PLAIN LANGUAGE

Some examples from the proposed new Michigan Rules of Evidence

BY JOSEPH KIMBLE

On December 22, 2021, by Administrative Order No. 2021–8, the Michigan Supreme Court established a committee to review the Michigan Rules of Evidence. The order noted that a decade earlier, in 2011, the United States Supreme Court had approved a restyled version of the Federal Rules of Evidence. The Michigan committee was asked to propose revisions to the Michigan rules to conform them stylistically to the federal rules, but without making any substantive changes. The goal of both projects was to make the rules clearer and more consistent throughout, but — again — without changing meaning. The committee delivered its work to former Chief Justice Bridget Mary McCormack on October 8. And the Court approved the rules for publication (with some minor revisions) in March. They are available on the Court's website.[1]

The committee's chair was Timothy Baughman. The other members were the Hon. Timothy M. Kenny, Angela Mannarino, Mary Massaron, Michael Mittlestat, B. Eric Restuccia, and Judith Susskind. I was the style consultant (as I had been on the federal project).

Mr. Baughman had the challenging job of formatting the rules in side-by-side versions, with the current Michigan rule on the left and the parallel federal rule — if there was one — lined up on the right. Any modifications to the federal rule to accommodate substantive differences in the Michigan rules were indicated by strikeovers for deletions and italics for additions. If the Michigan rule had no federal parallel, the Michigan rule was restyled in the same manner as the other rules.

The rules were broken into three groups. Mr. Baughman prepared a clean side-by-side version of each one and sent it to me. Most often, the Michigan and federal rules were substantively the same, so no changes were needed to the federal rule; that is, the proposal was simply to adopt the federal version. If changes were needed to the federal rule because of a substantive difference in the Michigan rule, I suggested the restyled version of the Michigan rule that should be incorporated. That group was then sent to the committee to check for possible unintended substantive changes.

The examples below will give you an idea. This is the form in which they were submitted to the Court. I hope you'll see the improvement at a glance. As I've said in this column before (November 2020 and January 2022) with examples from the current project to restyle the Federal Rules of Bankruptcy Procedure, notice in the first, second, and last examples what a big difference it makes to use more subparts, headings, and vertical lists. These kinds of things should be fairly easy to do in any form of legal drafting (contracts, regulations, bylaws). Why don't we, then? And beyond these structural improvements, you should find more logical organization, shorter sentences, better sentence structure, tighter wording, and so on.

One reminder, though. The current Michigan rule may look poorly drafted compared to the federal rule, but the Michigan rule was probably just following the old federal rule. It was the old federal rule that was not up to stylistic par. To see for yourself, go to the columns for August through November 2009. (Just Google "Plain Language column index.")

ENDNOTE

1. https://www.courts.michigan.gov/49581e/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/proposed-orders/2021-10_2023-03-22_formor_propmre.pdf.

"Plain Language," edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 37 years. To contribute an article, contact Prof. Kimble at WMU–Cooley Law School, 300 S. Capitol Ave., Lansing, MI 48933, or at kimblej@cooley.edu. For an index of past columns, visit www.michbar.org/plainlanguage.

Rule 408. Compromise and Offers to Compromise.	**Rule 408. Compromise Offers and Negotiations***
Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.	**(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — to either prove or disprove the validity or amount of a disputed claim ~~or to impeach by a prior inconsistent statement or a contradiction~~: (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim. ~~— except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority~~. **(b) Exceptions.** ~~The court may admit this evidence~~ *If this evidence is otherwise discoverable, it need not be excluded merely because it is presented during compromise negotiations. And it need not be excluded if admitted* for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

*Late news: The Court modified this rule slightly.

Rule 606. Competency of Juror as Witness.	**Rule 606. Juror's Competency as a Witness**
(a) At the Trial. [Omitted] (b) Inquiry into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.	**(a) At the Trial.** [Omitted] **(b) During an Inquiry into the Validity of a Verdict or Indictment.** **(1)** ***Prohibited Testimony or Other Evidence.*** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters. **(2)** ***Exceptions.*** A juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form.

Rule 608. Evidence of Character and Conduct of Witness. (a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. (b) Specific Instances of Conduct. [Omitted]	**Rule 608. A Witness's Character for Truthfulness or Untruthfulness** **(a) Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked. **(b) Specific Instances of Conduct.** [Omitted]
Rule 610. Religious Beliefs or Opinions. 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.	**Rule 610. Religious Beliefs or Opinions.** Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.
Rule 706. Court-Appointed Experts. (a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness. (b) Compensation. [Omitted] (c) Disclosure of Appointment. [Omitted]	**Rule 706. Court-Appointed Expert Witnesses** **(a) Appointment Process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act. **(b) Expert's Role.** The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert: (1) must advise the parties of any findings the expert makes; (2) may be deposed by any party; (3) may be called to testify by the court or any party; and (4) may be cross-examined by any party, including the party that called the expert. **(c) Compensation.** [Omitted] **(d) Disclosing the Appointment to the Jury.** [Omitted]