Lessons in Drafting from the New Federal Rules of Civil Procedure (Part 5)

By Joseph Kimble

I'll end my series of drafting articles with this fifth part. But I may return to the subject later because there is so much—so many improvements on the old civil rules—that I haven't been able to cover. I haven't covered the rampant inconsistencies in the old rules.[1] The examples are almost endless:

- *for cause shown*; *upon cause shown*; *for good cause*; *for good cause shown*.
- *on motion*; *on application*.
- *court orders*; *court directs*.
- *make orders*; *issue orders*.
- *counsel*; *attorney*.
- *costs, including reasonable attorney's fees*; *reasonable costs and attorney's fees*; *reasonable expenses, including attorney's fees*; *reasonable expenses, including a reasonable attorney's fee*.
- *no genuine issue as to any material fact*; *without substantial controversy*; *actually and in good faith controverted*; *not in controversy*.

Nor have I covered the repeated misuse of *shall* in the old rules—*shall*s that have now been converted to the present tense, *may*, *should*, or (most commonly) *must*. And in the earlier parts of the series, I offered only one or two of the many ambiguities that the new rules have eliminated.[2] I'll save *shall* and ambiguity for separate articles.

Some of the improvements in the new rules—especially the structural changes—can't be easily illustrated in the short space of this column. But if you'd like to see the striking difference made by reorganizing jumbled provisions, compare the old rules with new 6(c), 8(b), 16(b), 23.1, 26(e), 30(b), 37(d), 44(a)(2), 45(c)(2)(B), 52(a), and 70. More specifically, let me offer just one example of the greater coherence that comes from grouping related items:

Old 53(c) & (d)	New 53(c)
(c) Master's Authority. Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may by order impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty. **(d) Evidentiary Hearings.** Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.	**(c) Master's Authority.** **(1) *In General.*** Unless the appointing order directs otherwise, a master may: (A) regulate all proceedings; (B) take all appropriate measures to perform the assigned duties fairly and efficiently; and (C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence. **(2) *Sanctions.*** The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

For more of the same, compare the old rules with new 30(c) & (d) (grouping the materials on objections in (c) only); 37(b)(2)(A) & (B) (breaking out the illogical grouping in old (b)(2)(C) & (E)); 37(c)(1) (grouping the sanctions into a list); and 52(a) (grouping the last sentence of old (b) with the other material on findings and conclusions). The organizational changes—even without changing any of the main numbers—have significantly transformed the rules.

Finally, this series has barely touched on formatting. I'll do that in item 14 below, but the new rules are designed to make it much easier to see how everything fits together. They are broken down into more levels—hence the greater use of headings and subheadings; they use progressive, or cascading, indents to show subparts and sub-subparts; they use hanging indents so that all the lines in a subpart or a list are indented the same as the first word in the first line (see new 53(c) above); they use many more vertical lists; and the lists are always at the end of the sentence, never in the middle.

Unfortunately, in most of the 2007–2008 academic pamphlets containing the new rules, the publishers have largely mangled the intended formatting. That's quite a disappointment after the

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concerted effort we made. But I have recently contacted the major publishers, urging them to adjust the formatting next year and offering to help. Now we'll see whether *they* care to help their readers.

In any event, here are five more guidelines.

14. Use informative headings and subheadings.

Good headings and subheadings are vital navigational aids for the reader. The old rules have 359 of them; the new rules have 757. Just to illustrate their value:

Old 8(b)	New 8(b)
(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 16(b)	New 16(b)
(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 26(a)	New 26(a)
(a) Required Disclosures; Methods to Discover Additional Matter. **(1) Initial Disclosures.** **(2) Disclosure of Expert Testimony.** **(3) Pretrial Disclosures.** **(4) Form of Disclosures.** **(5) [Now deleted]**	**(a) Required Disclosures.** **(1) *Initial Disclosure.*** **(A)** *In General.* **(B)** *Proceedings Exempt from Initial Disclosure.* **(C)** *Time for Initial Disclosures—In General.* **(D)** *Time for Initial Disclosures—For Parties Served or Joined Later.* **(E)** *Basis for Initial Disclosure; Unacceptable Excuses.* **(2) *Disclosure of Expert Testimony.*** **(A)** *In General.* **(B)** *Written Report.* **(C)** *Time to Disclose Expert Testimony.* **(D)** *Supplementing the Disclosure.* **(3) *Pretrial Disclosures.*** **(A)** *In General.* **(B)** *Time for Pretrial Disclosures; Objections.* **(4) *Form of Disclosures.***

Old 31(a)	New 31(a)
(a) Serving Questions; Notice.	**(a) When a Deposition May Be Taken.** **(1) *Without Leave.*** **(2) *With Leave.*** **(3) *Service; Required Notice.*** **(4) *Questions Directed to an Organization.*** **(5) *Questions from Other Parties.***

Old 68 [about Offer of Judgment]	New 68
	(a) Making an Offer; Judgment on an Accepted Offer. **(b) Unaccepted Offer.** **(c) Offer After Liability Is Determined.** **(d) Paying Costs After an Unaccepted Offer.**

15. Be wary of intensifiers.

Intensifiers are expressions that may seem to add emphasis but that, as a matter of good drafting, should be minimized for any of several reasons: they state the obvious, their import is so hard to grasp that it has no practical value, or they create negative implications for other rules.

- **4(d)(2)(A):** *The notice . . . shall be in writing and shall be addressed directly to the defendant.* How would you address a written notice indirectly?
- **6(a):** *any period of time prescribed . . . by any applicable statute.* Are we concerned about an inapplicable statute?
- **6(b)** (and several other rules): *the court . . . may . . . in its discretion. May* means "has the discretion to"; *in its discretion* is a pure intensifier.
- **12(b):** *may at the option of the pleader.* Same theory.
- **15(d):** *If the court deems it advisable . . . , it shall so order.* Presumably, the court would not choose to do something inadvisable.
- **41(d):** *the court may make such order for the payment of costs . . . as it may deem proper.* Same theory.
- **53(c) & (d):** *Unless the appointing order expressly directs otherwise.* An order cannot implicitly direct; it means only what it says. And using *expressly* suggests that this order is somehow different from all the other orders in the rules.
- **56(e):** *affidavits . . . shall show affirmatively.* Likewise, this rule is not meant to be different from all the other rules that require a party or a document to merely *show.*
- **61:** *inconsistent with substantial justice. Substantial* seems to add nothing—or nothing appreciable.
- **70:** *The court may . . . in proper cases.* The same theory as in 15(d) above.

16. Hunt down nouners.

"Nouners" is a term I coined to describe abstract nouns that take the place of strong verbs.[3] The tendency to turn strong verbs into abstract nouns accompanied by weak verbs (*is*, *do*, *make*, *have*) is one of the worst faults in modern writing. And the old civil rules are full of nouners:

- **4(l); now 4(l)(3):** *failure to make proof of service/failure to prove service.*
- **6(b):** *before the expiration of the period originally prescribed/before the original time . . . expires.*
- **7.1(b)(2):** *upon any change in the information that the statement requires/if any required information changes.*
- **11(c)(2)(A); now 11(c)(5)(A):** *for a violation of subdivision (b)(2)/for violating Rule 11(b)(2).*
- **13(a); now 13(a)(2)(B):** *the opposing party brought suit upon the claim/the opposing party sued on its claim.*
- **15(c)(3); now 15(c)(1)(C)(i):** *maintaining a defense on the merits/defending on the merits.*
- **26(g)(3):** *if . . . a certification is made in violation of the rule/if a certification violates this rule.*
- **30(b)(2); now 30(b)(3)(A):** *any party may arrange for a transcription to be made . . . of a deposition/any party may arrange to transcribe a deposition.*
- **30(e); now 30(e)(1):** *before completion of the deposition/before the deposition is completed.*
- **30(f)(2); now 30(f)(3):** *upon payment of reasonable charges therefor, the officer shall/when paid reasonable charges, the officer must.*
- **41(b):** *for failure of the plaintiff to prosecute/if the plaintiff fails to prosecute.*
- **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.*

There are lots more where those came from.

17. Simplify inflated diction.

There's no need to belabor this point—and I've had my say on it anyway.[4] Just ask yourself whether the plain words on the right below in any way cheapen, dumb down, debase, distort, oversimplify, or dull the new rules. Remember Walt Whitman's line: "The art of art, the glory of expression . . . is simplicity. Nothing is better than simplicity . . . ."[5]

- **4 (throughout)**: *effect service/make service* or *serve.*
- **4(d)(2); now 4(d)(2)(a):** *subsequently incurred/later incurred.*
- **4(d)(2)(B); now 4(d)(1)(G):** *dispatched/sent.*
- **8(b); now 8(b)(4):** *remainder/rest.*
- **9(a); now 9(a)(2):** *specific negative averment/specific denial.*
- **12(e):** *interposing a responsive pleading/filing a responsive pleading.*
- **15(b); now 15(b)(1):** *will be subserved/will aid.*
- **30(b)(4); now 30(b)(5)(C):** *concerning/about.*
- **30(e); now 30(e)(1)(B):** *reciting such changes/listing the changes.*
- **30(e); now 30(e)(2):** *append/attach.*
- **32(a)(3); now 32(a)(5)(B):** *demonstrates/shows.*
- **32(d)(3)(C):** *propounding* [the questions]/*submitting the question.*
- **32(d)(4):** *ascertained/known.*
- **36(b):** *will be subserved/would promote.*
- **37(a)(2)(B); now 37(a)(3)(C):** *the proponent of the question/the party asking a question.*
- **37(b); now 37(b)(2)(C):** *in lieu of/instead of.*
- **37(c)(2):** *thereafter/later.*
- **41(a)(2):** *deems/considers.*
- **49(b); now 49(b)(2):** *harmonious/consistent.*
- **62(d):** *procuring/obtaining.*
- **65(b); now 65(b)(2):** *be indorsed with the date/state the date.*

18. Above all, avoid hardcore legalese.

We come at last to the kind of talk and writing that has brought endless ridicule on our profession—and rightly so.[6] There is no excuse for it. Thus, the new rules have done away with *pursuant to*. They have done away with *provided that* (provisos). They don't use *such* when it means "a" or "the." They don't use *hereof* or *therefor* or *wherein*. In fact, the new rules have banished all the *here-*, *there-*, and *where-* words, with one painful exception. Rules 59(a)(1)(A) & (B) refer to "any reason for which a new trial [or rehearing] has heretofore been granted . . . in federal court." Can you guess why the Advisory Committee left these *heretofores*? Because they could not decide whether it meant "up until 1937," when the rules were originally drafted, or "up until now," when a judge is applying the rules. And if that isn't a classic example of the pseudoprecision of legalese, I don't know what is.

A few examples from the old and new rules.

Old 12(g)	New 12(g)(1)
(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. . . .	**(g) Joining Motions.** **(1)** ***Right to Join.*** A motion under this rule may be joined with any other motion allowed by this rule.

Old 37(b)(2)	New 37(b)(2)
(2) Sanctions by Court in Which Action Is Pending. . . . [T]he court in which the action is pending may make such orders in regard to the failure [to obey certain orders] as are just, and among others the following: . . . **(E)** Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination. In lieu of any of the foregoing orders or in addition thereto, the court shall	**(2)** ***Sanctions in the District Where the Action Is Pending.*** **(A)** *For Not Obeying a Discovery Order.* . . . [T]he court where the action is pending may issue further just orders. They may include the following: . . . **(B)** *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)–(vi), unless the disobedient party shows that it cannot produce the other person. **(C)** *Payment of Expenses.* Instead of or in addition to the orders above, the court must . . . .

Old 49(a)	New 49(a)(2)
(a) Special Verdicts. . . . The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue.	**(2)** ***Instructions.*** The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

Old 52(a)	New 52(a)(1)
(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58	**(a) Findings and Conclusions.** **(1)** ***In General.*** In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. . . . Judgment must be entered under Rule 58.

Old 56(e)	New 56(e)(1)
(e) Form of Affidavits; Further Testimony; Defense Required. . . . Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. . . .	**(1)** ***In General.*** . . . If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. . . .

Let's end this series where we began. The restyled civil rules are a dramatic improvement on the old rules. The new rules will be far easier for law students to learn and for lawyers and judges to use. If any inadvertent substantive changes were made, they can be fixed. And people who resist this change probably do not appreciate how poorly drafted the old rules were, how they would perpetuate the serious deficiencies that have plagued us for so long, how we should not be forever stuck in time, and how the new rules mark a long stride forward for legal writing and professional competence—not to mention the practice of law. ■

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FOOTNOTES

1. See Joseph Kimble, *Guiding Principles for Restyling the Civil Rules*, in Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure* x, xiii (February 2005), available at <http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf> (accessed November 8, 2007) (reprinted in 84 Mich B J 56 (September 2005); 84 Mich B J 52 (October 2005)).
2. See *id.* at xvi–xvii.
3. Joseph Kimble, *Hunting Down Nouners*, 86 Mich B J 44 (February 2007), available at <http://www.michbar.org/journal/pdf/pdf4article1124.pdf> (accessed November 8, 2007).
4. See Joseph Kimble, *Plain Words*, in *Lifting the Fog of Legalese: Essays on Plain Language* 163, 163–69 (Carolina Academic Press 2006).
5. Preface to *Leaves of Grass*.
6. See *Lifting the Fog of Legalese*, *supra* n 4, at 175–80.