A Drafting Example from the Proposed New Federal Rules of Evidence

By Joseph Kimble

There’s a new milestone on the long road to better legal writing. On June 1, the Standing Committee on Rules of Practice and Procedure approved for publication the “restyled” Federal Rules of Evidence. As drafting consultant, I began redrafting the rules in mid-2006, and in April the Advisory Committee on Evidence Rules approved the last set for transmittal to the Standing Committee. In August, the rules will be published in print and online at www.uscourts.gov/rules.

The goal has been to make the rules clearer, more consistent, and more readable—all without changing their meaning. No small assignment, and as you can imagine, the Advisory Committee scrutinized every word, looking for possible substantive change. The careful, systematic, three-year process is summarized by Judge Robert Hinkle, Chair of the Advisory Committee, in a report that’s available at www.uscourts.gov/rules/Agenda%20Books/Standing/ST2009-06.pdf, pages 480–84.

Of course, the work is not done. No doubt the public comments will produce any number of changes. And the final version must then be approved by the Standing Committee (again), the Judicial Conference of the United States, the Supreme Court, and Congress. The track record, though, is good: this is the fourth set of federal rules to be restyled. The Rules of Appellate Procedure took effect in 1998, the Rules of Criminal Procedure in 2002, and the Rules of Civil Procedure in 2007.

During the comment period for the civil rules, I wrote two Plain Language columns (December 2004 and January 2005) showing side-by-side examples of several old and new rules. This time, I’ll do something a little different. I’ll look in detail at one rule and try to describe some of its drafting deficiencies. Then I’ll offer the proposed new rule and, as I did with the two earlier columns, ask you to be the judge.

Nobody would claim that the restyled rules are perfect; on a project like this, you can always find pieces that could have been—and perhaps still will be—improved. Naturally, though, I do think that the new rules are far better. But see what you think. And then try your hand at the contest that follows.

Current Rule 609(a)-(b)  
Impeachment by Evidence of Conviction of Crime

(a) General Rule. For the purpose of attacking the character for truthfulness of a witness, evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.
Drafting Deficiencies

1. For the purpose of is a multiword preposition. Make it To attack.
2. An unnecessary prepositional phrase. Make it a witness’s character.
3. Two structural points. (1) Without digging, it’s hard to tell what the point of distinction is between this first paragraph and the second one; the restyled rule makes that clear at the beginning of each paragraph. (2) This dense first paragraph contains two possibilities that should be broken down.
4. Shall has become inherently ambiguous (among other disadvantages). The restyled rules use must for required actions.
5. A stuffy way of saying for more than.
6. Note the miscue: in excess of one year modifies imprisonment but not death. To avoid the miscue, insert by before imprisonment.
7. Arguably, it’s obvious what law we’re talking about. But the restyled rule at least shortens this clumsy phrasing to in the convicting jurisdiction.
8. A lot hangs on the word such. It avoids repetition, but it would be easy to blow past.
9. Note the repetition of evidence that... has been convicted of... a crime from the first part of this paragraph.
10. There’s no such the court determines that in, for instance, Rule 403. The restyled rule omits it.
11. An unnecessary prepositional phrase. Of course we’re talking about the effect on the accused. Strike to the accused.
12. The adverb should normally split the verb phrase. Whether to put it after the first or second of two auxiliary verbs can be tricky, but I’d say readily belongs after be.
13. Here, the can be determined that language needs to stay in order to keep the idea of “readily.” But why is it passive?
14. Prefer the -ing forms—proving and admitting—to the nouns with of.
15. Another unnecessary prepositional phrase. Make it a dishonest act.
16. The language beginning with proof is a syntactic muddle. We’re talking about the witness’s admitting something, but not the witness’s proving something.
17. Not an informative heading. The restyled heading makes it immediately clear when this part applies.
18. Of course we’re talking about a conviction under this rule. Strike under this rule.
19. Strike a period of.
20. Note the inconsistency with in excess of in (a)(1).
21. Strike the date of.
22. Make it the witness’s conviction or release.
23. To this point, the sentence uses nine prepositional phrases. The restyled rule uses three.
24. Note the double negative: is not admissible... unless. Make it is admissible only if.
25. Again, strike the court determines... that, along with in the interests of justice. The latter is a needless intensifier anyway.
26. This is a 72-word sentence.
27. Start sentences with But, not However. What’s more, this sentence actually contains a second condition to using the evidence. The rule should be structured to show that the evidence is allowed only if two conditions are met.
28. The previous sentence spells out ten.
29. Strike as calculated herein. Also, the comma needs a paired comma after old.
30. Another double negative.
31. Isn’t notice always in advance? At any rate, here it certainly has to be.
32. Try a pronoun—it—instead of of such evidence.
33. Try another pronoun—its—as in its use.

Now for the proposed new rule. Most of the changes are explained by my comments on the current rule. I’ll just make three salient points. First, the current rule contains 262 words; the new one contains 204, or 22 percent fewer. Second, the new rule is structured in a way that reflects the content much more clearly. Third, the new rule improves the formatting with progressive indents for the subparts and hanging indents (aligned on the left) within each subpart.