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The Federal Rule of Civil Procedure that Was Changed by Accident: A Lesson in the Perils of Stylistic Revision

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THE FEDERAL RULE OF CIVIL PROCEDURE THAT WAS CHANGED BY ACCIDENT: A LESSON IN THE PERILS OF STYLISTIC REVISION

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I. INTRODUCTION

Recently, the Federal Rules of Civil Procedure underwent a controversial and massive set of stylistic revisions. The process involved "legions of experts,"[1] took two and a half years to complete, and produced more than 600 documents.[2] The drafters insisted that this Style Project would not result in any unintended substantive changes in the Rules.[3] According to the Reporter for the United States Judicial Conference Advisory Committee on the Federal Rules of

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1. Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761, 1762 (2004).

2. Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure* (pt. 1), MICH. B.J., Sept. 2005, at 56, 56.

3. *See id.* ("This project was a style project, and the Advisory Committee on Civil Rules took extraordinary steps to avoid making any substantive changes.").

Civil Procedure, its goal was "to translate present text into clear language that does not change the meaning."[4] Indeed, the drafting consultant to the project promised that "the Advisory Committee on Civil Rules took extraordinary steps to avoid making any substantive changes"[5] and stated that "it's almost impossible to convey how excruciatingly careful our process was for redrafting the civil rules to improve their clarity, consistency, and readability—without making substantive changes."[6]

These stylistic revisions have resulted in a tremendous improvement in the clarity and elegance of many of the Federal Rules of Civil Procedure. As a professor who tries each year to teach these Rules to a new set of law students, my job in particular has been made much easier by many of the improvements. But a lively controversy remains regarding whether this benefit was worth its potential cost. Some observers question the value of this project, and others predicted that any alteration of the wording of the Rules would inevitably result in unintended changes of substance. In the view of one commentator, "[s]erious questions exist as to whether the benefits of restyling outweigh the considerable costs of performing this immense task and then in assimilating the product—plus the costs imposed by the inevitable changes of substance inadvertently made by the restylers, and the costs of litigating about those changes."[7] Another skeptic complained of "the near-impossibility of making significant textual changes without changing meaning."[8] That critic predicted: "If the Advisory Committee's distinguished members, advisors, consultants, and reporter missed things that I caught, I have to believe that others will catch things that we all missed."[9]

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4. *Id.* at 1761. Professor Cooper added that "the new rules are intended to bear the same meanings as the rules they replace." *Id.* at 1763.

5. *Id.* at 56. *See also* Jeremy Counseller, *Rooting for the Restyled Rules (Even Though I Opposed Them)*, 78 MISS. L.J. 519, 521–42 (2009) (discussing the goals and methodology of the Advisory Committee); Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure* (pts. 1 & 2), MICH. B.J., Sept. 2005, at 56, 56–57, MICH. B.J., Oct. 2005, at 52, 52–55 (same).

6. Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 SCRIBES J. LEGAL WRITING 25, 25 (2008–2009).

7. FEDERAL RULES OF CIVIL PROCEDURE AND SELECTED OTHER PROCEDURAL PROVISIONS 807 (Kevin M. Clermont ed., Foundation Press 2009) (discussing in an "editor's note" the amendments effective December 1, 2007). One critic lamented that too much of the recent work of the Advisory Committee has consisted of "obsessive 'restyling' and other silly tinkering." *See* RICHARD D. FREER, CIVIL PROCEDURE 308 (2d ed. 2009).

8. Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155, 164 (2006). Professor Hartnett predicted that lawyers dealing with the new rules would, at the very least, "be able to discover and make plausible arguments that [a] new rule does not mean the same thing as [an] old rule." *Id.* at 165.

9. *Id.* at 164–65. In 2009, another commentator echoed the prediction that "there are likely to be other undesirable substantive changes that have yet to be found." Counseller, *supra* note 5, at 565. This is the Article everyone has been waiting for.

As it turns out, the warnings of these critics were prophetic. Despite their best efforts, those involved in the Style Project accidentally changed the way one of the Civil Rules now operates. This Article points out and examines that accidental change, and explains how it will lead to significant complications in the litigation of important issues in real cases, at least until the rule is amended once again.

II. THE QUESTION PRESENTED

Consider the following scenario, which involves an issue that arises with reasonable frequency. Imagine that you are an attorney for the defendant in a civil case in federal court. About two weeks ago, you prepared and filed an answer on behalf of your client. Upon review of that answer, it comes to your attention that there were some important procedural steps you meant to take; you are certain your client would not be pleased to discover that you neglected these steps. (If it makes the story easier for you to think about or enjoy, feel free to assume that you can blame the mistake on a younger lawyer at the law firm or on an office assistant who failed to follow your clear instructions.)[10] Let us assume that the mistakes included one or more of the following three possibilities: (1) You forgot to assert the defenses that the court has no personal jurisdiction over your client, who is subject to suit only in some other venue that would be far more convenient, and that the defendant was not properly served with process;[11] (2) You forgot to request a trial by jury, as you had a right to do;[12] (3) You

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10. One lawyer found that his client's right to a jury trial was lost, even though he made a proper demand and filed it on time, because he failed to serve it in a timely fashion as a result of what was (according to him) "a mistake of his temporary secretary." O'Grady v. U.S. Dist. Court for the E. Dist. of Cal., No. 99-70117, 1999 WL 728524, at *1 (9th Cir. Sept. 16, 1999). Perhaps that is how one becomes a "temporary" secretary.

11. Obviously I am listing the three procedural defenses, *see* FED. R. CIV. P. 12(b)(2), (3), & (5) (referencing the procedural defenses of lack of personal jurisdiction, improper venue, and insufficient service of process), that are most readily subject to waiver under Rule 12(h)(1). I am not including the fourth defense governed by that rule, "insufficient process," *see* FED. R. CIV. P. 12(b)(4), in order to keep this hypothetical situation as realistic as possible. In the real world, it is virtually unheard of for any plaintiff to make that mistake or for any defendant to seriously raise that defense (much less worry about waiving it). *See* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1353, at 334 (3d ed. 2004) (noting the rarity of Rule 12(b)(4) motions). A plaintiff need only use the preprinted model forms provided in the Appendix to the Federal Rules of Civil Procedure, and even in the exceptionally rare case in which the summons is technically deficient, a party can amend it with the permission of the court, *see* FED. R. CIV. P. 4(a)(2), so that error would almost never result in dismissal.

12. *See* FED. R. CIV. P. 38(a) (providing that the right to trial by jury, as declared by the Seventh Amendment or as provided by federal statute, is inviolate). This is a matter of grave concern to some litigants because the choice between a jury and a judge will sometimes make an enormous difference in the outcome of a case. *See* Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 477–78 (2005) (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 63 & tbl.16 & n.11 (1966); Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its*

forgot to include in your answer a third-party claim to implead a third-party defendant from whom your client may be entitled to contribution or perhaps even full indemnification.[13]

The good news is that a defendant who neglected to attend to these details when preparing his answer can sometimes correct them.[14] But there is bad news, and a lot of it. Even though the defendant may have a constitutional right to demand a trial by jury or dismissal for lack of personal jurisdiction, a defense lawyer who does not act quickly enough can easily waive those rights.[15] Nor are these unimportant matters; depending on the details of a case, it may make a profound difference to the client whether the defense lawyer preserves the right to insist on a transfer, a dismissal for lack of jurisdiction or improper service of process, or a jury trial.[16] To make matters worse, let us assume that you have good reason to believe that the judge assigned to this case would not be inclined to do you any favors, perhaps based on your experience with the judge in other cases or what you know about the judge's attitude toward defendants charged

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Effects, 18 LAW & HUM. BEHAV. 29, 34, 48 & tbls.12 & 13 (1994); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065 (1964)).

13. *See* FED. R. CIV. P. 14(a)(1) (providing that a defendant must obtain leave of the court if it wishes to implead a third party more than fourteen days after serving its original answer).

14. *See* FED. R. CIV. P. 15(a)(2) (providing that a party may amend its pleadings with the other party's consent or with leave of the court and noting that the court should grant leave to amend when justice so requires).

15. *See* FED. R. CIV. P. 12(h)(1) (discussing waiver of the defense of lack of personal jurisdiction); FED. R. CIV. P. 38 (discussing the procedure for demanding a jury trial and the waiver of this right).

16. Why do such issues sometimes matter so greatly to the client? The reasons are well-known to any experienced litigator and not important enough for our purposes to deserve any extended discussion here. Those who desire proof of this assertion need only attend to the fairly significant number of cases decided by the United States Supreme Court with respect to the Seventh Amendment of the Constitution or the Fourteenth Amendment Due Process right to object to the personal jurisdiction of a trial court. Every one of those cases involved parties who were willing to undertake the considerable expense and risk of going all the way to the highest court in the land, sometimes on an interlocutory basis before the case was decided on the merits. *See, e.g.*, Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) (personal jurisdiction); Burnham v. Superior Court of Cal., 495 U.S. 604 (1990) (personal jurisdiction); Chauffeurs Local 391 v. Terry, 494 U.S. 558 (1990) (right to jury trial); Ross v. Bernhard, 396 U.S. 531 (1970) (right to jury trial). And those cases represent only the tip of the iceberg, because they do not include the far greater number of cases in which some party petitioned without success for a writ of certiorari on those same grounds. *See, e.g.*, Vaughn v. City of N. Branch, 103 F. App'x 73 (8th Cir. 2004) (right to jury trial), *cert. denied*, 543 U.S. 1065 (2005); Anderson v. Dassault Aviation, 361 F.3d 449 (8th Cir. 2004) (personal jurisdiction), *cert. denied*, 543 U.S. 1015 (2004); Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002) (personal jurisdiction), *cert. denied*, 538 U.S. 1035 (2003). It should also be noted, however, that a "mere" dismissal for improper service of process or lack of personal jurisdiction, although technically not on the merits, may effectively spell the end of the case forever if the statute of limitations expired shortly after the defendant was served, as it often does. *See* Advantedge Bus. Grp. v. Thomas E. Mestmaker & Assocs., 552 F.3d 1233, 1236 (10th Cir. 2009) (citing Gocolay v. N.M. Fed. Sav. & Loan Ass'n, 968 F.2d 1017, 1021 (10th Cir. 1992)) ("[A] dismissal without prejudice can have the practical effect of a dismissal with prejudice if the statute of limitations has expired.").

with the sort of conduct involved in this case. You are anxious, therefore, to find out how quickly you need to act to remedy these situations, preferably without needing to obtain the consent of the judge.

A bit of research quickly reveals the following relevant deadlines[17]:

1. The defenses of personal jurisdiction, venue, and service of process will be waived and lost forever because you omitted them from your answer,[18] unless you act quickly enough to assert them "in an amendment allowed by Rule 15(a)(1) as a matter of course."[19] That rule "requires the party to act very quickly"[20] because a defendant who wishes to amend his answer in that fashion may do so only "within 21 days after *serving* it."[21] These requirements "provide a strict waiver rule,"[22] and after the deadline, the court is powerless to overlook the waiver, even if it is persuaded that the defense has merit and would otherwise require the dismissal of the action.[23]

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17. The deadlines enumerated following this sentence were slightly changed as part of a set of revisions that went into effect on December 1, 2009. *See* FED. R. CIV. P. 6 advisory committee's note (2009 Amendments). At that time, Rule 6 was amended to delete the provision that had formerly excluded weekends and holidays from the calculation of certain deadlines, and the Federal Rules of Civil Procedure were altered to convert almost every deadline into some multiple of seven days so that litigants could simply reckon their obligations in terms of a specific number of weeks. Most ten-day deadlines therefore became fourteen days, and twenty-day deadlines became twenty-one days. *See id.* None of these simple numerical conversions had any bearing on any of the points made in this Article.

18. *See* FED. R. CIV. P. 12(h)(1) (discussing waiver of 12(b) motions).

19. FED. R. CIV. P. 12(h)(1)(B)(ii).

20. 5C WRIGHT & MILLER, *supra* note 11, § 1391, at 514.

21. FED. R. CIV. P. 15(a)(1)(A) (emphasis added). Prior to the amendment of this rule in December 2009, this deadline was twenty days. FED. R. CIV. P. 15(a)(1)(B) (2008) (amended 2009). This rule applies in the fairly common situation in which "a responsive pleading is not allowed," ordinarily because the answer contained no counterclaim, *see* 5B WRIGHT & MILLER, *supra* note 11, § 1345, at 37 (discussing when responsive pleadings are required), and "the action is not yet on the trial calendar." *See* FED. R. CIV. P. 15(a)(1)(B) (2008) (amended 2009). We shall assume that both of these propositions apply to this hypothetical case. Technically, and curiously, this deadline is not one of those specifically enumerated time limits that cannot be extended by the court, *see* FED. R. CIV. P. 6(b)(2), so perhaps in theory one might argue that this deadline could be extended by a judge. But any amendment granted pursuant to an "extension" of the time to amend a pleading under Rule 15(a)(1) would not truly be an amendment "as a matter of course"—that is, one made without judicial permission—but would be the functional equivalent of an amendment under Rule 15(a)(2). *See* Fed. R. CIV. P. 15(a) (noting that any amendment not made as a matter of course must be done either with leave of the court or with written consent of the opposing party). The federal courts have noted that allowing a judge to "extend" the time limits set forth under Rule 15(a)(1) would frustrate the letter of Rule 12(h)(1)(B), which declares that such defenses are waived if they are not included either in the answer or in an amendment permitted as a matter of course. *See* Ellibee v. Leonard, 226 F. App'x 351, 358 (5th Cir. 2007); Glater v. Eli Lilly & Co., 712 F.2d 735, 738 (1st Cir. 1983); Konigsberg v. Shute, 435 F.2d 551, 552 (3d Cir. 1970) (per curiam); Wurz v. Santa Fe Int'l Corp., 423 F. Supp. 91, 93 (D. Del. 1976).

22. *Glater*, 712 F.2d at 738.

23. In most other cases, the failure to amend one's pleading as a matter of course within this twenty-one day deadline is not a matter of great importance because even after that point, a pleading may be amended with the consent of the court and the court is to grant such consent "freely . . .

2. The failure to demand a jury trial in the answer also amounts to a waiver of that precious constitutional right,[24] unless the defendant acts quickly and makes such a demand in writing "no later than 14 days after the last pleading directed to the issue is *served*."[25] A party who waives this right by failing to make a timely demand can, in theory, request forgiveness and a jury trial with a motion under Rule 39(b).[26] But receiving a jury trial through this motion is an illusory prospect for most litigants because granting the motion is within the court's discretion, and "district judges have been extremely reluctant to exercise that discretion."[27] Virtually every litigant who makes a late jury demand does so as a result of "inadvertence" or ignorance of the law—but that excuse, under the law in most circuits, either requires that the court deny the motion for a jury trial,[28] or is at least a sufficient reason to deny the motion,[29] even if the delay in making the demand was fairly minimal.[30]

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when justice so requires." FED. R. CIV. P. 15(a)(2). But that kind of amendment would not be an amendment "as a matter of course," *compare* FED. R. CIV. P. 15(a)(1), *with* FED. R. CIV. P. 15(a)(2), and therefore would not spare the defendant from waiver under Rule 12(h)(1)(B). *See Ellibee*, 226 F. App'x at 358–59 (reversing a dismissal for lack of proper service where the defendant waived that defense by asserting it for the first time in an amended answer less than one month after the deadline to amend as a matter of course); *Konigsberg*, 435 F.2d at 551–52 (reversing the dismissal of a suit for lack of personal jurisdiction because the defendant waived that defense by failing to raise it until seeking leave to amend its answer only eight days after the deadline to amend as a matter of course); J. Slotnik Co. v. Clemco Indus., 127 F.R.D. 435, 440 (D. Mass. 1989) (holding that objection to service of process was waived because it was not raised in the answer or in an amendment as a matter of course); *Wurz*, 423 F. Supp. at 93 (finding that the defendants waived the defense of improper venue because it was first asserted in an amended answer only one week after the deadline to amend as a matter of course).

24. *See* FED. R. CIV. P. 38(d).

25. FED. R. CIV. P. 38(b)(1) (emphasis added). Prior to its amendment in December 2009, Rule 38 required the demand to be made within ten days after service of the answer. *See* FED. R. CIV. P. 38(b)(1) (2008) (amended 2009). For the sake of simplicity, we shall assume that this is a fairly typical case in which the defendant's answer was the last pleading in the case.

26. *See* FED. R. CIV. P. 39(b) (noting that on motion the court can order a jury trial on any issue for which one might have been demanded).

27. 9 WRIGHT & MILLER, *supra* note 11, § 2321, at 270; *see also, e.g.*, Gelardi v. Transamerica Occidental Life Ins. Co., 163 F.R.D. 495, 496 (E.D. Va. 1995) (citing Keatley v. Food Lion, Inc., 715 F. Supp. 1335, 1338 (E.D. Va. 1989)) ("This court grants such motions infrequently, and ordinarily only when the moving party presents some exceptional circumstance, beyond mere inadvertence, to justify the original waiver."). It is easy to understand why so many judges are extremely reluctant to give parties a jury trial after they have waived that right; denying such a motion will always decrease the length and complexity of the trial by eliminating the need for jury selection and jury instructions, and will also decrease the risk of reversal on appeal. *See* Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL STUD. 121, 130 tbl.1 (2009) (noting that the reversal rate in the federal cases studied was 20.4% for jury trials compared with 16.5% for bench trials).

28. Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 356 (2d Cir. 2007) (quoting Noonan v. Cunard S.S. Co., 375 F.2d 69, 70 (2d Cir. 1967)); Lutz v. Glendale Union High Sch., 403 F.3d 1061, 1065 n.4 (9th Cir. 2005) (quoting Pac. Fisheries Corp. v. HIH Cas. & Gen. Ins., Ltd., 239 F.3d 1000, 1002 (9th Cir. 2001)); Galella v. Onassis, 487 F.2d 986, 996–97 (2d Cir. 1973)

3. The failure to implead the additional defendant can also be remedied without the consent of the judge, but only if the defendant files a third-party complaint adding that new party no later than "14 days after *serving* its original answer."[31] After that deadline expires, the defendant may only implead additional parties if he makes a motion and obtains the consent of the court.[32]

So far, this is all perfectly plain. But then things get a little tricky. All three of these important deadlines dictate that the controlling time periods for the defendant to remedy his mistakes began to run on the day that the defendant served his answer on the plaintiff.[33] To find out whether you can fix some or all of these mistakes, therefore, you would need to check the file and find out the precise date on which you served the answer. But let us assume that when you go back through your file to see the precise date on which you served the answer, the records indicate that you are now extremely close to missing one or more of the deadlines. Maybe you have only a few hours left, or perhaps you have missed the deadline by only a day or two; it does not matter for our purposes which is the case. For one reason or another, the precise calculation of the relevant deadline is a matter of exceptional urgency.

(citing *Noonan*, 375 F.2d at 70) ("Untimely requests for jury trial must be denied unless some cause beyond mere inadvertence is shown.").

29. Andrews v. Columbia Gas Transmission Corp., 544 F.3d 618, 632 (6th Cir. 2008) (citing Misco, Inc. v. U.S. Steel Corp., 784 F.2d 198, 205 (6th Cir. 1986)); Dill v. City of Edmond, Okla., 155 F.3d 1193, 1208 (10th Cir. 1998) (quoting Nissan Motor Corp. v. Burciaga, 982 F.2d 408, 409 (10th Cir. 1992)); Farias v. Bexar Cnty. Bd. of Trs. for Mental Health Mental Retardation Servs., 925 F.2d 866, 873 (5th Cir. 1991) (citing Bush v. Allstate Ins. Co., 425 F.2d 393, 396 (5th Cir. 1970)); Parrott v. Wilson, 707 F.2d 1262, 1267 (11th Cir. 1983); *see also* McCray v. Burrell, 516 F.2d 357, 371 (4th Cir. 1975) (citing Gen. Tire & Rubber Co. v. Watkins, 331 F.2d 192, 197–98 (4th Cir. 1964)) (affirming denial of Rule 39(b) motion in the absence of "exceptional circumstances").

30. Richardson v. Stanley Works, Inc., 597 F.3d 1288, 1292, 1297 (Fed. Cir. 2010) (upholding denial of a jury trial even though demand was filed less than three weeks late); Mega Life & Health Ins. Co., v. Pieniozek, 585 F.3d 1399, 1404–05 (11th Cir. 2009) (upholding denial of a jury trial even though demand was filed only five weeks after the deadline); U.S. Sec. & Exch. Comm'n v. Infinity Grp. Co., 212 F.3d 180, 195–96 (3d Cir. 2000) (upholding denial of a jury trial where demand for the jury trial was less than two months late and the delay caused no prejudice to the opposing party, and noting that "the only justification for the delay was attorney inadvertence"); King v. Patterson, 999 F.2d 351, 352–53 (8th Cir. 1993) (holding that the district court did not abuse its discretion in refusing to grant a jury trial even though a pro se litigant filed his demand less than three months late); Wienke v. Haworth, Inc., No. 92-1021, 1993 WL 6830, at *6 (6th Cir. Jan. 11, 1993) (unpublished table decision) (finding no abuse of discretion by the district court in denying a jury trial even though demand was filed less than three weeks late); Rump v. Philips Lifeline, No. C 09-3271 SI, 2009 WL 3320266, at *1–2 (N.D. Cal. Oct. 14, 2009) (striking a jury demand filed only three weeks late, despite a concession by the district court that the rules governing the deadline for jury demands in cases removed from California state courts "create[] ambiguity and a trap for the unwary").

31. FED. R. CIV. P. 14(a)(1) (emphasis added). Before the amendment in December 2009, the rule set this deadline at ten days after service. FED. R. CIV. P. 14(a)(1) (2008) (amended 2009).

32. FED. R. CIV. P. 14(a)(1).

33. *See* FED. R. CIV. P. 14(a)(1), 15(a)(1), & 38(b).

But there is one possible glimmer of hope. It turns out from your review of the file—no surprise—that you did not serve your answer by personal delivery to the office of the plaintiff's counsel, which would have been rather unusual, but instead sent it to opposing counsel by mail or by electronic transmission.[34] At that point you dimly recall reading something about situations in which a little extra time is sometimes available when a party serves papers by mail.

This set of facts is entirely realistic and squarely poses the following critical question: In the fairly common case in which a defendant desires to take some important action that the Rules only permit within a certain number of days after service of the answer upon opposing counsel—for example, demanding a jury, amending the answer as a matter of course, or impleading an additional party without the consent of the judge—does the law give the defendant an additional three days to complete those actions if, as will usually be the case, the defendant served that answer by mail?

The remainder of this Article is devoted entirely to an examination of this seemingly straightforward question. The answer, as it turns out, is not as simple as most readers are likely to assume. Indeed, it involves some surprisingly intricate issues of statutory construction, all made necessary as the direct result of the supposedly "stylistic" revisions to the Federal Rules of Civil Procedure.

III. THE EVOLUTION OF RULE 6 OF THE FEDERAL RULES OF CIVIL PROCEDURE: WHAT IT SAID BEFORE AND AFTER ITS STYLISTIC REVISION

Every experienced lawyer knows at least a little bit about the provision in Rule 6 of the Federal Rules of Civil Procedure that provides three extra days when calculating certain deadlines that begin to run with service by mail.[35] But one important limitation was written into this rule from the beginning. For the first sixty-five years that the Civil Rules were on the books, dating all the way back to their enactment in 1938,[36] Rule 6 provided three extra days to only one party: the party to whom service was sent through the mail.

The original text of Rule 6 made this point plainly:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice

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34. Of course, it is permissible to serve the answer by delivering it personally to the plaintiff's lawyer or by leaving it at the lawyer's office, FED. R. CIV. P. 5(b)(2)(A) & (B), but that would be relatively unusual. Such personal service usually involves a bit of additional inconvenience. Service by mail is generally more convenient and equally effective in meeting any applicable deadlines, since such service "is complete upon mailing," FED. R. CIV. P. 5(b)(2)(C).

35. *See* FED. R. CIV. P. 6(d).

36. *See* Letter of Transmittal from Homer Cummings, Att'y Gen. of the United States, to Congress (January 3, 1938), *in* 308 U.S. 647 (discussing the United States Supreme Court's adoption of the "Rules of Civil Procedure for the District Courts of the United States").

> or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.[37]

That language was unchanged for nearly half a century, until it was amended in 1987 to replace the words "upon him" with "upon the party,"[38] and then amended in 2001 to include methods of service other than mail.[39] With those two fairly modest amendments in place, the rule read as follows after December of 2001:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.[40]

Under the language of that rule, three extra days were given to "a party" only if (1) the time for that party to take some action began to run when some paper was served "upon *the* party," and (2) that paper was served "upon *the* party" by mail or some method other than personal service.[41] The use of the definite article made it obvious that the party getting the three extra days was the same party who was served with the paper that began the running of the party's time to act. The original version of Rule 6 made this point even more explicit, by announcing that the extra time was given only to "a party" after some paper was "served upon him by mail."[42]

Under the version of Rule 6 that was on the books for more than half a century before 2005, therefore, the law was plain and unambiguous. A defendant or any other party who was required to do something within a certain number of days after serving his pleading or any other paper would not receive three extra days merely because he served it upon opposing counsel by mail.[43]

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37. FED. R. CIV. P. 6(e) (1937), *reprinted in* 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 6App.01 [1] (3d ed. 1997).

38. FED. R. CIV. P. 6(e) (1987), *reprinted in* MOORE, *supra* note 37, § 6App.09 [1].

39. FED. R. CIV. P. 6(e) (2001), *reprinted in* MOORE, *supra* note 37, § 6App.11 [1].

40. *Id.*

41. *Id.* (emphasis added).

42. *See* FED. R. CIV. P. 6(e) (1937), *reprinted in* MOORE, *supra* note 37, § 6App.01 [1]. Up until one year ago, the corresponding provision in the Federal Rules of Appellate Procedure explicitly made this same point, granting three extra days only "[w]hen a party is required or permitted to act within a prescribed period after a paper is served on *that* party[,]" and the paper is not served by personal delivery. FED. R. APP. P. 26(c) (2005) (emphasis added). The clarity was unfortunately lost, however, in an amendment to that rule that took effect in December 2009; the rule now applies "[w]hen a party may or must act within a specified time after service." FED. R. APP. P. 26(c) (2009).

43. This meant that service by mail would sometimes give one party a little more time than the other to get something done, even if they were technically subject to the same deadline. For

As the federal courts agreed, this three-day extension simply never applied "to actions taken by a party after the service of a notice or other paper by that party."[44]

This result made plenty of sense and is what any observer would have intuitively suspected. The obvious purpose behind the "three-day rule" is to compensate for the fact that, although service by mail is complete upon mailing, the party being served does not receive a document the same day the opposing party mails it to him.[45] The rule operated as a sort of presumption that a party generally does not receive a paper served by mail until approximately three days later.[46] It therefore gave an additional three days to the party who was waiting by the mailbox for something to arrive, "to afford equal response time to those served by mail."[47] But no reason exists to extend that same indulgence to a party who *serves* papers by mail. If a defendant serves his answer by mail on a plaintiff, the plaintiff obviously does not see it the same day, but any defendant who serves his answer has of course already seen it regardless of how it was served,[48] and can hardly insist that he deserves more time to decide whether to amend that answer merely because he mailed it to someone else. That is the simple and compelling reason why Rule 6, at least until recently, only gave extra

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example, when Rule 38 states that the plaintiff and the defendant are permitted to demand a jury trial within a certain number of days after the service of the last pleading, *see* FED. R. CIV. P. 38(b)(1), the defendant's service of the answer by mail under the former version of Rule 6 meant that the plaintiff's time to serve a timely demand would expire three days after the deadline for the defendant to do so. *See* FED. R. CIV. P. 6(e) (2001), *reprinted in* MOORE, *supra* note 37, § 6 App. 11[1].

44. Lewis v. Sch. Dist. #70, 523 F.3d 730, 739 (7th Cir. 2008) (quoting FED. R. CIV. P. 6(e) (2001) (amended 2007)); *accord* Mosel v. Hills Dep't Store, 789 F.2d 251, 253 (3d Cir. 1986) (per curiam) (holding that Rule 6(e) only "allows a party [that has been] served additional time to respond, in order to account for the time required for delivery of the mail"); Hill v. Vill. of Loomis, Neb., No. 4:09CV3061, 2009 WL 1813563, at *1 (D. Neb. June 25, 2009) (citing *Lewis*, 523 F.3d at 739; Kabacinski v. Bostrom Seating, Inc., No. 02-CV-8910, 2003 WL 21250651, at *2 (E.D. Pa. Mar. 7, 2003)); Priest v. Rhodes, 56 F.R.D. 478, 479 (N.D. Miss. 1972) (rejecting the argument that defendant should receive three extra days under Rule 6(e) to demand a jury, stating that the "[d]efendant is the party who served the answer, and not the party upon whom service was made"). In reaching these results, the courts relied entirely on the portion of Rule 6 that referred to service "upon the party," *see Lewis*, 523 F.3d at 739; *Mosel*, 789 F.2d at 253; *Hill*, 2009 WL 1813563, at *1; *Priest*, 56 F.R.D. at 479, which, as we shall see, is no longer in the rule.

45. *See* Carr v. Veterans Admin., 522 F.2d 1355, 1357 (5th Cir. 1975) (noting that "the probable purpose of Rule 6(e) [is] to equalize the time for action available to parties served by mail with that afforded those served in person").

46. *See* Baldwin Cnty. Welcome Ctr. v. Brown, 466 U.S. 147, 148 & n.1 (1984) (per curiam) (citing FED. R. CIV. P. 6(e) (1937) (amended 2007)).

47. Tushner v. U.S. Dist. Court for the Cent. Dist. of Cal., 829 F.2d 853, 855 (9th Cir. 1987).

48. *See* FED. R. CIV. P. 11(b). This is not merely a common-sense truism; it is a legal requirement. A defendant who mails his answer to opposing counsel before he has read it over closely and thought about it carefully—perhaps to beat some deadline or avoid a default—is not merely unwise; he is violating the rules. *See id.*

time to the party who was waiting for something to arrive in the mail before he could get started on his next move.

But the admirable clarity of this aspect of Rule 6 began to unravel in a pair of accidental changes made by the Advisory Committee in the past five years. In 2005, the Advisory Committee amended the rule to read as follows:

> Whenever a party must or may act within a prescribed period after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days are added after the prescribed period would otherwise expire under subdivision (a).[49]

According to the Advisory Committee Notes attending this amendment, its purpose was simply to clarify the method for calculating how the three days would be added.[50] The Notes contained no indication that the Advisory Committee had any reason for shortening the phrase "service of a notice or other paper upon the party" merely to "service," a change that the Advisory Committee obviously saw as a mere stylistic improvement requiring no explanation.[51] That stylistic change was carried forward two years later in the more recent amendment that went into effect on December 1, 2007.[52] According to the Advisory Committee Notes, the amendment was "intended to be stylistic only" and was merely "part of the general restyling of the [Federal Rules of Civil Procedure] to make them more easily understood and to make style and terminology consistent throughout the rules."[53] As amended, the rule now reads:

> When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).[54]

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49. FED. R. CIV. P. 6(e) (2005), *reprinted in* MOORE, *supra* note 37, § 6App.12 [1].

50. More specifically, the Advisory Committee Notes to this 2005 amendment explain that it was intended to resolve some outstanding controversies as to (1) whether the three additional days should be added at the beginning or at the end of the time calculation, and (2) whether applying the additional days to a time period of ten days would result in a combined period of more than eleven days, thus no longer requiring the exclusion of intervening weekends and holidays. FED. R. CIV. P. 6 advisory committee's note (2005 Amendments).

51. *See* FED. R. CIV. P. 6 advisory committee's note (2005 Amendments) (failing to provide justification for the specified change).

52. *See* FED. R. CIV. P. 6(d) (2007), *reprinted in* MOORE, *supra* note 37, § 6App.13 [1]. When this portion of former Rule 6(e) was amended, it was restyled as Rule 6(d) because of the simultaneous deletion of former Rule 6(c). *Compare* FED. R. CIV. P. 6(e) (2005), *reprinted in* MOORE, *supra* note 37, § 6App.12 [1], *with* FED. R. CIV. P. 6(d). For the sake of simplicity and to minimize confusion, I shall refer to this portion of the rule in the text of this discussion simply as "Rule 6."

53. FED. R. CIV. P. 6 advisory committee's note (2007 Amendment).

54. FED. R. CIV. P. 6(d).

When one carefully compares this language with former versions of the rule, the most conspicuous change is the deletion of the phrase "upon the party," which had previously appeared twice in the rule to clarify that it applied only when a party's time to perform some act began to run with "the service of a notice or other paper *upon the party* and the notice or paper is served *upon the party*" by mail.[55] Those words are now gone, and the Advisory Committee added no language to take their place.[56] The same ambiguity infects the title of this subsection: "Additional Time After Certain Kinds of Service." Both the title and the text of the rule now speak merely of service and contain not one word to imply that a distinction is to be made between the party who serves a document and the party served with that document.

Why did the Advisory Committee make this change and shorten "the service *of a notice or other paper upon the party*" merely to "service"? The Advisory Committee never gave any explanation for this unfortunate deletion and must have thought that the italicized words were redundant, but that was only partially correct. The phrase "of a notice or other paper" was indeed unnecessary prolixity. (What else would you serve under the Rules—coffee?) But as we now see, the last three words in that phrase were neither redundant nor unimportant. The Advisory Committee may have been laboring under the mistaken assumption that any time a party is subject to some deadline under the Rules that begins to run with the service of some paper, that deadline will always commence with the service of that paper *upon that party* by someone else.[57] If that assumption were true, those three words would have been redundant in the former version of Rule 6, and their deletion would not change the law. But that assumption is not true, for the Rules contain at least three important time limitations that permit a defendant to take certain action within a specified number of days after it has served its answer.[58]

How does this change in the language of the rule affect the resolution of the question outlined in Part II of this Article? The answer is inescapable and unambiguous—and just as plainly contrary to what the rule said before the supposedly "stylistic" revision. Rule 6 now states, with no trace of textual

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55. *See* FED. R. CIV. P. 6(e) (1987), *reprinted in* MOORE, *supra* note 37, § 6App.09 [1] (emphasis added).

56. *Compare* FED. R. CIV. P. 6(e) (2005), *reprinted in* MOORE, *supra* note 37, § 6App.12 [1], *with* FED. R. CIV. P. 6(d). The Advisory Committee could have easily preserved the sense of the former language by rephrasing it to state that three days are given to a party (1) after he is served, or (2) after being served, or (3) after service upon that party. For the first time in its history, the rule now says none of those things.

57. The Advisory Committee on the Federal Rules of Civil Procedure was, by its own admission, influenced by its favorable experience with the earlier restyling of the Federal Rules of Criminal Procedure, *see* Cooper, *supra* note 1, at 1762, which also contain a rule allowing three extra days "after service." FED. R. CRIM. P. 45(c). But the critical difference is that the Federal Rules of Criminal Procedure, unlike the Federal Rules of Civil Procedure, do not impose a single deadline upon any party that begins to run when that party serves papers upon someone else.

58. *See* FED. R. CIV. P. 14(a)(1), 15(a)(1)(A), & 38(b)(1).

ambiguity, that three extra days are allowed when "a party may or must act within a specified time *after service* and *service is made*" by mail or some method other than personal delivery.[59] Under the only literal reading of these plain words, three additional days are available to a defendant who serves his answer by mail and then wishes to (1) amend that answer as a matter of course under Rule 15,[60] (2) demand a trial by jury under Rule 38,[61] or (3) implead a third-party defendant without leave of the court under Rule 14.[62] As we have seen, all three of these rules provide a strict time limit in which a defendant is permitted to take some action after the service of its answer. There is simply no other way to read the rule, unless one pretends that the deleted words are still there.

IV. AN EXAMINATION OF RULE 6 IN LIGHT OF THE PRINCIPLES OF STATUTORY CONSTRUCTION

The unfortunate and accidental change in Rule 6 is a time bomb waiting to go off. Lawyers frequently wait until what they think is their last day to get something done, often after they have given themselves the benefit of the "three extra days" to which they deem themselves entitled. In one recent case where the losing litigant had sixty days to prepare and file a notice of appeal—a one-sentence document that only takes one minute to dictate—his experienced attorney waited a full sixty-three days to file the notice because he mistakenly thought he had three extra days under this rule; the court dismissed the appeal as a result.[63] It is only a matter of time before some defendant will arguably miss by one or two days the time limit for amending its answer as a matter of course, or for demanding a jury trial after serving its answer. It has happened before, and it will happen again.[64] What will the parties argue in such a case, and how will the judge rule? The most likely arguments are easy to foresee and will surely bear out the prediction of one critic that "the restyled rules will engender litigation over whether to adhere to the current meaning of the current rule in

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59. *See* FED. R. CIV. P. 6(d) (emphasis added). To be more precise, Rule 6 now applies to situations where service is made in any manner other than personal delivery, including service by mail, by leaving it with the court clerk, by electronic means with the written consent of the party being served, or by any other means that the opposing party consented to in writing. *See* FED. R. CIV. P. 5(b)(2)(C), (D), (E), & (F).

60. *See* FED. R. CIV. P. 15(a)(1)(A).

61. *See* FED. R. CIV. P. 38(b)(1).

62. *See* FED. R. CIV. P. 14(a)(1).

63. McCarty v. Astrue, 528 F.3d 541 (7th Cir. 2008).

64. *See, e.g.*, Tushner v. U.S. Dist. Court for the Cent. Dist. of Cal., 829 F.2d 853, 855–56 (9th Cir. 1987) (determining that a district court judge erred in striking a demand for a jury trial in an action removed from state court, where the plaintiff's demand, by the calculations of the district judge, was filed and served only one day late, although the Court of Appeals concluded that the demand was two days early); Priest v. Rhodes, 56 F.R.D. 478, 479 (N.D. Miss. 1972) (holding that the defendant served its demand for a jury trial two days beyond the deadline).

light of the Advisory Committee Notes or instead to follow the plain language of the restyled rule."[65] We will examine the most likely arguments now, starting with the most important.

A. Is Rule 6 Plain and Unambiguous?

Let us consider the position of those defendants who will inevitably need to persuade some court that they are entitled to three extra days to amend their answer or to demand a trial by jury because they served their answer by mail. In support of that conclusion, these defendants can make an impressive collection of arguments in favor of reading the rule precisely as it is written, all of them based on well-settled maxims of statutory construction.

First and foremost, the defendant will point out that courts should read the Federal Rules of Civil Procedure in accordance with "their plain meaning," just like a statute.[66] If the "statutory text is plain and unambiguous," the courts "must apply the statute according to its terms."[67] As we have seen, no trace of ambiguity exists in the text of Rule 6 as it is now drafted. The rule gives three extra days to all those who are permitted to take certain actions "within a specified time after service"[68]—and that is true of literally every defendant who serves his answer by mail.

As a result of its recent amendments, Rule 6 now refers in unqualified terms to any deadline that begins with "service," even though we know that those who drafted the rule surely had a more specific situation in mind. But as the Supreme Court has stated, "it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that [its drafter] was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself."[69]

Moreover, the Supreme Court has shown special reluctance to find ambiguity in a rule or statute by comparing it with an earlier version of the same text. In a case decided a few years ago, the Court interpreted a statute, just like Rule 6, that was the subject of an amendment deleting a few words in "an apparent legislative drafting error."[70] In arguing that the Court should regard the text as ambiguous and should therefore consult the pertinent legislative history, one of the parties to that case reasoned, "for the most part, by comparing the present statute with its predecessor," and by arguing that there was "no apparent

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65. Hartnett, *supra* note 8, at 178.

66. Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 540 (1991) (citing Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 123 (1989)).

67. Carcieri v. Salazar, 129 S. Ct. 1058, 1063–64 (2009) (citing United States v. Gonzales 520 U.S. 1, 4 (1997)); *see also* Jimenez v. Quarterman, 129 S. Ct. 681, 685 (2009) ("It is well established that, when the statutory language is plain, we must enforce it according to its terms.").

68. FED. R. CIV. P. 6(d).

69. Brogan v. United States, 522 U.S. 398, 403 (1998).

70. Lamie v. U.S. Tr., 540 U.S. 526, 530 (2004).

reason" why Congress would have intentionally deleted the missing words.[71] The Court dismissed that contention as beside the point, holding that "[t]he starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes."[72] By that same logic, one is hard-pressed to argue that courts should regard Rule 6 in its current form as ambiguous merely because it produces different results from the version that preceded it.

Just about the only way to read Rule 6 in a manner that would avoid the plain import of its literal terms is to assume that the Advisory Committee intended the phrase "service" to mean "service upon that party." This would require reading into the statute words that simply are not there—indeed, the very words that were intentionally deleted in the most recent pair of stylistic amendments to the rule.[73] That would violate the maxim that courts "ordinarily resist reading words or elements into a statute that do not appear on its face."[74]

The Advisory Committee could also have preserved the former sense of Rule 6 if it had worded the rule to refer to situations in which a party is permitted or required to take some action within a specified time "after *being served*," instead of as it now reads, "after *service*."[75] More than a dozen Federal Rules of Civil Procedure prescribe a time period in which a party may or must act after "being served" with some paper.[76] The Advisory Committee could have easily used that language in Rule 6, and by doing so would have explicitly limited the rule's provision of three additional days to the party who was waiting for some document to come in the mail. To read into a statute a phrase that the drafters were willing and able to use in other contexts "runs afoul of the usual rule that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'"[77]

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71. *Id.* at 533 (quoting Brief for Petitioner at 17, *Lamie*, 540 U.S. 526 (2004) (No. 02-693), 2003 WL 21295241).

72. *Id.* at 534 (citation omitted).

73. *Compare* FED. R. CIV. P. 6(e) (2001), *reprinted in* MOORE, *supra* note 37, § 6App.11 [1], *with* FED. R. CIV. P. 6(d).

74. Dean v. United States, 129 S. Ct. 1849, 1853 (2009) (quoting Bates v. United States, 522 U.S. 23, 29 (1997)) (internal quotation marks omitted); *see also* Ali v. Fed. Bureau of Prisons, 128 S. Ct. 831, 841 (2008) ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable.").

75. *See* FED. R. CIV. P. 6(d) (emphasis added).

76. *See* FED. R. CIV. P. 12(a)(1)(A)(i), 12(a)(1)(B), 12(a)(1)(C), 12(f)(2), 26(a)(1)(D), 31(a)(5), 32(d)(3)(C), 33(b)(2), 34(b)(2)(A), 36(a)(3), 37(d)(1)(A)(i), 38(c), 59(c), 68(a), & 81(c)(2)(B). It deserves mention that the Criminal and Appellate Rules also contain several rules setting deadlines requiring a party to take certain action within a specified number of days after "being served." *See* FED. R. CRIM. P. 59(a) & 59(b)(2); FED. R. APP. P. 6(b)(2)(B)(ii), 10(c), & 17(a).

77. Sosa v. Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004) (quoting 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06, at 194 (6th ed. 2000)). This principle of statutory construction has been frequently employed by the Court. *See, e.g.*, Eisenstein *ex rel.* United States v. City of New York, 129 S. Ct. 2230, 2235 (2009) (refusing to interpret "party" to include a "real party in interest" when the two phrases were used in different

These considerations, taken together, amount to a powerful argument that the language of Rule 6 is plain and unambiguous, and therefore must be enforced according to its terms, unless perhaps there is some equally compelling and countervailing doctrine of statutory construction that might justify a departure from that plain language.

B. Legislative History and the Intent of the Drafters

In arguing that the defendant should not receive three extra days merely because he served his answer by mail, as we have seen, the plaintiff cannot resort to the language of Rule 6 as it now stands. Under the only natural construction of the plain text of the rule, three days are given to anyone who is required to do something after service by mail, regardless of whether the service was by that party or upon that party. With the text furnishing no support for its position, the plaintiff will have no choice but to argue for a nonliteral interpretation based on what we know, or think we know, from the legislative history about the intentions of those who wrote this change.

But in the case of an unambiguous rule like Rule 6, it is beside the point whether its plain text arguably conflicts with the intentions of those who wrote it. The Supreme Court has made this point in just about every way that can be imagined. Because the courts do not "resort to legislative history to cloud a statutory text that is clear,"[78] the stated intentions of the drafters are simply "irrelevant to the interpretation of an unambiguous statute."[79] Even in cases in which the legislative history creates "a direct conflict" with the plain language of some statutory text, "the text must prevail."[80] When "the statutory language is clear, there is no need to reach . . . arguments based on statutory purpose [or] legislative history . . . ."[81] Consequently, where the text of some rule is unambiguous, the courts should "reject . . . at the very outset"[82] any evidence offered from the legislative history to prove that the drafters did not intend to

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portions of the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure); Jones v. Bock, 549 U.S. 199, 222 (2007) (refusing to treat "claim" as synonymous with "action" when various federal statutes confirmed that "Congress knew how to differentiate between the entire action and particular claims when it wanted to"); Bailey v. United States, 516 U.S. 137, 150 (1995) (refusing to interpret a statute governing the "use" of a firearm to cover a firearm "intended to be used," because another statute included that very phrase and therefore "demonstrate[d] that Congress knew how to draft a statute to reach a firearm that was 'intended to be used'").

78. Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994).

79. Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 n.3 (1989) (citing United Air Lines, Inc. v. McMann, 434 U.S. 192, 199 (1977)); *see also* Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1332 n.3 (2010) (stating that "reliance on legislative history is unnecessary in light of the statute's unambiguous language").

80. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1466 n.6 (2009).

81. Boyle v. United States, 129 S. Ct. 2237, 2246 (2009).

82. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 567 (2005).

change some aspect of the law that was nevertheless changed—even if only accidentally—by that plain language.[83]

Nor does it make any difference that the Federal Rules of Civil Procedure are supposed to "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[84] Even if a literal reading of Rule 6 could lead to some sort of injustice, that admonition is not a license for courts to construe procedural rules "to mean something other than what they plainly say."[85] The admonition to interpret the rules to secure the just disposition of a case "sets forth a principle of interpretation to be used in construing ambiguous rules, not a principle of law superseding clear rules that do not achieve the stated objectives."[86]

Even if we were to assume for the sake of argument that it would be proper for courts to look beyond the plain language of Rule 6, it is far from clear that the stated intentions of its drafters should be controlling in this context. In fairness, one must concede that the plain text of the rule will now produce results that those who drafted it almost certainly did not intend.[87] The earlier version of the rule clearly settled that the party making service by mail would never be entitled to three extra days,[88] and the Advisory Committee has explicitly disclaimed any intention to change the substance of the rule, insisting that its most recent changes to this portion of the rule were meant to be merely stylistic.[89] But those assurances are by no means decisive. In two recent cases, two circuits of the United States Court of Appeals expressed doubts that they could overlook such ambiguities merely because an Advisory Committee insisted that its work was intended to be stylistic only. The Second Circuit pointed out that the Advisory Committee amended one of the Federal Rules of Appellate Procedure in ways that arguably amounted to an unintended change in

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83. In *Exxon Mobile*, the Court was "presented with a bizarre proposition: a statute that by its terms overrul[ed] [prior law], but whose drafters [said], in essence, 'we didn't mean it.'" FREER, *supra* note 7, § 13.3, at 770. As we have seen, that is a fair description of what has become of Rule 6 after its recent stylistic revisions. *See supra* Part III.

84. FED. R. CIV. P. 1.

85. Carlisle v. United States, 517 U.S. 416, 424 (1996). The Court was interpreting the virtually identical provision of the Federal Rules of Criminal Procedure. *See* FED. R. CRIM. P. 2 ("These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."). The same reasoning would apply with as much force to the interpretation of the Federal Rules of Civil Procedure.

86. *Carlisle*, 517 U.S. at 424.

87. *See* Cooper, *supra* note 1, at 1761 ("[T]he goal of the Style Project is to translate present text into clear language that does not change the meaning.").

88. *See supra* notes 43–48 and accompanying text.

89. FED. R. CIV. P. 6 advisory committee's note (2007 Amendments); *see also* Cooper, *supra* note 1, at 1761.

the law, despite its assertion that the change was "intended to be stylistic only,"[90] and concluded that this danger required it to "warn litigants of a potential minefield."[91] And the Fifth Circuit likewise concluded that the recent amendment to Rule 55 of the Federal Rules of Civil Procedure, although also "intended to be stylistic only,"[92] may well have altered the legal standard for setting aside a default judgment.[93] Both courts thought it necessary to caution litigants that the respective Advisory Committee had arguably created apparent changes in the controlling procedural rules, and that they would not necessarily disregard those unintentional changes merely because of the Advisory Committee's assurances that they intended to limit their changes to matters of style.

The Supreme Court evidently agrees with that conclusion and has indicated that it will not automatically defer to an Advisory Committee's assurances that a change in the wording of a rule involves nothing but a matter of style. In the Court's only decision to date involving the stylistic revisions to the Federal Rules of Civil Procedure, after noting that the most recent revisions to Rule 19 were reportedly intended to be "stylistic only," it made a point of noting that it had undertaken an independent assessment of the effect of those changes, at least in the context of that rule.[94] It comes as little surprise that the Court proceeded on the assumption that the judiciary has the final responsibility to determine whether the Advisory Committee succeeded in its intention to draft changes that would be merely stylistic. Although members of the Court have expressed different views as to how much weight the Advisory Committee Notes should be given when interpreting procedural rules,[95] a majority of the Court agrees that

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90. Sorensen v. City of New York, 413 F.3d 292, 297 n.2 (2d Cir. 2005) (quoting FED. R. APP. P. 4 advisory committee's note (1998 Amendments)) (internal quotation marks omitted).

91. *Id.*

92. *In re* OCA, Inc., 551 F.3d 359, 370 n.29 (5th Cir. 2008) (quoting FED. R. CIV. P. 55(c) (1987) (amended 2007); FED. R. CIV. P. 55(c); FED. R. CIV. P. 55 advisory committee's note (2007 Amendments)) (internal quotation marks omitted) (citing Fed. Sav. & Loan Ins. Corp. v. Kroenke, 858 F.2d 1067, 1069 (5th Cir. 1988)).

93. *See In re* OCA, Inc., 551 F.3d 359, 370 n.29 (5th Cir. 2008) (quoting FED. R. CIV. P. 55(c)).

94. Republic of Philippines v. Pimentel, 128 S. Ct. 2180, 2184 (2008) ("The Rules Committee advised the changes were stylistic only, and we agree." (citation omitted)). Those last three words suggest that the Court properly regards itself as obligated to decide for itself whether to accept the assurances of the Advisory Committee that the amendments have changed nothing but matters of style.

95. *Compare* Schiavone v. Fortune, 477 U.S. 21, 31 (1986) ("Although the Advisory Committee's comments do not foreclose judicial consideration of the Rule's validity and meaning, the construction given by the Committee is 'of weight.'" (quoting Mississippi Pub. Corp. v. Murphee, 326 U.S. 438, 444 (1946))), *with* Krupski v. Costa Crociere S.p.A., 130 S. Ct. 2485, 2498–99 (2010) (Scalia, J., concurring) ("I join the Court's opinion except for its reliance on the Notes of the Advisory Committee as establishing the meaning of Federal Rule of Civil Procedure 15(c)(1)(C). The Advisory Committee's insights into the proper interpretation of a Rule's text are useful to the same extent as any scholarly commentary. But the Committee's intentions have no

there are circumstances in which "the policy expressed in the rule's text points clearly enough in one direction that it outweighs whatever force the Notes may have."[96]

These rules of statutory construction surely apply with even greater force in the context of Rule 6, where there is no direct conflict between the unambiguous meaning of its plain text and its legislative history. The Advisory Committee Notes to this rule and all of its assorted stylistic amendments have not addressed the specific issue we are considering here.[97] The most that could be said about the legislative history in this context is that there is a conflict between the change made by the plain language of the rule and the generic statements by its drafters that they did not intend to make any changes other than to the style.[98] That hardly furnishes a substantial basis for disregarding the plain language of the rule.

C. Does a Literal Reading of Rule 6 Lead to Absurd Results?

Apart from the arguments based on legislative history—or more specifically, the silence of the legislative history to suggest that the Advisory Committee intentionally changed the rule in the way identified here—the plaintiff's only other possible argument would be to emphasize the policy consequences of a literal reading of Rule 6 as it is drafted. The Supreme Court will countenance a departure from the plain language of a rule only in the extremely narrow class of cases in which a literal reading will lead to absurd results. The Court has often reiterated the familiar principle that "when [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[99]

One can argue with considerable force that it makes no sense to give a defendant three extra days to decide whether to demand a jury trial or to amend his answer as a matter of course and assert a lack of personal jurisdiction merely because he served his answer by mail.[100] To put it in other words: there is no sensible reason to give that defendant three more days than we would give to a codefendant in the same case who served his answer on the same day by personal delivery to the plaintiff's counsel. But although that result may seem

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effect on the Rule's meaning. Even assuming that we and the Congress that allowed the Rule to take effect read and agreed with those intentions, it is the text of the Rule that controls.").

96. Williamson v. United States, 512 U.S. 594, 602 (1994) (interpreting Rule 804(b)(3) of the Federal Rules of Evidence).

97. *See* FED. R. CIV. P. 6 advisory committee's notes.

98. *See* FED. R. CIV. P. 6 advisory committee's note (2007 Amendment).

99. Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989)) (internal quotation marks omitted).

100. *See supra* notes 43–48 and accompanying text.

unwise or unnecessary, it hardly amounts to a showing that those results can be described as "absurd."

The Supreme Court has made it clear that courts have precious little discretion to disregard the plain language of a rule or statute on the basis of the results to which it would lead. Just a few years ago, the Supreme Court was called upon to interpret a federal statute that severely limited the ability of federal inmates to seek habeas corpus relief based on changes in the law after their convictions became final on direct review.[101] The Court deemed itself bound to give a literal interpretation to the plain language of the statute[102] even though this led to a bizarre conclusion that would, for many prisoners, "make it possible for the limitations period [for a habeas petition] to expire before the cause of action accrue[d]."[103] In a masterpiece of understatement, the Court acknowledged that this conclusion was of course "harsh" and "strict," but nevertheless stated that the result was not the sort of "absurd" consequence that would permit the courts to refuse to enforce the rule according to its plain language.[104] And this was in a case, mind you, brought by a man sentenced to thirty years in prison without any chance of parole, making a claim that his guilt had not been proved in the manner required by law![105]

Even though a literal reading of Rule 6 will now lead to some strange results, it is far from clear that the results will be utterly senseless or manifestly absurd. At least in the context of Rule 38, which gives both parties the same number of days to demand a jury trial after the answer is served, one could plausibly imagine that the drafters of Rule 6 intended to expand its provisions to make the deadline for a jury trial demand uniform for both parties—as the rule now does—rather than having the deadline expire on two different days.[106] I am not suggesting that the Advisory Committee actually anticipated, much less intended, this result. But the fact that we can imagine a plausible purpose behind the change makes it much more difficult for a plaintiff to argue that the literal reading of the rule produces such manifestly absurd results that every defendant has constructive notice that the rule cannot be interpreted in accordance with its literal terms.

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101. *See* Dodd v. United States, 545 U.S. 353, 354–55 (2005).

102. *Id.* at 359.

103. *Id.* at 361 (Stevens, J., dissenting). The majority opinion did not deny that this was an accurate description of the Court's holding. *See id.* at 359.

104. *Id.* at 359–60.

105. *Id.* at 355.

106. In at least one reported case decided before the 2005 amendment to this rule, a defendant specifically complained that under Rule 6 the plaintiff served with the answer by mail received three extra days "within which to serve a written demand for a jury trial, and that [the] defendant should have the same privilege." Priest v. Rhodes, 56 F.R.D. 478, 479 (N.D. Miss. 1972). That argument was rejected, but only because it was foreclosed by the language of Rule 6 at that time—the same language that has since been deleted.

In deciding whether a literal reading of Rule 6 would be "absurd," it must be emphasized that this is not a case where the plain language might lead to results that one could describe as harsh or strict, that could cause anyone to lose valuable rights through inadvertence, or that could unfairly catch either party by surprise.[107] Because the most literal reading of Rule 6 is the most generous to a defense attorney who seeks a few extra days to correct an error that might otherwise inadvertently waive his client's constitutional rights, it is also the reading that is most consistent with the spirit of the Federal Rules of Civil Procedure and their rejection of "the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome"[108] of the litigation. A literal enforcement of Rule 6 as it is now written will indeed lead to results that are unintended and strange—but only by dispensing three extra days to litigants who do not really deserve them. If the Supreme Court felt bound to follow the "plain language" of a statute even though it sometimes resulted in the denial of habeas corpus relief to possibly innocent inmates who had been unjustly convicted, it is impossible to argue with a straight face that the unintended generosity of Rule 6 would constitute a result so absurd as to constitute a license to refuse to follow its plain language.

Besides, although a literal reading of Rule 6 leads to strange and almost surely unintended results, one cannot push that logic too hard. Under any conceivable interpretation of Rule 6, even one that would be most faithful to its former wording, the rule is still fraught with lines that are difficult to logically justify. For example, when a rule requires a lawyer to respond after being served with some document—for example, a set of interrogatories[109]—Rule 6 never gives the lawyer three extra days to prepare that response if the opposing party personally delivers the discovery request to the lawyer's office and leaves it with

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107. It stands to reason that an unintended consequence of a statute's plain language will most likely be deemed intolerably "absurd" when it leads to results that are harsh or strict, rather than unreasonably merciful or forgiving. For example, a rule that unexpectedly causes innocent parties to lose valuable constitutional rights should be more readily rejected as absurd than one that (like Rule 6) unexpectedly makes that result less likely. The Supreme Court has never yet said this, but it makes perfect sense, and follows logically from what the Court has written in this context. *See, e.g.*, Nelson v. Adams USA, Inc., 529 U.S. 460, 465 (2000) ("The Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees."); Hormel v. Helvering, 312 U.S. 552, 557 (1941) ("Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.").

108. Conley v. Gibson, 355 U.S. 41, 48 (1957). Moreover, giving virtually every defendant three extra days before they inadvertently waive their constitutional right to demand a jury trial, or their constitutional right to demand a dismissal for lack of personal jurisdiction, is certainly more consistent with the insistence that "[p]leadings must be construed so as to do justice," FED. R. CIV. P. 8(e), and that the right to a trial by jury "is preserved to the parties inviolate." FED. R. CIV. P. 38(a).

109. Interrogatories, like many other discovery devices in the federal rules, must be answered within thirty days after they are served upon the party who is obligated to respond to them. FED. R. CIV. P. 33(b)(2).

the secretary. It *does* give the lawyer three extra days, however, if the opposing party serves the interrogatories by email or fax or some other electronic means.[110] What sense does that make? Electronic transmission of a document never takes three days, not even in Elbonia. The framers presumably reasoned that a lawyer receiving service electronically might not check his email every day.[111] (The framers have not met any of the students I have taught in the past decade.) But the same can be said when service consists of the delivery of papers left with an office assistant; plenty of documents delivered by couriers sit unopened for a day or two after delivery—and yet the rule allows no extra time to parties served in that fashion.[112] The bottom line is that no reading of the three-day rule in Rule 6 will generate results that are perfectly consistent with its underlying rationale. That fact cuts strongly against the conclusion that the plain language of the rule should be disregarded merely to make the rule "just a little bit less absurd" in light of its supposed logic.

D. The Consequences of Not Enforcing the Rule as it is Written

As we have shown, a literal reading of Rule 6 leads to results that are strange and unintended, but not absurd. One could well argue, however, that a refusal to enforce this rule as it is now written would indeed lead to results so intolerable as to be absurd. As the Supreme Court has noted, it is especially inappropriate to deviate from the "plain language" of a rule when reading additional words into the text "would lead to absurd results."[113]

Only a plain reading of Rule 6 will eliminate the risk that the rule will inevitably act as a pitfall for some hapless litigant who took it at face value in calculating how much time he had to get something done. With good reason, the Supreme Court has cautioned that a procedural rule should not be interpreted in a manner that would convert it "into a trap for unwary litigants."[114] Indeed, this

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110. FED. R. CIV. P. 6(d) (giving extra time to those served under Rule 5(b)(2)(E) (electronic service), but not to those served under Rule 5(b)(2)(B)(i) (service by personal delivery to a person's office)).

111. The Advisory Committee's Notes to Rule 6 offer no explanation for this rule. But it is presumably the same logic adopted by those who included a similar provision in the Appellate Rules on the basis of their view that "[e]lectronic service is usually instantaneous, but sometimes it is not, because of technical problems. Also, if a paper is electronically transmitted to a party on a Friday evening, the party may not realize that he or she has been served until two or three days later." FED. R. APP. P. 26 advisory committee's notes (2002 Amendments).

112. *Compare* FED. R. CIV. P. 5(b)(2)(B)(i) (addressing service upon an office assistant), *with* FED. R. CIV. P. 6(d) (failing to give three additional days for parties served under Rule 5(b)(2)(B)(i)).

113. *See* Harbison v. Bell, 129 S. Ct. 1481, 1487 n.6 (2009) (refusing to read additional language into a statute governing federally appointed attorneys because such an interpretation "would lead to absurd results" by requiring an inmate to secure "new counsel" in addition to his appointed counsel).

114. *See* Darby v. Cisneros, 509 U.S. 137, 147 (1993).

very reason is at the heart of the Court's repeated insistence that unambiguous rules be applied in accordance with their plain meaning.

If any unintended substantive change in the wording of a rule could be disregarded merely because the drafters had made a generic disavowal of such an intention, future courts and litigants would in effect be required to apply the following bizarre maxim of statutory interpretation: When interpreting any Federal Rule of Civil Procedure, just to be safe, you must always be sure to go back and compare it with the language of the same rule before its stylistic revisions in the earlier part of the twenty-first century, make a careful note of all the differences—and then disregard all those differences that changed the operation of the rule in any way.

That principle of statutory construction—perhaps *deconstruction* would be more accurate—would completely defeat the entire purpose behind the stylistic revisions.[115] It would also make the Federal Rules of Civil Procedure as mysterious and as difficult to interpret as the Seventh Amendment, and with the passage of time would require federal judges to embark on "needless and intractable excursions into increasingly unfamiliar territory."[116] That truly would be absurd.

V. CONCLUSION

One proponent of the stylistic revisions predicted that advocates will "seize on every nuance" introduced by the changes "and attempt to wring advantage from it."[117] He even suggested that proponents of plain language interpretation—which would apparently include me—will be engaged in an intentional act of willful deception. "In the first years, the effort often will be willful: the advocate knows what the prior language was, knows what it had come to mean, and knows that no change in meaning was intended."[118] To all these sinister-sounding charges, I fear that have no choice but to plead guilty as charged. But that does not change the inescapable fact that, as this Article has demonstrated, Rule 6 has been the subject of just such an unintentional substantive change.

Someday soon, a defendant will be accused of waiting one or two days too long to demand a jury, to amend his answer to add the defense of personal jurisdiction, or to implead a third-party defendant without the consent of the

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115. *See* Cooper, *supra* note 1, at 1761.

116. Chauffeurs Local 391 v. Terry, 494 U.S. 558, 581 (1990) (Brennan, J., concurring). The phrase is taken from Justice Brennan's apt description of the difficulties caused by the Seventh Amendment's unfortunate use of the word "preserved" and the Supreme Court's resulting jurisprudence that requires courts, when deciding whether a party has a constitutional right to a jury, to undertake an examination of the eighteenth century actions brought in the courts of England prior to the merger of the courts of law and equity. *See id.* 574–81.

117. Cooper, *supra* note 1, at 1783.

118. *Id.*

court. That defendant, perhaps after reading this Article, will contend that he was technically not too late because he served his answer by mail and point out that Rule 6, by its plain terms, now gives an extra three days to everyone whose time to take some action began "after service" of some paper. He will persuasively insist that he had every reason to take the rule at face value when calculating how much time he had to make up his mind.[119] He will also remind the court that a literal reading of the rule would cause no real unfairness to opposing counsel or deprive either side of some lawful right to which it was entitled.

When that day comes, it will be difficult for the district court to meet all those arguments with the response: "Well, you should not have taken that rule literally, because your research should have led you to discover that the former version of the rule had a few extra words that compelled the opposite conclusion, and that the drafters who removed those words explicitly stated that they did not intend to make any change in its operation." That reasoning would convert the interpretation of the Federal Rules of Civil Procedure into an exercise in cryptography. As the defendant will correctly point out, it makes much more sense to interpret and apply the rules as they are written and to handle the unanticipated consequences of those changes, if need be, through the normal process of amending their language.

As matters now stand, at least until the next time that Rule 6 of the Federal Rules of Civil Procedure is amended, its three-day provision is a terrible trap destined to catch some unwary defense attorneys by surprise. As I have shown, the best available arguments of statutory construction all weigh heavily in favor of the conclusion that the rule should be enforced according to its plain language. But that leads to some admittedly strange results that are not easy to justify in terms of the underlying purpose behind the rule—which may well persuade some district judges to reach the contrary conclusion and to interpret the rule so that its earlier meaning is not altered. If that happens, some defense lawyer will find to his horror that he has inadvertently waived some extremely precious right of his client, perhaps even a constitutional right, because he relied on the plain language of Rule 6 and took it at face value. How ironic that this ticking time bomb has been unintentionally planted in the rule governing the calculation of time.

The good news is that all of these problems can—and inevitably will—be cured through an extremely simple amendment to Rule 6(d).[120] The portion of

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119. Even good lawyers will sometimes have good reasons to wait as long as possible before making certain kinds of seemingly easy procedural decisions. *See* Bowles v. Russell, 127 S. Ct. 2360, 2372 n.9 (2007) (Souter, J., dissenting on other grounds) (noting the reasonableness of waiting "until the penultimate day under [a] judge's order" to file a notice of appeal since "filing the notice of appeal starts the clock for filing the record, which in turn starts the clock for filing a brief" (citations omitted)).

120. Indeed, the Advisory Committee has recently begun a discussion of whether Rule 6(d) should be amended, although because of concerns other than the problem identified in this Article.

that rule that extends an extra three days to parties who "may or must act within a specified time after *service*"[121] must be restored to refer, as it did for many years, to parties who must take some action within a specified time after *being served*. That simple change will eliminate all of the unfortunate problems that the stylistic revisers created. As it turns out, a surprising amount of confusion and complexity can be injected into the operation of a rule by the deletion of a single word.[122]

But until the inevitable day when that change is made, a sobering note of caution is required for those law students and defense attorneys who read this Article before finding themselves in a situation like the one described above. You should not take the liberty of presuming that you can take Rule 6 literally or assume that you will be able to persuade the court that you were given three additional days by the stylistic revision of the rule. That is a risk not worth taking. You will be much better off in every way, and sleep better at night, if you forget everything you read in this Article and assume that you do not have three additional days. This Article has been written instead for the benefit of two groups: (1) those future defense lawyers who did not see this Article (or this paragraph) in time and are trying after the fact to persuade a court that they did not miss a deadline;[123] and (2) the members of the assorted Advisory Committees and the many others involved in the amendment process who might be tempted to dabble in "stylistic" revisions in the future. You would be wise to proceed with caution. It turns out that the fears of your critics[124] were prophetic. It is exceptionally difficult, if not impossible, to engage in the extensive revision of the language of a set of rules without inadvertently making changes of real substance.[125]

See Minutes, Advisory Comm. on Evidence Rules, 31 (Nov. 20 2009), http://www.uscourts.gov /uscourts/RulesAndPolicies/rules/Minutes/EV11-2009-min.pdf (discussing the Civil Rules Advisory Committee's request for advice on whether the three-day extension should be applicable for service by e-delivery and service pursuant to agreed means).

121. FED. R. CIV. P. 6(d) (emphasis added).

122. In the words of one noted British commentator: "It's funny how one insect can damage so much grain." ELTON JOHN, *Empty Garden (Hey Hey Johnny)*, *on* JUMP UP (MCA 1992).

123. Good luck with that. As you can see, you have the clear weight of authority in your favor, and the author of this Article has already written your entire brief for you. But nobody can predict with confidence how a judge will rule in a given case. And that is the entire problem with the recent amendment to Rule 6.

124. *See* Hartnett, *supra* note 8, at 178 ("[T]he restyled rules will engender litigation over whether to adhere to the current meaning of the current rule in light of the Advisory Committee Notes or instead to follow the plain language of the restyled rule.").

125. After completing the first draft of this Article, I reviewed the recently proposed stylistic changes to the Federal Rules of Evidence, and found no fewer than four unintended substantive changes that would have been made by the "merely stylistic" changes that had been proposed for Rules 103(a), 411, 611(b), & 804(a)(1). *See* James J. Duane, *Some Comments on the Proposed Style Revision of the Federal Rules of Evidence*, 1–8 (2010), http://www.uscourts.gov/uscourts/ RulesAndPolicies/rules/2009%20Comments%20Committee%20Folders/EV%20Comments%20200 9/09-EV-018-Comment-Duane.pdf. After I brought these changes to the attention of the Advisory

Committee, it voted to change its proposed revisions to all four of those rules along the lines that I had suggested to avert the substantive changes they were on the verge of making by accident. *See* Memorandum from Judge Robert L. Hinkle, Chair, Advisory Comm. on Evidence Rules to The Honorable Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure (May 10, 2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/jc09-2010/2010-09-Appendix-D.pdf.