Lessons in Drafting from the New Federal Rules of Civil Procedure (Part 1)

By Joseph Kimble

April 30, 2007, was a historic day in the long, hard fight for better legal writing: the United States Supreme Court approved the "restyled" Federal Rules of Civil Procedure. The project began in mid-2002 and will officially end on December 1, when the new rules are scheduled to take effect. The project was carried out by the Advisory Committee on Civil Rules. I was the drafting consultant.

It's impossible to convey in this short space how excruciatingly careful our process was for redrafting the rules to improve their clarity, consistency, and readability—without making substantive changes. I outlined the process in a memo that accompanied the rules when they were published for comment in February 2005.[1] But even that outline doesn't capture the amount of work in my three 40- by 12-inch file drawers or the 775 documents in the archive at the Administrative Office of the United States Courts.

What I can do in this space is offer some drafting tips and examples from the new rules. My February 2005 memo touched on formatting, consistency, outdated and repetitious material, and (broadly) "other kinds of changes." Now I'll revisit everything, develop some old points, add some new ones, and try to provide a little advice. At the same time, I hope to put to rest any lingering doubts about whether this redrafting project was needed.

Just three caveats. First, nobody would claim that the new rules are perfect. You can always go back and find things that could be further improved. That said, I think the difference between the old and new rules is dramatic. (Ask students at Thomas Cooley Law School, who have had side-by-side versions available to them since the new rules were first published.) Second, if any mistakes were made in the restyling project, they can easily be fixed. Third, the examples below are just that—examples. They could be multiplied by many others from the old rules.

1. Put the parts in a logical order.

This may seem like an obvious principle, but the old rules violate it repeatedly—and right from the start. In the very first rule with any length—Rule 4—you will find three glaring examples.

First, old 4(a) puts the last parts of a summons first. New 4(a) fixes that and uses a handy vertical list besides. (I'll get to vertical lists in the next section.)

Old 4(a)	New 4(a)(1)
(a) Form. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. . . .	**(a) Contents; Amendments.** **(1)** ***Contents.*** A summons must: (A) name the court and the parties; (B) be directed to the defendant; (C) state the name and address of the plaintiff's attorney or—if unrepresented—of the plaintiff; (D) state the time within which the defendant must appear and defend; (E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint; (F) be signed by the clerk; and (G) bear the court's seal.

Second, old 4(d)(2) does the same thing: jumbles the requirements for a notice and request to waive service. The method of mailing, for instance, which should come last, appears second in a seven-item list. (I'll skip the example.)

Third, the paragraphs in old 4(d) follow this illogical progression:

- the effect of defendant's waiving service on an objection to venue or jurisdiction;
- how plaintiff requests a waiver;
- one consequence of defendant's failing to waive;
- the time for defendant to file an answer after returning a waiver;
- the results of plaintiff's filing the waiver (proof of service is not required); and
- a second consequence of defendant's failing to waive.

The order of the paragraphs in new 4(d):

- how plaintiff requests a waiver of service;
- the consequences of defendant's failing to waive;
- the time for defendant to file an answer after returning a waiver;
- the results of plaintiff's filing the waiver (proof of service is not required); and
- the effect of defendant's waiver on an objection to venue or jurisdiction.

This new order, by the way, is reflected in the headings to 4(d)(1)–(5). Old 4(d)(1)–(5) used no headings. If it had, the disorder might have been apparent. In addition, separating the consequences of failing to waive produced repetition and unnecessary cross-references:

Old 4(d)(2) (last sentence) and (5)	New 4(d)(2)
(2) . . . If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown. . . . **(5)** The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.	**(2)** ***Failure to Waive.*** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant: (A) the expenses later incurred in making service; and (B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

2. Use lists to the best advantage.

The vertical list is one of the drafter's—and reader's—best friends. Probably no other technique is more useful for organizing complex information, breaking it down into manageable chunks, avoiding repetition, and preventing ambiguity.

Take organization. Notice in this example how the exceptions are pulled together in the list and the second sentence in the old rule is included within the third exception.

Old 6(d)	New 6(c)(1)
(d) For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. . . .	**(c) Motions, Notices of Hearing, and Affidavits.** **(1)** ***In General.*** A written motion and notice of the hearing must be served at least 5 days before the time specified for the hearing, with the following exceptions: (A) when the motion may be heard ex parte; (B) when these rules set a different time; or (C) when a court order—which a party may, for good cause, apply for ex parte—sets a different time.

In the next example, the list not only breaks up a ridiculously long sentence but also reorganizes the "failures" into two categories—failing to appear and failing to serve a paper.

Old 37(d)	New 37(d)(1)(A)
(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. . . .	**(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.** **(1)** ***In General.*** (A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if: (i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or (ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

Incidentally, notice (1) how in the new rule the subject of the independent clause (*the court*) is placed at the beginning rather than appearing midsentence and (2) how the needless elaboration at the end of the old rule—29 words beginning with *may make such orders*—is tightened to *may . . . order sanctions.*

Now consider the value of a list for avoiding repetition. Two examples follow, with the repetition italicized. (In the first example, the items are, again, not in a logical order.)

Old 16(f)	New 16(f)(1)
(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or *if* no appearance is made *on behalf of a party* at a scheduling or pretrial conference, or *if a party or party's attorney* is substantially unprepared to participate in the conference, or *if a party or party's attorney* fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). . . .	**(f) Sanctions.** **(1)** ***In General.*** On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party or its attorney: (A) fails to appear at a scheduling or other pretrial conference; (B) is substantially unprepared to participate—or does not participate in good faith—in the conference; or (C) fails to obey a scheduling or other pretrial order.

Old 17(b)	New 30(g)
(b) Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. *The capacity* of a corporation *to sue or be sued shall be determined* by the law under which it was organized. In all other cases *capacity to sue or be sued shall be determined* by the law of the state in which the district court is held, except	**(b) Capacity to Sue or Be Sued.** Capacity to sue or be sued is determined as follows: (1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile; (2) for a corporation, by the law under which it was organized; and (3) for all other parties, by the law of the state where the court is located, except . . . .

Next, an example of the value of a list for avoiding ambiguity. In the old rule, the words *which are in the possession, custody or control of the party* seem to modify only *any designated tangible things* and not the earlier *any designated documents or electronically stored information*. The new rule gets the modification right with a list.

Old 34(a)	New 34(a)
(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained—translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and *which are in the possession, custody or control of the party* upon whom the request is served; or (2) to permit entry upon designated land	**(a) In General.** A party may serve on any other party a request within the scope of Rule 26(b): (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample *the following items in the responding party's possession, custody, or control*: (A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or (B) any designated tangible things; or (2) to permit entry onto designated land . . . .

Besides the ambiguity, the old rule repeats *inspect, copy, test, or sample*, and the word *translated* after the second dash connects in a clumsy, broken way with *information* before the first dash.

3. Break up long sentences.

This is standard advice for all forms of legal writing, since the ultralong sentence is one of our oldest and worst linguistic vices. My object here is to look at some specific ways to cure it.

First way: simply convert a compound sentence using *and* into two sentences.

Old 56(g)	New 56(g)
(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, *and* any offending party or attorney may be adjudged guilty of contempt.	**(g) Affidavit Submitted in Bad Faith.** If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

Second way: pull an exception into a new sentence, typically beginning with *But*.

Old 12(b)	New 12(b)
(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion	**(b) How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. *But* a party may assert the following defenses by motion . . . .

Old 71A(k)	New 71.1(k)
(k) Condemnation Under a State's Power of Eminent Domain. The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.	**(k) Condemnation Under a State's Power of Eminent Domain.** This rule governs an action involving eminent domain under state law. *But* if state law provides for trying an issue by jury—or for trying the issue of compensation by jury or commission or both—that law governs.

I hope to put to rest any lingering doubts about whether this redrafting project was needed.

A variation on this second technique is to signal the main rule with a word like *Ordinarily* and put an exception or a condition in a second sentence beginning with *But*. The new rules may have innovated this technique; I have not seen it discussed in the literature.

Old 26(b)(3)	New 26(b)(3)(A)
(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. . . .	**(3) *Trial Preparation: Materials.*** (A) *Documents and Tangible Things. Ordinarily,* a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). *But,* subject to Rule 26(b)(4), those materials may be discovered if: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

Third way, similar to the last one: pull a condition or conditions into a new sentence.

Old 12(f)	New 12(f)
(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.	**(f) Motion to Strike.** The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act: (1) on its own; or (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 20 days after being served with the pleading.

Fourth way: repeat a key word from the previous sentence at or near the beginning of the new sentence:

Old 7(b)(1)	New 7(b)(1)
(b) Motions and Other Papers. **(1)** An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor and shall set forth the relief or order sought. . . .	**(b) Motions and Other Papers.** **(1) *In General.*** A request for a court order must be made by motion. *The motion* must: (A) be in writing unless made during a hearing or trial; (B) state with particularity the grounds for seeking the order; and (C) state the relief sought.

Finally, note that the vertical list, even when it does not serve any of the larger purposes described in the previous section, still provides structure to a long sentence and makes the items easy to sort out and identify.

Old 5(c)	New 5(c)(1)
(c) Same: Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained *therein* shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. . . .	**(c) Serving Numerous Defendants.** **(1) *In General.*** If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that: (A) defendants' pleadings and replies to them need not be served on other defendants; (B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and (C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

As a last little challenge, can you quickly tell what the italicized *therein* refers to in the old rule? Ah, the false efficiency and pseudo-precision of legalese. ■

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 recently led the work of redrafting the Federal Rules of Civil Procedure.*

FOOTNOTE

1. Joseph Kimble, *Guiding Principles for Restyling the Civil Rules,* in Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure* x (February 2005), available at <http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf> (accessed July 12, 2007); reprinted in 84 Mich B J 56 (September 2005) and 84 Mich B J 52 (October 2005).