A Drafting Example from the Proposed New Federal Rules of Evidence

By Joseph Kimble

There's a new milestone on the long road to better legal writing. On June 1, the Standing Committee on Rules of Practice and Procedure approved for publication the "restyled" Federal Rules of Evidence. As drafting consultant, I began redrafting the rules in mid-2006, and in April the Advisory Committee on Evidence Rules approved the last set for transmittal to the Standing Committee. In August, the rules will be published in print and online at www.uscourts.gov/rules.

The goal has been to make the rules clearer, more consistent, and more readable—all without changing their meaning. No small assignment, and as you can imagine, the Advisory Committee scrutinized every word, looking for possible substantive change. The careful, systematic, three-year process is summarized by Judge Robert Hinkle, Chair of the Advisory Committee, in a report that's available at www.uscourts.gov/rules/Agenda%20Books/Standing/ST2009-06.pdf, pages 480–84.

Of course, the work is not done. No doubt the public comments will produce any number of changes. And the final version must then be approved by the Standing Committee (again), the Judicial Conference of the United States, the Supreme Court, and Congress. The track record, though, is good: this is the fourth set of federal rules to be restyled. The Rules of Appellate Procedure took effect in 1998, the Rules of Criminal Procedure in 2002, and the Rules of Civil Procedure in 2007.

During the comment period for the civil rules, I wrote two Plain Language columns (December 2004 and January 2005) showing side-by-side examples of several old and new rules. This time, I'll do something a little different. I'll look in detail at one rule and try to describe some of its drafting deficiencies. Then I'll offer the proposed new rule and, as I did with the two earlier columns, ask you to be the judge.

Nobody would claim that the restyled rules are perfect; on a project like this, you can always find pieces that could have been—and perhaps still will be—improved. Naturally, though, I do think that the new rules are far better. But see what you think. And then try your hand at the contest that follows.

"Plain Language" is a regular feature of the *Michigan Bar Journal,* edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee. Contact Prof. Kimble at kimblej@cooley.edu. For a list of previous articles, go to www.michbar.org/generalinfo/plainenglish/columns.cfm. 2009 is a notable year for the column.

Current Rule 609(a)–(b)
Impeachment by Evidence of Conviction of Crime

(a) General Rule. For the purpose of[1] attacking the character for truthfulness of a witness,[2]

(1)[3] evidence that a witness other than an accused has been convicted of a crime shall[4] be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of[5] one year[6] under the law under which the witness was convicted,[7] and evidence that an accused has been convicted of such[8] a crime[9] shall be admitted if the court determines that[10] the probative value of admitting this evidence outweighs its prejudicial effect to the accused;[11] and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily[12] can be determined that[13] establishing the elements of the crime required proof or admission[14] of an act of dishonesty[15] or false statement by the witness.[16]

(b) Time Limit.[17] Evidence of a conviction under this rule[18] is not admissible if a period of[19] more than[20] ten years has elapsed since the date of[21] the conviction or of the release of the witness[22] from the confinement imposed for that conviction,[23] whichever is the later date, unless[24] the court determines, in the interests of justice, that[25] the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.[26] However,[27] evidence of a conviction more than 10[28] years old as calculated herein,[29] is not admissible unless[30] the proponent gives to the adverse party sufficient advance[31] written notice of intent to use such evidence[32] to provide the adverse party with a fair opportunity to contest the use of such evidence.[33]

Drafting Deficiencies

1. *For the purpose of* is a multiword preposition. Make it *To attack*.
2. An unnecessary prepositional phrase. Make it *a witness's character*.
3. Two structural points. (1) Without digging, it's hard to tell what the point of distinction is between this first paragraph and the second one; the restyled rule makes that clear at the beginning of each paragraph. (2) This dense first paragraph contains two possibilities that should be broken down.
4. *Shall* has become inherently ambiguous (among other disadvantages). The restyled rules use *must* for required actions.
5. A stuffy way of saying *for more than*.
6. Note the miscue: *in excess of one year* modifies *imprisonment* but not *death*. To avoid the miscue, insert *by* before *imprisonment*.
7. Arguably, it's obvious what law we're talking about. But the restyled rule at least shortens this clumsy phrasing to *in the convicting jurisdiction*.
8. A lot hangs on the word *such*. It avoids repetition, but it would be easy to blow past.
9. Note the repetition of *evidence that . . . has been convicted of . . . a crime* from the first part of this paragraph.
10. There's no such *the court determines that* in, for instance, Rule 403. The restyled rule omits it.
11. An unnecessary prepositional phrase. Of course we're talking about the effect on the accused. Strike *to the accused*.
12. The adverb should normally split the verb phrase. Whether to put it after the first or second of two auxiliary verbs can be tricky, but I'd say *readily* belongs after *be*.
13. Here, the *can be determined that* language needs to stay in order to keep the idea of "readily." But why is it passive?
14. Prefer the *-ing* forms—*proving* and *admitting*—to the nouns with *of*.
15. Another unnecessary prepositional phrase. Make it *a dishonest act*.
16. The language beginning with *proof* is a syntactic muddle. We're talking about the witness's admitting something, but not the witness's proving something.
17. Not an informative heading. The restyled heading makes it immediately clear when this part applies.
18. Of course we're talking about a conviction under this rule. Strike *under this rule*.
19. Strike *a period of*.
20. Note the inconsistency with *in excess of* in (a)(1).
21. Strike *the date of*.
22. Make it *the witness's conviction or release*.
23. To this point, the sentence uses nine prepositional phrases. The restyled rule uses three.
24. Note the double negative: *is not admissible . . . unless*. Make it *is admissible only if*.
25. Again, strike *the court determines . . . that*, along with *in the interests of justice*. The latter is a needless intensifier anyway.
26. This is a 72-word sentence.
27. Start sentences with *But*, not *However*. What's more, this sentence actually contains a second condition to using the evidence. The rule should be structured to show that the evidence is allowed only if two conditions are met.
28. The previous sentence spells out *ten*.
29. Strike *as calculated herein*. Also, the comma needs a paired comma after *old*.
30. Another double negative.
31. Isn't notice always in advance? At any rate, here it certainly has to be.
32. Try a pronoun—*it*—instead of *such evidence*.
33. Try another pronoun—*its*—as in *its use*.

Now for the proposed new rule. Most of the changes are explained by my comments on the current rule. I'll just make three salient points. First, the current rule contains 262 words; the new one contains 204, or 22 percent fewer. Second, the new rule is structured in a way that reflects the content much more clearly. Third, the new rule improves the formatting with progressive indents for the subparts and hanging indents (aligned on the left) within each subpart.

Restyled Rule 609(a)–(b)
Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, if the witness is not a defendant in a criminal case; and

(B) must be admitted if the witness is a defendant in a criminal case and the probative value of the evidence outweighs its prejudicial effect; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for the conviction, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

The Contest Returns!

You've probably missed the contest, which hasn't appeared for a while. Time to revive it. I'll send a copy of *Lifting the Fog of Legalese: Essays on Plain Language* to the first person who sends me (kimblej@cooley.edu) an "A" revision of the two sentences below. The deadline is August 20, and I have to be the sole judge of the winner. No fair peeking at the restyled rule online.

The revision should be fairly easy: the sentences are not long, the meaning is clear, the syntax isn't tangled, there's no need to restructure, and there's not much legalese. The main vices are wordiness (note the eight prepositional phrases) and an unnecessary passive construction. So here it is—current Rule 606(a):

> A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

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