handwriting, but is called upon to testify merely from comparison of hands); United States v. Samet, 466 F.3d 251, 254 (2d Cir. 2006) (holding that witness must have familiarity with handwriting which has not been acquired solely for purposes of litigation at hand).