

Lessons in Drafting from the New Federal Rules of Civil Procedure (Part 3)

By Joseph Kimble

Why has most legal drafting been so bad for so long? The reasons number at least five.

First, law schools have traditionally neglected legal drafting.¹ Even “neglected” is putting it rather mildly. “Ignored” is more like it. Until the mid-1980s, most schools barely taught how to write memos and briefs. And until this century, only a small percentage required students to take drafting as part of the school’s writing program. (Incidentally, when I say “take drafting,” I mean take a course in how to clearly and effectively draft any contract or statute or rule; I don’t mean an elective that centers on drafting the substance of particular kinds of documents, such as real-estate documents or wills and trusts.)

Second, I suspect that after law school most lawyers do not fill in the gap through self-education, by reading one of the good books on drafting, say, or even taking a CLE course. Rather, they tend to copy the old forms, thus continuing the cycle of bad drafting. Nobody should think that old forms must be tried and true—let alone well drafted.²

Third, young lawyers who learned the basics of plain English in law school may still have to “learn” drafting—or at least take direction—from older lawyers who never did learn those basics. The blind leading the partially sighted. (Again, I’m not talking about what substantive provisions to include, but how best to draft them.) In short, many or most lawyers still learn drafting on the job—a questionable practice:

[S]tudents in the law schools should be taught how to draft legal documents, and should not be left to learn draftsmanship merely in the school of experience.

Learning draftsmanship in the school of experience exclusively is costly to clients; it is costly to the public, and it is costly to the lawyer. It is like learning surgery by experience—it is possible, but it is tough on the patient, and tough on the reputation of the surgeon.³

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Fourth, lawyers typically think they should draft for judges rather than the public or administrators or other front-end users. That, too, is a questionable strategy—and tends to produce poor drafting.⁴

Fifth, transactional lawyers seem to be less interested in skilled drafting than litigators are in writing skilled briefs or other court papers.⁵ Maybe that’s because litigators’ briefs are regularly tested, so to speak, in court, while transactional documents rarely are. At any rate, the great disconnect is that while most transactional lawyers say that a very small percentage of the legal drafting they see is of a genuinely high quality, almost all of them would claim to produce high-quality documents.⁶

All in all, most lawyers—as smart, talented, and experienced as they may be—have a limited critical faculty when it comes to legal drafting. This series of articles tries to raise awareness and offer a little concrete help. Below are four more guidelines.

7. Keep the subject and verb—and the parts of the verb itself—close together.

It’s standard advice to avoid creating wide gaps between the subject, verb, and object. Since these parts form the core of the sentence, the advice should be fairly obvious even to writers who aren’t acquainted with the literature. But apparently not, judging from the old civil rules.

Interestingly, though, gaps between the subject and verb are much more common than gaps between the verb and object. So are gaps between the parts of the verb itself. (Note that a fairly short gap, a short insertion, may work fine: *the court may, for good cause, order that . . .*)

Here, for example, are two mind-bending gaps between the subject and verb (which are italicized on the left):

Old 32(a)(2)	New 32(a)(3)
(2) The <i>deposition</i> of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party <i>may be used</i> by an adverse party for any purpose.	(3) Deposition of Party, Agent, or Designee. An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party’s officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

Notice how easy that fix was, using the active voice.

Old 44(b)	New 44(b)
<p>(b) Lack of Record. A written <i>statement</i> that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, <i>is</i> admissible as evidence that the records contain no such record or entry.</p>	<p>(b) Lack of a Record. A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under Rule 44(a)(1). For foreign records, the statement must comply with (a)(2)(C)(ii).</p>

And here are two examples of big gaps between the parts of the verb:

Old 16(b)	New 16(b)
<p>(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, <i>shall</i>, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, <i>enter</i> a scheduling order</p>	<p>(b) Scheduling. (1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order: (A) after receiving the parties’ report under Rule 26(f); or (B) after consulting with the parties’ attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.</p>

Old 56(a)	New 56(a)
<p>(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment <i>may</i>, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, <i>move</i> with or without supporting affidavits for a summary judgment in the party’s favor upon all or any part thereof.</p>	<p>(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after: (1) 20 days have passed from commencement of the action; or (2) the opposing party serves a motion for summary judgment.</p>

New Rule 56(a) also illustrates two techniques, discussed in Part 1 of this series, for breaking up long sentences: repeat or echo a key word from the previous sentence at the beginning of the new

sentence (here *motion* echoes *move*); and pull conditions or qualifications into a new sentence.

8. Normally, don’t put the main clause late in the sentence.

The main, or independent, clause is most typically delayed by piling up conditions or qualifiers at the beginning of the sentence. Again, Part 1 of this series included some examples—old and new 37(d), 16(f), and 12(f). Here’s one more:

Old 37(a)(2)(B)	New 37(a)(3)(B)
<p>(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. . . .</p>	<p>(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: (i) a deponent fails to answer a question asked under Rule 30 or 31; (ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4); (iii) a party fails to answer an interrogatory submitted under Rule 33; or (iv) a party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.</p>

If a condition or conditions are reasonably short (as in this sentence), then putting them at the beginning of the sentence will not tax the reader’s memory. But a long condition belongs at the end, after the main clause:

Old 55(b)(2)	New 55(b)(2)
<p>(2) By the Court. . . . If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper</p>	<p>(2) By the Court. . . . The court may conduct hearings or make referrals . . . when, to enter or effectuate judgment, it needs to: (A) conduct an accounting; (B) determine the amount of damages; (C) establish the truth of any allegation by evidence; or (D) investigate any other matter.</p>

9. Try to put statements in positive form.

Avoid multiple negatives—that’s another standard guideline the old rules often ignore. Below are several common patterns for multiple negatives. Remember that besides *no*, *not*, and words

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with negative prefixes (*in-*, *un-*, *non-*), words like *unless*, *without*, *absent*, *fail*, and *preclude* also have negative force.

Pattern 1: *shall/may not . . . unless/without/if . . . not.*

Old 38(d)	New 38(d)
(d) Waiver. The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided <i>may not</i> be withdrawn <i>without</i> the consent of the parties.	(d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

The next example—if you can believe it—uses *save* in its archaic negative sense.

Old 41(a)(2)	New 41(a)(2)
(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action <i>shall not</i> be dismissed at the plaintiff's instance <i>save</i> upon order of the court and upon such terms and conditions as the court deems proper. . . .	(2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. . . .

Pattern 2: *no _____ shall/may . . . unless/without/if . . . not.*

Old 55(b)(2)	New 55(b)(2)
(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but <i>no</i> judgment by default <i>shall</i> be entered against an infant or incompetent person <i>unless</i> represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. . . .	(2) By the Court. In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. . . .

Pattern 3: *no _____ /nothing . . . prevents/precludes.*

Old 50(d)	New 50(e)
(d) Same: Denial of Motion for Judgment as a Matter of Law. . . . If the appellate court reverses the judgment, <i>nothing</i> in this rule <i>precludes</i> it from determining that the appellee is entitled to a new trial	(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. . . . If the appellate court reverses the judgment, it may order a new trial

Pattern 4: *unless . . . is not.*

Old 11(c)(1)(A)	New 11(c)(2)
(A) By Motion. A motion for sanctions . . . shall be served as provided in Rule 5, but shall not be filed with or presented to the court <i>unless</i> , within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial <i>is not</i> withdrawn or appropriately corrected. . . .	(2) Motion for Sanctions. A motion for sanctions . . . must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. . . .

You may have noticed that the last example actually uses three negatives. That's right—the rare triple negative. For your reading pleasure, behold one more:

Old 8(e)(2)	New 8(d)(2)
(2) . . . When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is <i>not</i> made <i>insufficient</i> by the <i>insufficiency</i> of one or more of the alternative statements. . . .	(2) Alternative Statements of a Claim or Defense. . . . If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

10. Minimize cross-references.

Most readers will tell you, if you care to ask, that unnecessary cross-references are at least distracting and at worst irritating. They distract by cluttering the sentence and directing the reader's attention elsewhere. And they irritate when the reader realizes that the reference was to something already known or entirely obvious.

The prime reason for unnecessary cross-references is an unwillingness to trust the reader to read successive subparts together, as if each textual sliver had to stand alone in the world. Thus, you get drafting like this:

Old 53(h)(1) & (2)	New 53(g)(1) & (2)
(h) Compensation. (1) Fixing Compensation. The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment (2) Payment. The compensation fixed under Rule 53(h)(1) must be paid	(g) Compensation. (1) Fixing Compensation. Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order (2) Payment. The compensation must be paid

Old 51(c)(2) & (d)	New 51(c)(2) & (d)
<p>(2) An objection is timely if:</p> <p>(A) a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 51(b)(1), objects at the opportunity for objection required by Rule 51(b)(2); or</p> <p>(B) a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused.</p> <p>(d) Assigning Error; Plain Error.</p> <p>(1) A party may assign as error:</p> <p>(A) an error in an instruction actually given if that party made a proper objection under Rule 51(c), or</p> <p>(B) a failure to give an instruction if that party made a proper request under Rule 51(a), and—unless the court made a definitive ruling on the record rejecting the request—also made a proper objection under Rule 51(c).</p>	<p>(2) When to Make. An objection is timely if:</p> <p>(A) a party objects at the opportunity provided under Rule 51(b)(2); or</p> <p>(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.</p> <p>(d) Assigning Error; Plain Error.</p> <p>(1) Assigning Error. A party may assign as error:</p> <p>(A) an error in an instruction actually given, if that party properly objected; or</p> <p>(B) a failure to give an instruction, if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record—also properly objected.</p>

The new rules may still have too many cross-references, but they have about 45 fewer than the old rules. That's progress. ■



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Federal Rules of Civil Procedure.

FOOTNOTES

1. See Joseph Kimble, *How to Mangle Court Rules and Jury Instructions*, in *Lifting the Fog of Legalese: Essays on Plain Language* 105, 123–24 (Carolina Academic Press 2006) (citing data from the 2005 survey by the Association of Legal Writing Directors and the Legal Writing Institute).
2. *The Great Myth That Plain Language Is Not Precise*, in *Lifting the Fog of Legalese*, n 1, *supra*, at 37, 45 n 7 (citing authority for why forms are often unreliable and imprecise).
3. Charles A. Beardsley, *Beware of, Eschew and Avoid Pompous Prolixity and Platitudinous Epistles*, 16 Cal B J 65, 65 (March 1941).
4. See Bryan A. Garner, *Legal Writing in Plain English* 91 (University of Chicago Press 2001) (describing five reasons why the strategy is “wrongheaded”).
5. See Bryan A. Garner, *President’s Letter*, *The Scrivener* 1, 1 (Winter 1998) (describing the author’s CLE participants). *The Scrivener* is the newsletter of Scribes—The American Society of Legal Writers.
6. *Id.* at 3 (5% of the documents are of high quality; 95% would claim to produce high-quality documents).