You Think Lawyers Are Good Drafters?

By Joseph Kimble

No, I'm sorry, but most lawyers are not skilled drafters. It doesn't matter how smart or experienced they are or how many legal documents they have drafted. Most—a supermajority, probably—are lacking. And yet, oddly enough, while they tend to be blind to their own shortcomings, the poor quality of others' drafting is plain for them to see.[1] When was the last time you heard a lawyer praise the clarity of a statute or rule or contract?

In another column, I identified five reasons for this professional deficiency,[2] but I think two of them stand out. First, until very recently, law schools have tended to neglect legal drafting. Shamefully neglect. For how can lawyers practice effectively without training in how to draft—and critically review—legal instruments? Second, rather than take it upon themselves to acquire the skill, lawyers naturally turn to formbooks—those bastions of dense, verbose, antiquated drafting. So the ineptitude cycles on.

Neglect by law schools. The poor models in formbooks. If anything, law schools have historically provided a perverse kind of antitraining—through the models that the profession itself saddled them with. Think of the generations of law students who studied, intensively, the Internal Revenue Code, the Uniform Commercial Code, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence, among other such promulgations. And I doubt that many professors made it a point to criticize the drafting in those laws and rules or occasionally asked the class to work on improving a provision. So most law students must have come away with the impression that the drafting was perfectly normal and generally good. Well, it may have been normal, but it was far from good, as I've tried to show.[3] The heartening news is that current and future generations will at least not have to endure the old Federal Rules of Civil Procedure and Rules of Evidence, since completely redrafted sets took effect in 2007 and 2011.

> Legal drafting is a demanding skill that needs to be learned and practiced.

Still, we need to be constantly reminded of how pervasive the ailment is in our profession, so I'll dutifully keep nagging.

Another would-be model

In October 2012, the Charleston School of Law hosted a symposium on Federal Rule of Evidence 502—governing the extent to which a waiver occurs when a party discloses legally protected information. As part of the symposium, the participating judges, lawyers, and professors prepared a "model" order to carry out Rule 502(d), which allows a judge to order that a disclosure connected with pending litigation does not create a waiver. The order was published in the *Fordham Law Review*,[4] and it presumably has, or will, come to the attention of federal district judges. Thus, another typical piece of drafting makes the rounds as an imitable form, an example to follow, a convenient resource.

On page 56, I have reproduced the order as published. (On a positive note, the word *shall* is nowhere to be found.) Alongside it is my redraft. I decided against annotating the original in detail—to spare readers a swarm of forbidding footnotes. Instead, I'll just highlight the drafting slips in the original and stand on the comparison between the two versions.

So what's wrong?

- The original uses 125 more words than the revision.
- The first sentence favors us with hardcore legalese—*pursuant to*.
- The original uses four unnecessary parenthetical definitions (starting with "Disclosing Party"). This is one of the worst tics of all—producing any number of distracting, unnecessary capitals.
- In several places, the original departs from the language of Rule 502 for no apparent reason. For instance, section (a) uses *waiver or forfeiture*, but *forfeiture* does not appear in 502. And then (b) drops *forfeiture*, creating further inconsistency. For another instance, (a) refers to information that is *privileged*—generally—or *protected by the attorney-client privilege*. But 502 refers to the latter only. Why the difference?
- The sequence of events seems questionable. Under (b), the receiving party

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"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. To contribute an article, contact Prof. Kimble at Western Michigan University Cooley Law School, P.O. Box 13038, Lansing, MI 48901, or at kimblej@cooley.edu. For an index of past columns, visit http://www.michbar.org/generalinfo/plainenglish/.

must—unless it contests the claimed privilege or protection—notify the disclosing party that the receiving party will make best efforts to properly handle the information. Then the disclosing party has five business days to explain its claim. But can the receiving party usually know whether to contest the claim before getting the explanation? My redraft follows the sequencing in the original, but should the disclosing party's explanation (my (d)) accompany its original notification (my (b))?

- The second sentence in (a) is 94 words. The average sentence length in the original is 34 words. The revised version averages 26.
- The second sentence begins with the truism *Subject to the provisions of this Order*. And note the pointless (and inconsistent) capitalization of *order*.
- Besides *pursuant to*, (a) contains two other multiword prepositions—*in connection with* and *with respect to*.
- (b) and (f) both contain unnecessary cross-references.
- (b) should be divided into additional sections.
- (b) uses *review, dissemination, and use*, but (e) uses *examining or disclosing* for what seem to be the same ideas.
- (e) and (g) start with *Nothing in this order*, but (h) doesn't follow suit.
- (e) uses *privileged* only, not *privileged or protected*. Is that difference intended?
- (f) switches from *Proving* in the heading to *establishing* in the text. What's the difference?
- The relationship between the two sentences in (h) needs clarifying, but I didn't venture into that.
- After the first mention, *attorney-client privilege or work product protection* can be shortened to *privilege or protection*. That's what Rule 502 does.
- *Work-product protection* needs a hyphen throughout.

Incidentally, if my revision makes some inadvertent substantive change, it would be easy to fix and would hardly rationalize the old-style drafting in the original.

One more time: legal drafting is a demanding skill that needs to be learned and practiced. The more important the project, and the more it affects the public or the profession, then the more important it is that this skill shine through. ■

This article originally appeared in the Autumn 2014 issue of The Green Bag.

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ENDNOTES

1. See Garner, *President's Letter*, The Scrivener (Winter 1998), pp 1, 3 (reporting on the author's survey of lawyers at his seminars: they view only 5% of the documents they read as well drafted, but, amazingly, 95% would claim that they draft high-quality documents).
2. See Kimble, *Another Example from the Proposed New Federal Rules of Evidence*, 88 Mich B J 46 (September 2009), available at <http://www.michbar.org/journal/pdf/pdf4article1570.pdf> (accessed April 20, 2015).
3. Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J Legal Writing 25 (2008–2009); *Drafting Examples from the Proposed New Federal Rules of Evidence*, 88 Mich B J 52 (August 2009), 46 (September 2009), 54 (October 2009), 50 (November 2009), available at <http://www.michbar.org/generalinfo/plainenglish/> (accessed April 20, 2015).
4. Symposium Participants, *Model Draft of a Rule 502(d) Order*, 81 Fordham L R 1587 (2013).

MODEL DRAFT OF A RULE 502(D) ORDER	REVISED DRAFT
(a) No Waiver by Disclosure. This order is entered pursuant to Rule 502(d) of the Federal Rules of Evidence. Subject to the provisions of this Order, if a party (the "Disclosing Party") discloses information in connection with the pending litigation that the Disclosing Party thereafter claims to be privileged or protected by the attorney-client privilege or work product protection ("Protected Information"), the disclosure of that Protected Information will not constitute or be deemed a waiver or forfeiture—in this or any other action—of any claim of privilege or work product protection that the Disclosing Party would otherwise be entitled to assert with respect to the Protected Information and its subject matter.	**(a) No Waiver by Disclosure**. This order is entered under Federal Rule of Evidence 502(d). It applies when a party discloses information connected with this litigation and later claims that the information is covered by the attorney–client privilege or work-product protection. By disclosing, the party does not waive—in this action or any other—any claim of privilege or protection concerning the information or its subject matter.
(b) Notification Requirements; Best Efforts of Receiving Party. A Disclosing Party must promptly notify the party receiving the Protected Information ("the Receiving Party"), in writing, that it has disclosed that Protected Information without intending a waiver by the disclosure. Upon such notification, the Receiving Party must—unless it contests the claim of attorney-client privilege or work product protection in accordance with paragraph (c)—promptly (i) notify the Disclosing Party that it will make best efforts to identify and return, sequester or destroy (or in the case of electronically stored information, delete) the Protected Information and any reasonably accessible copies it has and (ii) provide a certification that it will cease further review, dissemination, and use of the Protected Information. Within five business days of receipt of the notification from the Receiving Party, the Disclosing Party must explain as specifically as possible why the Protected Information is privileged. [For purposes of this Order, Protected Information that has been stored on a source of electronically stored information that is not reasonably accessible, such as backup storage media, is sequestered. If such data is retrieved, the Receiving Party must promptly take steps to delete or sequester the restored protected information.]	**(b) Giving Notice of the Disclosing Party's Claim**. The disclosing party must, in writing, promptly notify the party receiving the information that it is privileged or protected and that no waiver is intended. **(c) Action by the Receiving Party if It Does Not Contest the Claim**. Upon receiving notice, the receiving party must promptly do the following unless it contests the claim: (1) notify the disclosing party that it will make its best efforts to identify and to return, sequester, or destroy (or electronically delete) the information and any reasonably accessible copies it has; and (2) certify that it will not further review, disseminate, or use the information. [The information is sequestered if stored on an electronic source that is not reasonably accessible. If the information is retrieved, the receiving party must promptly take steps to sequester or delete it.] **(d) Explanation by the Disclosing Party**. Within five business days after receiving the best-efforts notice in (c), the disclosing party must explain as specifically as possible why the information is privileged or protected. [*Should the explanation accompany the notice in (b)?*]
(c) Contesting Claim of Privilege or Work Product Protection. If the Receiving Party contests the claim of attorney-client privilege or work product protection, the Receiving Party must—within five business days of receipt of the notice of disclosure—move the Court for an Order compelling disclosure of the information claimed as unprotected (a "Disclosure Motion"). The Disclosure Motion must be filed under seal and must not assert as a ground for compelling disclosure the fact or circumstances of the disclosure. Pending resolution of the Disclosure Motion, the Receiving Party must not use the challenged information in any way or disclose it to any person other than those required by law to be served with a copy of the sealed Disclosure Motion.	**(e) Contesting the Claim**. If the receiving party contests the claim of privilege or protection, then within five business days after receiving notice of the claim, the receiving party must move for an order compelling disclosure of all or part of the information. The motion must be filed under seal and must not assert as one of its grounds the facts or circumstances of the disclosure. While the motion is pending, the receiving party must not use the challenged information in any way or disclose it to anyone except those who are legally required to be served with the motion.
(d) Stipulated Time Periods. The parties may stipulate to extend the time periods set forth in paragraphs (b) and (c).	**(f) Stipulating to a Different Time Period**. The parties may stipulate to extend the time periods in (d) and (e). **(g) Burden of Proving Privilege or Protection**. The disclosing party has the burden of proving a contested claim of privilege or protection.
(e) Attorney's Ethical Responsibilities. Nothing in this order overrides any attorney's ethical responsibilities to refrain from examining or disclosing materials that the attorney knows or reasonably should know to be privileged and to inform the Disclosing Party that such materials have been produced.	**(h) Attorney's Ethical Responsibilities**. This order does not override an attorney's ethical responsibility to (1) refrain from reviewing, disseminating, or using materials that the attorney knows or reasonably should know to be privileged and (2) inform the disclosing party that those materials have been produced.
(f) Burden of Proving Privilege or Work-Product Protection. The Disclosing Party retains the burden—upon challenge pursuant to paragraph (c)—of establishing the privileged or protected nature of the Protected Information.	
(g) In camera Review. Nothing in this Order limits the right of any party to petition the Court for an *in camera* review of the Protected Information.	**(i) In Camera Review**. This order does not limit a party's right to petition the court to review the information in camera.
(h) Voluntary and Subject Matter Waiver. This Order does not preclude a party from voluntarily waiving the attorney-client privilege or work product protection. The provisions of Federal Rule 502(a) apply when the Disclosing Party uses or indicates that it may use information produced under this Order to support a claim or defense.	**(j) Voluntary and Subject-Matter Waiver**. This order does not preclude a party from voluntarily waiving the attorney–client privilege or work-product protection. Federal Rule of Evidence 502(a) applies when the disclosing party uses or indicates that it may use information produced under this order to support a claim or defense.
(i) Rule 502(b)(2). The provisions of Federal Rule of Evidence 502(b)(2) are inapplicable to the production of Protected Information under this Order.	**(k) Inapplicability of Rule 502(b)(2)**. Federal Rule of Evidence 502(b)(2) does not apply to producing information under this order.