Redrafting All the Federal Court Rules: A 30-Year Odyssey

BY JOSEPH KIMBLE

The Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States oversees the work of the five advisory committees that draft proposed new and amended federal court rules. In 1991, the chair of the Standing Committee, Robert E. Keeton, had the great insight and foresight to address a pervasive problem with the five sets of rules: their drafting was not up to par. He saw the need for much greater clarity, consistency, and readability — not only within each set but also across the different sets. And now, more than 30 years later, the fifth and last set — the Rules of Bankruptcy Procedure — has been "restyled" and sent to the Supreme Court. If they are approved, as the other four sets have been, and Congress does not intervene, they will take effect in December. That will complete a remarkable story and remarkable accomplishment.

After Judge Keeton overcame some initial opposition, his first step in 1991 was to appoint a style subcommittee of the Standing Committee, chaired by Charles Alan Wright. The Standing Committee then engaged Bryan A. Garner, a preeminent authority on legal writing and legal language, as its first style consultant. I succeeded Garner when he stepped down in 2000. He returned in 2016. And for this entire time, Joseph Spaniol, a former clerk of the Supreme Court, has also served as a style consultant. We three form the current style team.

For the record, here are the dates on which each set of restyled rules took effect: the Rules of Appellate Procedure in 1998; Criminal Procedure, 2002; Civil Procedure, 2007; and Evidence, 2011. Each project took several years. Work on the Civil Rules, for instance, began in 2002. I'll never forget receiving 30- to 40-page memos from both the reporter for the Civil Rules Advisory Committee, Edward Cooper, and a consultant, Thomas Rowe, on the draft of just Civil Rules 1 through 7. The process was excruciatingly careful, and rightly so. More on that in a moment.

By all measures, the projects have been a success. Fears about "transactional costs," such as making unintended substantive changes, have proved to be unwarranted. Only a small number of these hundreds of rules, and thousands of provisions, have needed adjustments. Even at a glance, readers should see that the revised versions have been substantially, sometimes strikingly, improved. (You'll find before-and-after examples toward the end.)

The Trouble with the Old Rules

So what was wrong with the former rules? To be frank, just about everything. I have described them as "riddled with inconsistencies, ambiguities, disorganization, poor formatting, clumps of unbroken text, uninformative headings, unwieldy sentences, verbosity, repetition, abstractitis, unnecessary cross-references, multiple negatives, inflated diction, and legalese."[1] In four different evidence rules, picked pretty much at random, I identified 33, 31, 18, and 28 "drafting deficiencies."[2]

How did the former rules come to be in such a state? Two main reasons.

First, the old rules had, of course, been amended many times over the years and by many different drafters. There's a natural tendency while amending to focus on the proposed new language, in isolation, causing the drafter to miss a possible inconsistency with another rule or rules. It could be a substantive inconsistency. Or it could be a stylistic inconsistency — which the old rules were full of, since the drafters were not operating under any common set of drafting guidelines or principles.

To take just two examples, the old Civil Rules used these variations:

- *for cause shown*, *upon cause shown*, *for good cause*, *for good cause shown*
- *costs*, *including reasonable attorney's fees*; *reasonable* ▸

Our profession suffers from a serious lack of self-awareness when it comes to legal drafting.

costs and attorney's fees; *reasonable expenses*, *including attorney's fees*; *reasonable expenses*, *including a reasonable attorney's fee*

Is there an intended difference between "cause" and "good cause"? Does "shown" add anything? Is there a difference between "costs" and "expenses"? Sometimes it was fairly clear that a difference was merely stylistic. Other times, it was not so clear. We had to deal with questions like this repeatedly during the restylings.

The second reason for the state of the old rules runs deeper and is perhaps harder to swallow: the generally poor quality of legal drafting within the profession, even among accomplished lawyers. Although things began to change in the 1990s, law schools have historically failed to teach this skill. Thus, many lawyers have "learned" on the job, where either they copy the lumbering old forms or imitate that style, or they are schooled by older lawyers who never learned the skill themselves. Our profession suffers from a serious lack of self-awareness when it comes to legal drafting.[3]

The Restyling Ground Rules

The goal throughout was to improve the rules without making any substantive changes. At the outset, the Standing Committee made a crucially good decision: if a change was stylistic only, then the style version prevailed, regardless of whether members of the Advisory Committee or the Standing Committee "liked" it. On the other hand, if even a small minority of the committee thought a change was substantive, that view usually prevailed. Most of the time when the question came up, the decision was easy to make; sometimes it was not, and each set of rules presented dozens of arguable calls. The Rules Office at the Administrative Office of the U.S. Courts has in its archives more than 750 documents discussing various points on the Civil Rules. (I didn't ask them to check the other sets.)

There were constraints on the projects and hurdles to overcome. Here are five.

1. We could not change the rule numbers. Long rules like Civil Rules 4 and 26 could not be broken out into separate shorter rules. Any reordering was done at the subdivision level — (a), (b), (c) — and lower. Even then, the Advisory Committee approved reordering only when it was satisfied that the improved sequencing outweighed the possible short-term inconvenience of changing familiar designations.
2. We could not change so-called sacred phrases, such as *transaction, occurrence, or event* (what's the difference?) (Civil Rule 15(d)); *no genuine issue as to any material fact* (= *no genuine issue of material fact*) (Civil Rule 56(c)); *subsequent remedial measures* (= *later remedial measures*) (Evidence Rule 407); *property of the estate* (= *estate property*) (multiple bankruptcy rules). These are not exactly terms of art like *hearsay* and *bailment*, but phrases that have become so familiar as to be forever fixed in concrete.
3. Similarly, we could not always change statutory language — although federal statutes are hardly a model of good drafting. In the Criminal Rules, we had to stick with *attorney for the government* (= *government attorney*). In the Bankruptcy Rules, we could not touch the provisions that had been drafted by Congress: 2002(n), 3001(g), 7004(h), and pieces of 2002(f) and 7004(b). We could not change *the convenience of the parties* (= *the parties' convenience*), among others, because that phrase is used in the Bankruptcy Code. We could not so much as hyphenate a phrase like *equity security holder* or *small business case* that's defined in the Code.
4. We occasionally met resistance to certain good drafting techniques that lawyers are not accustomed to: using bullets, using pronouns, using em-dashes, using possessives with inanimate objects (*evidence of the claim's validity*), starting sentences with *But* or *And*. These were style calls, though, so the resistance was almost always overcome.
5. Finally, we had to leave any ambiguity that the Advisory Committee considered intractable. Again, the Advisory Committee normally felt comfortable resolving an inconsistency or possible ambiguity. But when the in-

tended meaning was not pretty clear, the ambiguity was passed forward. One painful example, in Civil Rule 59(a): *for any reason for which a new trial has heretofore been granted*. What does *heretofore* mean? Up until when? Up until 1937, when the rule was first adopted? Up until today, when the rule is being applied? The *heretofore* needed to stay. Ah, the pseudoprecision of legalese.

The Restyling Process

As mentioned, each of the five sets of rules has an Advisory Committee, whose work must be approved by the Standing Committee. Each of the current five, as well as the Standing Committee itself, has at least one reporter, a law professor who teaches or has a scholarly focus on that subject. Some committees have an associate reporter. For the Civil Rules restyling, a third law-professor consultant was added. I'll refer to these professors as "the reporter," with the understanding that more than one law-school expert may have consulted on the project.

For the first four restylings (appellate, criminal, civil, and evidence), the Standing Committee had a style subcommittee. The style subcommittee reviewed the drafts, including any outstanding issues, before they went to the full Standing Committee. The style subcommittee of the Standing Committee was not reconstituted for the last restyling (bankruptcy). But the Bankruptcy Advisory Committee had its own style subcommittee that reviewed the drafts.

Once the Advisory Committee's work is approved by the Standing Committee, the work goes up the line to the Judicial Conference of the United States (consisting of the chief judge and a district judge from each federal circuit, and the chief judge of the Court of International Trade), then to the Supreme Court, and then to Congress. Generally, the approval process has gone smoothly with each set of rules, although the Civil Rules project did require a meeting with a congressional subcommittee to address some questions that had been raised in letters to the subcommittee.

Within each Advisory Committee, the restyling process unfolded as follows. There were individual wrinkles with each project, but this is the general outline for each one.

First, the style consultants prepared the original working draft — the redraft of the then-current rules.

Second, the reporter reviewed the draft in a detailed memorandum that identified possible substantive changes.

Third, the style consultants revised the original draft in light of the reporter's comments. That produced draft No. 2.

Fourth, that draft went to the Standing Committee's style subcommittee (or, in the case of bankruptcy, to its style subcommittee). The style subcommittee reviewed the entire draft, including any issues that remained after the interaction between the style consultants and the reporter. That resulted in draft No. 3.

Fifth, the Advisory Committee reviewed the draft, concentrating on any still-remaining issues. Thus, draft No. 4. Naturally, there were fewer and fewer changes at each of these steps.

Sixth, the draft proposal went to the Standing Committee, which rarely suggested any further changes. Once the Standing Committee approved them, the restyled rules were published for comment.

Seventh, the reporter reviewed the public comments — and there were lots of them, as you can imagine. The reporter discussed with the style consultants which ones to incorporate into the final draft, draft No. 5. And that draft then went to the Advisory Committee and again to the Standing Committee for final approval to send it to the Judicial Conference of the United States.

Now, this outline doesn't capture the countless emails between the reporter and the style consultants throughout the process, hashing over one change or another. Under "Bankruptcy restyling" in my email folders, I have about 275 emails.

Nor does the outline capture the involvement of various outside groups in the process. The Department of Justice always looks closely at any rule changes. For the Civil Rules project, two representatives of the ABA's Litigation Section were appointed to consult with the Advisory Committee. The Federal Magistrate Judges Association also submitted detailed comments. And an ad hoc group of law professors and lawyers did the same and presented their comments at a scheduled hearing with the Advisory Committee. For the Bankruptcy Rules project, the National Bankruptcy Conference submitted especially detailed and helpful comments. Those are examples from just two of the projects.

It's hard to convey how painstaking the work was. Civil Rule 1 is only two sentences. The old rule referred to *all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty*. Forget the missing comma after *nature*. Is the piece beginning with *whether* needed? No. Should the rule be changed to add *with the exceptions stated in Rule 81*? No: *except as stated in Rule 81*. Civil Rule 2 is one sentence. The old rule: *There shall be one form of action to be known as "civil action"*. Forget the mistaken placement of the period outside the closing quotation mark. Here ▸

we have one of the many misuses of *shall* in the old federal rules.[4] New Rule 2: *There is one form of action — the civil action*. And so it went, sentence by sentence.

I recall a comment from one member of the Standing Committee when it was considering the restyled Evidence Rules: "You changed every sentence." We did indeed.

Lessons for Any Revisory Project

Any organization that undertakes a revisory project, whether legal or not, could learn from the federal-rules projects.

Perhaps most importantly, a drafting expert or experts — ideally someone who knows the principles of writing in plain language — must prepare the first draft. I'll repeat that drafting is a demanding skill learned through reading, practice, and good critique. Most lawyers have not acquired the skill but, strangely enough, consider themselves to be quite competent drafters.[5]

Of course, the drafting expert must work closely with the substantive experts to ensure the accuracy of the work. They caught any number of questionable changes in the rules projects. It takes a team to do it right, especially when the original text is opaque or ambiguous.

You must identify your style guides at the outset. Otherwise, you may spend time debating whether to write *attorney fees*, *attorney's fees*, or *attorneys' fees*, for instance; or how to form the singular possessive of a noun ending in *s*, as in *witness' testimony* or *witness's testimony*; or whether it's proper to split infinitives; or when and when not to hyphenate. Questions like this will come up often. For the rules projects, we used Bryan Garner's *Guidelines* for *Drafting and Editing Court Rules* (1996) for general drafting technique. (Garner and I are expanding that booklet into a publication called *Essentials for Drafting Clear Legal Rules*.) We also relied on his *Dictionary of Legal Usage* (now in its third edition, 2011) and his *Modern English Usage* (now in its fifth edition, 2022). For spelling questions not covered by those sources, we relied on *Merriam-Webster's Collegiate Dictionary*.

You should aim for a typical first-time reader, not someone experienced in the field. So for court rules, think about the law student who is taking a survey course in criminal procedure or evidence or bankruptcy. Although a significant number of unrepresented parties file cases in federal district courts, the main audience is still the legal profession. We were simply not charged with making the rules accessible to the general public — a task that would have added a layer of detail to a great many of the old rules.

The last lesson is obvious: compromise and flexibility will be needed from everyone. Everyone will be disappointed in some decision or another. Occasionally, the reporter claimed that a revision was substantive because it somehow changed the emphasis. Occasionally, too, the reporter felt strongly about what was undeniably a style call. A tiny example: in a couple of Civil Rules, the style recommendation was to change *attempt* to *try*. The reporter objected that *try* was "too colloquial." Not in my book, but we did not push it. Pick your battles.

Before-and-After Examples[6]

Nobody would claim that the restyled rules are perfect or even near-perfect. I'm sure that the style consultants themselves could go back and further improve many of them. But are they considerably better? You can be the judge.

I won't be able to illustrate all the different kinds of improvements, down to and including fixes to the punctuation. I'll just show some of the main ones, with the caveat that the examples under each category could be multiplied many times over.

More structural divisions

Probably the single biggest improvement is in the much greater use of subparts and their attendant headings. The old Civil Rules, for instance, had 359 headings and subheadings; the restyled rules have 757. Thus, the restyled rules not only break the material down into manageable chunks but also help readers navigate through them far more easily.

(b) Defenses; Form of Denials.	(b) Defenses; Admissions and Denials. (1) In General. (2) Denials — Responding to the Substance. (3) General and Specific Denials. (4) Denying Part of an Allegation. (5) Lacking Knowledge or Information. (6) Effect of Failing to Deny.
Old Fed. R. Civ. P. 8(b)	Current rule

I recall a comment from one member of the Standing Committee when it was considering the restyled Evidence Rules: "You changed every sentence."

(b) Scheduling and Planning.	(b) Scheduling. (1) *Scheduling Order.* (2) *Time to Issue.* (3) *Contents of the Order.* *(A) Required Contents.* *(B) Permitted Contents.* (4) *Modifying a Schedule.*
Old Fed. R. Civ. P. 16(b)	Current rule

More vertical lists

The restyled rules make copious use of vertical lists — another technique that helps readers quickly see and tick off a series of related items. Vertical lists are essential for good, readable drafting.

In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties.	If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that: (A) defendants' pleadings and replies to them need not be served on other defendants; (B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and (C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.
Old Fed. R. Civ. P. 5(c)	Current rule 5(c)(1)

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.	(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if: (1) it is offered in a criminal case; (2) the adjudication was of a witness other than the defendant; (3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and (4) admitting the evidence is necessary to fairly determine guilt or innocence.
Old Fed. R. Evid. 609(d)	Current rule

Vertical lists can be especially helpful for avoiding potential syntactic ambiguity (a subject I'll return to shortly).

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(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information . . . or to inspect, copy, test, or sample any designated tangible things *which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served*; or (2) to permit entry upon designated land . . . . [The italicized *which*-clauses seem to modify only *any designated tangible things* and not the earlier *any designated documents or electronically stored information*. And the first *which*-clause seems not to modify item (2).]	**(a) In General.** A party may serve on any other party a request *within the scope of Rule 26(b)*: (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample *the following items in the responding party's possession, custody, or control*: (A) any designated documents or electronically stored information . . . ; or (B) any designated tangible things; or (2) to permit entry onto designated land . . . .
Old Fed. R. Civ. P. 34(a)	Current rule

Note that the restyled rules use hanging, or progressive, indents so that the architecture of each rule is immediately apparent. Unfortunately, despite requests from the Rules Office, publishers typically follow their house formatting, which does not use hanging indents.

Shorter sentences

Long, winding sentences are legal writing's oldest and worst curse. We used various techniques to shorten them, including these three.

Break long compound sentences into two or more shorter ones. Don't hesitate to start a sentence with a coordinating conjunction (such as *and*, *but*, *or*).

In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.	When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.
Old Fed. R. Evid. 613(a)	Current rule

Pull exceptions and conditions into a separate sentence or a vertical list.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, *except that* the following defenses may at the option of the pleader be made by motion	Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. *But* a party may assert the following defenses by motion . . . .
Old Fed. R. Civ. P. 12(b)	Current rule
If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, *upon certifying familiarity with the record of the trial*, may proceed with and finish the trial.	Any judge regularly sitting in or assigned to the court may complete a jury trial if: (1) *the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and* (2) *the judge completing the trial certifies familiarity with the trial record*. [Clauses and other lengthy items in vertical lists are counted as separate sentences.]
Old Fed. R. Crim. P. 25(a)	Current rule

Repeat a key word at or near the beginning of a new sentence.

(b) Motions and Other Papers. (1) An application to the court for an order shall be by *motion* which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.	(b) Motions and Other Papers. **(1)** ***In General.*** A request for a court order must be made by *motion*. *The motion* must: (A) be in writing unless made during a hearing or trial; (B) state with particularity the grounds for seeking the order; and (C) state the relief sought.
Old Fed. R. Civ. P. 7(b)(1)	Current rule

Better sentence structure

We tried to avoid long gaps between the subject and verb, again using various techniques.

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence *shall be determined* by the court, subject to the provisions of subdivision (b).	*The court must decide* any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible.
Old Fed. R. Evid. 104(a)	Current rule

And we tried to avoid delaying the main verb, the verb in the independent clause.

If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court *may conduct* such hearings or order such references as it deems necessary and proper	The court *may conduct* hearings or make referrals . . . when, to enter or effectuate judgment, it needs to: (A) conduct an accounting; (B) determine the amount of damages; (C) establish the truth of any allegation by evidence; or (D) investigate any other matter.
Old Fed. R. Civ. P. 55(b)(2)	Current rule

Less repetition

The old rules were weighed down with unnecessary repetition. Sometimes it was quite pronounced.

(b) Capacity to Sue or Be Sued. *The capacity* of an individual, other than one acting in a representative capacity, *to sue or be sued shall be determined* by the law of the individual's domicile. *The capacity* of a corporation *to sue or be sued shall be determined* by the law under which it was organized. In all other cases *capacity to sue or be sued shall be determined* by the law of the state in which the district court is held, except	**(b) Capacity to Sue or Be Sued.** *Capacity to sue or be sued is determined* as follows: (1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile; (2) for a corporation, by the law under which it was organized; and (3) for all other parties, by the law of the state where the court is located, except . . . .
Old Fed. R. Civ. P. 17(b)	Current rule

Note how the vertical list solves the problem.

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Very often, the repetition was produced by a reluctance to use a shortened reference to a preceding item, as if we can't trust readers to read successive sentences or subparts together.

A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record *a written order* setting forth the disposition of the matter. Within 10 days after being served with a copy of *the magistrate judge's order*, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in *the magistrate judge's order* to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of *the magistrate judge's order* found to be clearly erroneous or contrary to law.	When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a *written order* stating the decision. A party may serve and file objections to *the order* within 14 days after being served with a copy. A party may not assign as error a defect in *the order* not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of *the order* that is clearly erroneous or is contrary to law.
Old Fed. R. Civ. P. 72(a)	Current rule

Other times, a later reference was unnecessary because it was clearly implicit.

Notice of *a judgment or order entered by a district judge* is governed by Rule 77(d) F.R.Civ.P. Unless the case is a chapter 9 municipality case, the clerk shall forthwith transmit to the United States trustee a copy of *a judgment or order entered by a district judge*.	Notice of *a district judge's judgment or order* is governed by Fed. R. Civ. P. 77(d). Except in a Chapter 9 case, the clerk must promptly send a copy to the United States trustee.
Old Fed. R. Bankr. P. 9022(b)	Proposed style revision

Fewer cross-references

The same reluctance to trust readers to read consecutively produces unnecessary cross-references. The restyled Civil Rules have 45 fewer of them.

(h) Compensation. **(1) Fixing compensation.** The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment . . . . **(2) Payment.** The compensation *fixed under Rule 53(h)(1)* must be paid	**(g) Compensation.** **(1)** ***Fixing Compensation.*** Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order . . . . **(2)** ***Payment.*** The compensation must be paid . . . .
Old Fed. R. Civ. P. 53(h)(1) & (2)	Current rule 53(g)(1) & (2)

Very often, the repetition was produced by a reluctance to use a shortened reference to a preceding item, as if we can't trust readers to read successive sentences or subparts together.

Less ambiguity

The most common form of syntactic ambiguity in legal drafting is caused by a modifier that immediately precedes or follows a series — a so-called leading or trailing modifier. Trailing modifiers (as in the second and third examples) are especially prone to ambiguity.

Unless this rule provides otherwise, the defendant must be present at: (1) the initial appearance, arraignment, and plea; . . . [Does *initial* apply to all the items?]	Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at: (1) the initial appearance, *the* initial arraignment, and *the* plea; . . . [The fix: start the syntax over again.]
Fed. R. Crim. P. 43(a) (intermediate redraft)	Current rule

. . . the court may . . . order . . . that any designated book, paper, document, record, recording, or other material *not privileged*, be produced . . . . [Does *not privileged* modify all the items?]	. . . the court . . . may also require the deponent to produce at the deposition any designated *material that is not privileged, including* any book, paper, document, record, recording, or data. [The fix: move the trailing modifier to the front of the series.]
Old Fed. R. Crim. P. 15(a)	Current rule 15(a)(1)

These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof. [Does the phrase beginning with *against the United States* modify both items? Repeating *to* before the second item — *to claim credits* — suggests not because it seems to start the syntax over.]	These rules do not expand the right to assert a counterclaim — or to claim a credit — against the United States or a United States officer or agency. [The dashes resolve the ambiguity.]
Old Fed. R. Civ. P. 13(d)	Current rule

Stronger verbs

We were always on the lookout for zombie nouns, abstract nouns that could be replaced by strong verbs. These examples are from the Civil Rules before and after restyling.

- 4(l); now 4(l)(3): failure to *make proof of* service / failure to *prove* service.
- 6(b); now 6(b)(1)(A): before *the expiration of* the period originally prescribed / before the original time . . . *expires*.
- 26(g)(3): if . . . a certification is *made in violation of* the rule / if a certification *violates* this rule.
- 30(e); now 30(e)(1): before *completion of* the deposition / before the deposition *is completed*.
- 45(a)(1)(C); now 45(a)(1)(A)(iii): *give testimony* / *testify*.
- 47(a): *conduct the examination of* prospective jurors / *examine* prospective jurors.
- 49(b); now 49(b)(1): *make answers to* the interrogatories / *answer* the questions.

Tighter drafting

The old rules were full of verbosity. I wish I could show you more examples than just this handful.

(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer	(b) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.
Old Fed. R. Civ. P. 12(a)(2) — 43 words	Current rule 12(a)(1)(B) — 26 words

In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate.	After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate . . . .
Old Fed. R. Civ. P. 25(a)(2) — 49 words	Current rule — 24 words

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Now the task is to make sure that the rules never again fall into the state they were in when the projects began. The Standing Committee must maintain its commitment by continuing to involve drafting experts in the work on all new and amended rules. No exceptions.

The single biggest cause of wordiness in the rules — as it is in all forms of legal writing — was unnecessary prepositional phrases.

A subpoena may be served *by* any person who is not a party and is not less than 18 years *of* age. Service *of* a subpoena *upon* a person named therein shall be made *by* delivering a copy thereof *to* such person	Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy *to* the named person . . . .
Old Fed. R. Civ. P. 45(b)(1) — six total	Current rule — just one

Evidence *of* the beliefs or opinions *of* a witness *on* matters *of* religion is not admissible *for* the purpose *of* showing that *by* reason *of* their nature the witness' credibility is impaired or enhanced.	Evidence *of* a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.
Old Fed. R. Evid. 610 — eight total, or six if you count the last four as two multiword prepositions	Current rule — just one

At this point, I'll only mention some of the other kinds of improvement to the rules.

- Grouping similar items.
- Converting passive to active voice when appropriate.
- Placing conditions and exceptions where they can be read most easily.
- Preferring positive form (not *may not . . . unless* but *may . . . only if*).
- Using more pronouns, as you'd do in other forms of legal writing (or in speaking) when the antecedent is unmistakable.
- Omitting needless intensifiers (the court may *in its discretion*).
- Omitting unnecessary information (shall give . . . notice . . . to every other party ~~to the action~~; any admission ~~made by a party~~ under this rule . . . .)
- Collapsing phrases and clauses into a word (not *a judgment which may be entered* but *a possible judgment*; not *the party who prevailed on the motion* but *the prevailing party*).
- Shunning hard-core legalese (*pursuant to*; *here-*, *there-*, and *where-* words like *herein* and *thereof*; *provided that* (provisos); *such* when it means "a" or "the").
- Conforming punctuation to best practices.
- Eradicating *shall*, with one glaring exception in the Civil Rules[7] and four in provisions of the Bankruptcy Rules that were drafted by Congress.

Parting Thoughts

There have been eight chairs of the Standing Committee since Judge Keeton: Judges Alicemarie Stotler, Anthony Scirica, David Levi, Lee Rosenthal, Mark Kravitz, Jeffrey Sutton, David Campbell, and John Bates. All of them deserve

immense credit for whatever rules project was ongoing during their tenure. So do the chairs of the Advisory Committees at the time: Judges James Logan (appellate), W. Eugene Davis (criminal), Lee Rosenthal (civil), Robert Hinkle (evidence), and Dennis Dow (bankruptcy). And so do the diligent reporters: Professors Carol Ann Mooney (appellate), David Schlueter (criminal), Edward Cooper, Richard Marcus, and Thomas Rowe (civil), Daniel Capra (evidence), Elizabeth Gibson and Laura Bartell (bankruptcy), and Daniel Coquillette (Standing Committee).

For the record, two of the rules projects — civil and evidence — have won prestigious Burton Awards for Reform in Law. The evidence project also won a ClearMark designation from the Center for Plain Language. And many states have restyled or are restyling their own court rules to substantially conform to corresponding federal rules.[8]

For my part, I confess to some relief that the last set has been completed. It has been an arduous journey — but in the end, altogether satisfying. Now the task is to make sure that the rules never again fall into the state they were in when the projects began. The Standing Committee must maintain its commitment by continuing to involve drafting experts in the work on all new and amended rules. No exceptions.

Just over 30 years ago, Robert Keeton had a brilliant idea. Everyone who has since had a hand in the projects — committee chairs, committee members, reporters, consultants — can take great pride in what they accomplished. Generations of law students and lawyers will benefit from clearer, more readable rules. The rulemakers created something for posterity.

1 Joseph Kimble, *Another Example from the New Evidence Rules*, *in* Seeing Through Legalese: More Essays on Plain Language 105, 106 (2017).

2 *Drafting Examples from the New Federal Rules of Evidence*, *in id.* at 97–126.

3 *See, e.g.*, Joseph Kimble, *You Think Lawyers Are Good Drafters?*, 18 Green Bag 2d 41, 41 (Autumn 2014).

4 For a catalogue of those misuses, see *Lessons in Drafting from the New Federal Rules of Civil Procedure*, *in* Seeing Through Legalese, *supra* note 1, at 35, 87–93.

5 *See* Bryan A. Garner, *President's Letter*, The Scrivener (newsletter of Scribes — The American Society of Legal Writers), Winter 1998, at 1, 3 (reporting on the author's survey of lawyers at his seminars; they view only 5 percent of the documents they read as well drafted, but 95 percent would claim that they themselves draft high-quality documents).

6 All examples are from the forthcoming book by Bryan A. Garner and Joseph Kimble — Essentials for Drafting Clear Legal Rules.

7 For that story, see *Lessons in Drafting from the New Federal Rules of Civil Procedure*, *in* Seeing Through Legalese, *supra* note 1, at 35, 92–93.

8 *E.g.*, Arizona, Delaware, Idaho, Indiana, Iowa, Maine, Michigan, Mississippi, New Hampshire, New Mexico, North Dakota, Pennsylvania, South Dakota, Texas, Utah, West Virginia (evidence); Idaho, Kansas, Montana, Nevada, Wyoming (civil). This list was compiled by searching for selected federal provisions in state rules.

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