

Lessons in Drafting from the New Federal Rules of Civil Procedure (Part 4)

By Joseph Kimble

The advice in this part of the series will be all about omitting needless words—about tightening. And here the examples below can't begin to do justice to the restyling project, because just about every other sentence seemed to have extra words. So it's a real challenge to choose from all the possible examples.

Consider this: the old rules had about 45,500 words; the new rules, even with the much greater use of headings, have about 39,280. That's 6,220 fewer words, or almost 14 percent less—all while following the Advisory Committee's mandate to not change substantive meaning.

Of course, writing clearly and plainly does not necessarily mean always using the fewest possible words in every sentence. But I would be surprised to learn of a plain-language project that did not produce a significant reduction overall.

Finally, remember that two of the guidelines discussed in Part 2 of this series—avoid needless repetition and don't state the obvious—also bear on omitting needless words.

11. Root out unnecessary prepositional phrases. Question every *of*.

There's no surer way to tighten legal writing than to eliminate unnecessary prepositional phrases. And as simple as it may sound, there's no better indicator than the word *of*.

Old 4(d)(1)	New 4(d)(5)
(1) A defendant who waives service <i>of</i> a summons does not thereby waive any objection <i>to</i> the venue or <i>to</i> the jurisdiction <i>of</i> the court <i>over</i> the person <i>of</i> the defendant.	(5) <i>Jurisdiction and Venue Not Waived.</i> Waiving service <i>of</i> a summons does not waive any objection <i>to</i> personal jurisdiction or <i>to</i> venue.

Old 10(a)	New 10(a)
(a) Caption; Names of Parties. . . . <i>In</i> the complaint the title <i>of</i> the action shall include the names <i>of</i> all the parties, but <i>in</i> other pleadings it is sufficient <i>to</i> state the name <i>of</i> the first party <i>on</i> each side <i>with</i> an appropriate indication <i>of</i> other parties.	(a) Caption; Names of Parties. . . . The title <i>of</i> the complaint must name all the parties; the title <i>of</i> other pleadings, after naming the first party <i>on</i> each side, may refer generally <i>to</i> other parties.

Old 16(b)(8)	New 16(b)(3)(B)(vi)
The scheduling order . . . may include . . . any other matters appropriate <i>in</i> the circumstances <i>of</i> the case.	The scheduling order may . . . include other appropriate matters.

Old 35(b)(3)	New 35(b)(6)
(3) . . . This subdivision does not preclude discovery <i>of</i> a report <i>of</i> an examiner or the taking <i>of</i> a deposition <i>of</i> the examiner <i>in accordance with</i> the provisions <i>of</i> any other rule.	(6) . . . This subdivision does not preclude obtaining an examiner's report or deposing an examiner <i>under</i> other rules.

Old 45(b)(1)	New 45(b)(1)
(1) A subpoena may be served <i>by</i> any person who is not a party and is not less than 18 years <i>of</i> age. Service <i>of</i> a subpoena <i>upon</i> a person named therein shall be made <i>by</i> delivering a copy thereof <i>to</i> such person	(1) <i>By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.</i> Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy <i>to</i> the named person

Old 54(d)(2)(C)	New 54(d)(2)(C)
(C) . . . The court may determine issues <i>of</i> liability <i>for</i> fees <i>before</i> receiving submissions bearing <i>on</i> issues <i>of</i> evaluation <i>of</i> services <i>for</i> which liability is imposed <i>by</i> the court. . . .	(C) <i>Proceedings.</i> . . . The court may decide issues <i>of</i> liability <i>for</i> fees <i>before</i> receiving submissions <i>on</i> the value <i>of</i> services. . . .

One good, recurring way to minimize *of*-phrases is to use possessives. The new rules convert dozens and dozens of *of*-phrases—and other prepositional phrases—to possessives. Some examples:

- **4(f)(2)(A):** *the law of the foreign country/the foreign country's law.*
- **5(c):** *the pleadings of the defendants/defendants' pleadings.*
- **13(i):** *the claims of the opposing party/the opposing party's claims.*
- **26(a)(2)(B):** *the qualifications of the witness/the witness's qualifications.*
- **26(a)(2)(C):** *the disclosure made by the other party/the other party's disclosure.*
- **26(b)(3):** *a statement . . . previously made by that person/the person's own previous statement.*
- **28(c):** *a relative or employee or attorney or counsel of any of the parties/any party's relative, employee, or attorney.*
- **35(b)(2):** *a report of the examination so ordered/the examiner's report.*
- **60(a):** *with leave of the appellate court/with the appellate court's leave.*

A second—and similar—technique for minimizing *of*-phrases and other prepositional phrases: convert them to adjectives. Of course, some of the phrases are used repeatedly.

- **4(d)(1); now 4(d)(5):** *the jurisdiction of the court over the person of the defendant/personal jurisdiction.*
- **4(k)(1)(D); now 4(k)(1)(C):** *a statute of the United States/a federal statute.*
- **26(b):** *by order of the court/by court order.*
- **32(a)(4); now 32(a)(8):** *action . . . in any court of the United States or of any State/any federal- or state-court action.*
- **38(b):** *trial by jury/jury trial.*
- **54(c):** *judgment by default/default judgment.*
- **57:** *an action for a declaratory judgment/a declaratory-judgment action.*
- **63:** *trial without a jury/nonjury trial.*
- **69(a):** *a judgment for the payment of money/a money judgment.*

A third technique: convert [article] [noun] of into an *-ing* form.

- **11(c)(2)(A); now 11(c)(5)(A):** *for a violation of subdivision (b)(2)/for violating Rule 11(b)(2).*
- **16(c)(4); now 16(c)(2)(D):** *the avoidance of unnecessary proof/avoiding unnecessary proof.*
- **16(c)(7); now 16(c)(2)(G):** *the identification of witnesses/identifying witnesses.*
- **23.2:** *in the conduct of the action/in conducting the action.*
- **37(g); now 37(f):** *the development and submission of a proposed discovery plan/developing and submitting a proposed discovery plan.*
- **61:** *no error in either the admission or the exclusion of evidence/no error in admitting or excluding evidence.*

12. Replace multiword prepositions.

Multiword prepositions—also called compound or complex or phrasal prepositions—are pervasive in legal writing.¹ One writer calls them the “compost of our language.”² You can almost always replace them with a simpler preposition, the one that you would probably use in speech.

- **4(i)(3); now 4(i)(4):** *for the purpose of curing the failure/to cure its failure.*
- **16(c):** *in order to consider possible settlement/to consider possible settlement.*
- **16(c):** *take appropriate action with respect to/take appropriate action on.*

- **16(c)(13); now 16(c)(2)(M):** *a separate trial pursuant to Rule 42(b)/a separate trial under Rule 42(b).* [Imagine how many times this one occurs.]
- **26(a)(2)(C):** *in the absence of other directions from the court/absent . . . a court order.*
- **26(a)(3)(B); now 26(a)(3)(A)(ii):** *whose testimony is expected to be presented by means of a deposition/whose testimony the party expects to present by deposition.*
- **30(c):** *under the provisions of the Federal Rules of Evidence/under the Federal Rules of Evidence.*
- **32(a)(3)(E); now 32(a)(4)(E):** *such exceptional circumstances exist as to make it desirable/exceptional circumstances make it desirable.*
- **35(b)(3); now 35(b)(6):** *in accordance with the provisions of any other rule/under other rules.*
- **41(a)(2):** *prior to the service upon the defendant of the plaintiff's motion to dismiss/before being served with the plaintiff's motion to dismiss.*
- **44(b):** *in the case of a domestic record/for domestic records.*
- **64:** *during the course of an action/throughout an action.*
- **71:** *in favor of a person who is not a party to the action/for a nonparty.*

13. Collapse clauses into a word or two when possible.

Here are a handful of examples:

- **11(c)(3); now 11(c)(6):** *the conduct determined to constitute a violation of this rule/the sanctioned conduct.*
- **11(d):** *motions that are subject to the provisions of Rules 26 through 37/motions under Rules 26 through 37.*
- **14(a):** *a person not a party to the action/a nonparty.*
- **26(a)(1)(D); now 26(a)(1)(A)(iv):** *a judgment which may be entered/a possible judgment.*
- **26(g)(3):** *the person who made the certification/the signer.*
- **30(a)(2):** *the person to be examined/the deponent.*
- **33(b)(3); now 33(b)(2):** *the party upon whom the interrogatories have been served/the responding party.*
- **45(b)(3); now 45(b)(4):** *the court by which the subpoena is issued/the issuing court.*
- **50(d); now 50(e):** *the party who prevailed on that motion/the prevailing party.*

Let's end where we started, with the prescription to omit needless words. By combining all the techniques for doing that—and trying to say what you mean simply and directly—we produce differences like this:

Old 25(a)(2)	New 25(a)(2)
(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. . . .	(2) Continuation Among the Remaining Parties. After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate. . . .

Old 39(a)	New 39(a)
(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.	(a) When a Demand Is Made. When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless: (1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or (2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.

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	(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. . . .

Old 62(f)	New 62(f)
(f) Stay According to State Law. In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.	(f) Stay in Favor of a Judgment Debtor Under State Law. If a judgment is a lien on the judgment debtor's property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.

Old 64	New 64(a)
At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought	(a) Remedies Under State Law—In General. At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. . . .

Old 65(a)(2)	New 65(a)(2)
(2) Consolidation of Hearing With Trial on Merits. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.	(2) Consolidating the Hearing with the Trial on the Merits. But the court must preserve any party's right to a jury trial.

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.

How about that? ■

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FOOTNOTES

1. For a long list, see Joseph Kimble, *Plain Words*, in *Lifting the Fog of Legalese: Essays on Plain Language* 170–71 (Carolina Academic Press 2006).
2. C. Edward Good, *Mightier Than the Sword* 73 (Blue Jeans Press 1989).