

Revisiting the Writing Contests (on Wordiness)

By Joseph Kimble

We now finish our four-part retrospective of some of the contests that have appeared over the years. The first three below appeared in 2009, right after the “restyled” Federal Rules of Evidence were published for comment. I was the drafting consultant. The new rules took effect on December 1, 2011.

The column will take a break in March. It will return in May, along with a new contest (I hope). April is the directory month.

August 2009 Contest

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. 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 Federal Rule of Evidence 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.

The Results

Last month, I invited you to revise current Federal Rule of Evidence 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.

The winner is Drew Slager, with Mancini, Schreuder & Kline. His revision, slightly edited:

A juror may not testify at trial before the jury on which he or she sits. If a party calls a juror to testify, the opposing party may object out of the jury's presence. [Note: you won't find *he or she* in the restyled rules, but it has its place in some drafting—used sparingly.]

Compare that version with the restyled version published for comment [later modified slightly]:

A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury's presence.

October 2009 Contest

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 current Federal Rule of Evidence 610, set out below.

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.

Big hint: try using *to attack or support* in your version. And I hope you'll go after the unnecessary prepositional phrases and multiword prepositions. Can you believe how many there are in a single 34-word sentence?

The Results

Last month, I invited you to revise current Federal Rule of Evidence 610. I suggested that you use *to attack or support* in your version, and that you go after the unnecessary prepositional phrases and multiword prepositions. There are eight prepositional phrases—or six if you take the two multiword prepositions (*for the purpose of* and *by reason of*) as units. Rule 610:

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.

The winner is Robert Harvey, former vice president and general counsel for DTE Energy Technologies, Inc. His revision (with one slight edit) is identical to the restyled rule:

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

The entries this month raised two good questions. Do we need *Evidence of*? And do we need *or opinions*? Just goes to show that revision could last forever, although projects must eventually end.

I received one entry that deserves an honorable mention.

Dear Professor Kimble,

As a project for my 8th-grade English class, I decided that we would rewrite the rule of evidence for your October contest. We discussed what we understood the rule to mean and then rewrote it as plainly as possible. Besides advocating clear writing, I am trying to get my class to see that what they learn in English class is useful in the outside world. Thank you for your contest and for your consideration.

Rule 610: A witness's religious beliefs cannot be used to challenge or support his or her credibility.

Yours truly,
Barbara Shafer (P34786) and
the Dearborn Guardian Lutheran 8th grade

January 2010 Contest

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 first sentence in current Federal Rule of Evidence 407.

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.

This time, the challenge will not be to make a series of style improvements, but to cut through and capture the meaning in a clearer, smoother way.

The Results

Last month, I invited you to revise the first sentence of current Federal Rule of Evidence 407:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.

The winner is Cynthia Bostwick, now the legal manager for the Washtenaw County Friend of the Court. Her revision, slightly edited:

When actions taken after an injury or harm would have made the injury or harm less likely, they are not admissible to prove negligence, culpable conduct, a defect in a product or a product's design, or a need for a warning or instruction.

Compare that version with the restyled version:

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

March 2013 Contest

Below is a sentence from the old (before December 2007) Federal Rules of Civil Procedure. Notice, once again, the slew of unnecessary prepositional phrases:

The subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provision of any other rule.

I'll send a copy of *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* to the first two persons who send me an "A" revision. Send an e-mail to kimblej@cooley.edu.

No fair peeking at the current federal rules before you send your entry.

The Results

Last month, I invited readers to revise the following sentence from the old (before December 2007) Federal Rules of Civil Procedure. It's from old Rule 35(b)(3).

The subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provision of any other rule.

I promised a copy of *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* to the first two readers who sent me an "A" revision. I said to "notice the slew of unnecessary prepositional phrases." Unnecessary prepositional phrases are probably the most common cause of flab in legal and official writing. And what's the most common indicator of this possible flab? The word of.

In the sentence above, there are six or seven prepositional phrases, depending on whether you count the multiword preposition *in accordance with* as one or two. And there are five ofs. Awful.

The new, restyled rule is Rule 35(b)(6). The sentence has one prepositional phrase:

This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

The first winner is Jordan Reilly, now with Mohrman, Kaardal & Erickson, PA, in Minneapolis. His entry:

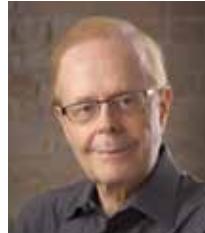
The subdivision does not preclude discovering an examiner's report or taking the examiner's deposition under any other rule.

The second winner is Linus Banghart-Linn, an assistant attorney general in Lansing.

The subdivision does not preclude deposing an examiner or discovering the examiner's report under any other rule.

Obviously, both these entries are very close to the new rule. Well done.

A number of entries converted *does not preclude* to positive form. I admit that it was hard to determine whether, in context, positive form would work as well or better. But even apart from that, I thought the two winning entries stood out.



Joseph Kimble taught legal writing for 30 years at WMU-Cooley Law School. His third and latest book is Seeing Through Legalese: More Essays on Plain Language. He is senior editor of The Scribes Journal of Legal Writing, editor of the "Redlines" column in Jedicature, a past president of the international organization Clarity, and a drafting consultant on all federal court rules. He led the work of redrafting the Federal Rules of Civil Procedure and Federal Rules of Evidence. Follow him on Twitter @ProfJoeKimble.