Lessons in Drafting from the New Federal Rules of Civil Procedure (Part 2)

By Joseph Kimble

The old Federal Rules of Civil Procedure, due to expire on December 1, are a gold mine—or should I say a landfill?—for examples of how not to draft. And it's inexcusable that generations of law students and young lawyers have had to wade through the clutter and confusion to learn civil procedure. The same goes for the Federal Rules of Evidence (which may be next in line for restyling), the Bankruptcy Code, most of the UCC, the Restatements, and just about all the rules, codes, and statutes that lawyers draft. Such a professional embarrassment. Such a waste of readers' time and effort.

Last month, I offered three fairly obvious—but routinely ignored—drafting guidelines: put the parts in a logical order, use lists to the best advantage, and break up long sentences. This month, I offer three more.

4. Avoid needless repetition.

Some of the repetition in the old civil rules is amazing. Below are four ways to deal with it. In each example, I'll italicize the repetition on the left.

Try a pronoun. (Incidentally, notice how the italicized items in the second sentence of the old rule aren't even in parallel order with the same items in the first sentence.)

Old 9(a)	New 9(a)
(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. *When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity*, the party desiring to raise the issue shall do so by	**(a) Capacity or Authority to Sue; Legal Existence.** **(1) *In General.*** Except when required to show that the court has jurisdiction, a pleading need not allege: (A) a party's capacity to sue or be sued; (B) a party's authority to sue or be sued in a representative capacity; or (C) the legal existence of an organized association of persons that is made a party. **(2) *Raising Those Issues.*** To raise any of *those* issues, a party must do so by . . . .

Similarly, try to shorten a second reference to the same thing. Thus, old Rule 72(a) allows a magistrate judge to issue an order and then refers three times to *the magistrate judge's order*; since there's no other order in sight, the new rule uses *the order* for the later references. Old Rule 23(e) uses [*proposed*] *settlement, voluntary dismissal, or compromise* seven times; the new rule, after a first reference to *proposed settlement, voluntary dismissal, or compromise*, uses *the proposal*. Old Rule 45 refers six times to *the court from* [or *by*] *which the subpoena was issued*; the new rule, after a full first reference, uses *the issuing court*. New Rule 4(d)(1) allows the plaintiff to *request that the defendant waive service of a summons*; then in (d)(2), (3), and (4), that is shortened to *the request* or *a waiver*. These examples make an important point: rather than seeming to start over again with each successive subpart, as the old rules tend to do, we can generally trust the reader to read the subparts together as a coherent whole.

Another technique: try to merge two provisions that are essentially the same. The new rules do this many times.

Old 26(g)	New 26(g)
(g) Signing of Disclosures, Discovery Requests, Responses, and Objections. **(1)** Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is . . . . **(2)** Every discovery request, response, or objection *made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection* is	**(g) Signing Disclosures and Discovery Requests, Responses, and Objections.** **(1) *Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address . . . . By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry: (A) with respect to a disclosure, it is . . . ; and (B) with respect to a discovery request, response, or objection, it is . . . .

Old 37(a)(2)(A) & (B)	New 37(a)(1)
(a) Motion For Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows: . . . **(2) Motion.** (A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action. (B) If a deponent fails to [make discovery in any of several ways], the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. *The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.*	**(a) Motion for an Order Compelling Disclosure or Discovery.** **(1)** ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action. [Subparagraphs 3(A) & (B) describe the two motions more specifically.]

Old 71	New 71
When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party; *and when obedience to an order* may be lawfully enforced against *a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if a party.*	When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

Finally, try a vertical list. As I illustrated last month, you can often pull repetitious language into the introduction to the list—and say it just once. Here's another example.

Old 30(g)	New 30(g)
(g) Failure to Attend or to Serve Subpoena; Expenses. **(1)** If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees. **(2)** *If the party giving the notice of the taking of a deposition of a witness fails* to serve a subpoena upon the witness and the witness because of such failure does not attend, *and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.*	**(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses.** A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to: (1) attend and proceed with the deposition; or (2) serve a subpoena on a nonparty deponent, who consequently did not attend.

5. Don't state the obvious.

Lawyers are naturally careful in their drafting, trying to guard against the occasional reader in bad faith. But at some point, the misinterpretations become highly improbable, and the effort to prevent them is cumbersome and excessive. Some things are just too obvious for words.

Consider these examples from the old rules. I could go on and on.

- **5(e):** *The filing of papers ~~with the court as required by these rules~~ shall be made by* . . . (i.e., *A paper is filed by* . . .).
- **6(b):** *When ~~by these rules or by a notice given thereunder or by order of court~~ an act is required or allowed to be done at or within a specified time* . . . . (What are you trying to exclude? Why not simply *When an act may or must be done within a specified time*?)
- **7(b)(2):** *The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers ~~provided for by these rules~~.*
- **7.1(a):** *A nongovernmental corporate party ~~to an action or proceeding in a district court~~ must file* . . . . (We know the world we're in—the district court.)

- **26(b)(3)** (after a sentence about a party's showing a need for materials): *In ordering discovery of such materials ~~when the required showing has been made~~ . . . .*
- **30(b)(1):** *shall give . . . notice . . . to every other party ~~to the action~~.*
- **36(b):** *Any admission ~~made by a party~~ under this rule . . . .*
- **38(d):** *A demand for trial by jury ~~made as herein provided~~ may not be withdrawn without the consent of the parties.*
- **41(d):** *the court may* [order] *the payment of costs . . . and may stay the proceedings ~~in the action~~ until the plaintiff has complied ~~with the order~~.*
- **46:** *Formal exceptions to rulings or orders ~~of the court~~ are unnecessary; ~~but for all purposes for which an exception has heretofore been necessary~~ it is sufficient that a party . . . .*
- **55(b)(2):** *the party . . . shall be served with written notice of the application for judgment at least 3 days prior to* [ugh] *the hearing ~~on such~~* [ugh] *~~application~~.*
- **56(a):** *A party . . . may . . . move . . . for a summary judgment ~~in the party's favor~~ . . . .*

The old rules also contain a number of self-evident—or redundant—cross-references. Thus, Rule 7(b)(3) requires that motions "be signed in accordance with Rule 11." But Rule 11 applies by its own terms to "every pleading, written motion, and other paper." Rule 8(b) states that a general denial is "subject to the obligations set forth in Rule 11." Of course it is; all pleadings are subject to Rule 11. Rule 33(b)(5) states that a party submitting interrogatories "may move for an order under Rule 37(a)." But Rule 37(a) allows sanctions for any failure to make disclosure or to cooperate in discovery. So why include the cross-reference to Rule 37 in just one or two discovery rules? The trouble with redundant cross-references is that they may lead the reader to think they have special significance. Another trouble is that there's no logical end to them.

6. Be clear; say what you mean in normal English.

Often in the old rules, you get the gist of what the meaning is, but you wonder why the drafter said it in such an odd or oblique way. What in the world impels lawyers to write like this?

- **4(l):** *If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof.*
- **7(a):** *There shall be a complaint . . . .*
- **8(c):** *In pleading to a preceding pleading . . . .*
- **18(b):** *Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion . . . .*
- **24(b):** *When a party to an action relies for ground of claim or defense upon any statute . . . .*
- **25(a):** *Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion . . . .*
- **34(b):** *The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection.*
- **36(a):** *A denial shall fairly meet the substance of the requested admission . . . .*
- **38(b):** *Such demand may be indorsed upon a pleading of the party.*
- **52(a):** *due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.* (See if you can rewrite without using a single *of*.)

That goes to show why legal writing has been ridiculed for centuries—and why the new civil rules are cause for celebration. ■

Joseph Kimble has taught legal writing for 25 years at Thomas M. Cooley Law School. He is the author of Lifting the Fog of Legalese: Essays on Plain Language, *the editor in chief of* The Scribes Journal of Legal Writing, *the past president of the international organization Clarity, a founding director of the Center for Plain Language, and the drafting consultant on all federal court rules. He led the work of redrafting the Federal Rules of Civil Procedure.*