

You Be the Judge (Again)

In last month's column, I suggested that instead of debating about plain language in the abstract, we might better look at empirical evidence and concrete examples. Otherwise, we may never get past the myths, misconceptions, and mischaracterizations that continue to cloud the debate and discourage reform.

The empirical evidence, as I've said, is all on the side of plain language. The October 1987 and May 1990 columns reported on a study of almost 1,200 judges and lawyers in three states: asked to choose between the A and B versions of different passages from legal documents, they preferred the plain-language versions by at least 80 percent in each state.¹ The latest volume of *The Scribes Journal of Legal Writing* reports on a study of 251 Michigan lawyers: asked to choose between the O and Y versions of a Court of Appeals opinion, 61 percent preferred the one that had been revised into plain—or plainer—language.² (In both studies, the dif-

ferent versions were identified only by a letter.) And you can add those results to the many other studies that test everything from improvements in readers' comprehension, efficiency, and motivation to the cost benefits of plainly written forms and notices.³

As further evidence, I invited you last month to consider some before-and-after examples from the momentous two-year project to "restyle" the Federal Rules of Civil Procedure. Those examples mainly illustrated differences at the sentence level. This month, I offer one longer example that illustrates differences in design (formatting) and organization.

As you look over the restyled rule, please ask yourself a few questions. Would you describe it as using grade-school prose? Does it dumb down the language? Does it change the meaning? Is it less precise than the current rule? Does it subvert any technical terms?

If you answered no to these questions, then you have adjudged the common criticisms of plain language to be unfounded.

Current Rule 14(a)

(a) **When Defendant May Bring in Third Party.** At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the

(Continued on next page)

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Restyled Rule

(a) **When a Defending Party May Bring in a Third Party.**

- (1) *Timing of the Summons and Complaint.* A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 10 days after serving its original answer.
- (2) *Third-Party Defendant's Claims and Defenses.* The person served with the summons and third-party complaint—the "third-party defendant":
 - (A) must assert any defense against the third-party plaintiff's claim under Rule 12;
 - (B) must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);
 - (C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

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Current Rule 14(a) (continued)

third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.

Joseph Kimble has taught legal writing at Thomas Cooley Law School for 20 years. He is the editor in chief of The Scribes Journal of Legal Writing, the president of the international organization Clarity, and the drafting consultant on all federal court rules.

Restyled Rule (continued)

- (D) may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.
- (3) *Plaintiff's Claims Against a Third-Party Defendant.* The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).
- (4) *Motion to Strike, Sever, or Try Separately.* Any party may move to strike the third-party claim, to sever it, or to try it separately.
- (5) *Third-Party Defendant's Claim Against a Nonparty.* A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.
- (6) *Third-Party Complaint in Rem.* If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.

FOOTNOTES

1. *Survey: Plain English Wins Every Which Way*, 66 Mich B.J. 1024 (1987); *Strike Three for Legalese*, 69 Mich B.J. 418 (1990). The study was repeated with judges in a fourth state, Texas, and the preference was 82 percent.
2. *The Straight Skinny on Better Judicial Opinions*, 9 Scribes J. Legal Writing 1 (2003–2004).
3. See *Writing for Dollars, Writing to Please*, 6 Scribes J. Legal Writing 1 (1996–1997).