Another Example from the Proposed New Federal Rules of Evidence

By Joseph Kimble

In the introductory essay to his book *Garner on Language and Writing*, Bryan Garner offers a sobering indictment: “a supermajority of lawyers—even law professors—grossly overestimate their writing skills, and underestimate the importance of those skills.” That’s the view of the preeminent authority on the subject. And what he says goes double for the category of legal writing that we call drafting—statutes, rules, contracts, wills, and the like.

So why has most legal drafting been so bad for so long? I posed that same question in the October 2007 Plain Language column and offered five reasons: (1) law schools have by and large failed to teach drafting; (2) most lawyers don’t fill the void through self-education, but rather tend to just copy the lumbering old forms; (3) young lawyers may have to “learn” drafting at the hands of older lawyers who never learned the skill themselves but who think their expertise in a particular field makes them adept drafters; (4) lawyers typically believe they should draft for judges rather than front-end users like clients, the public, and administrators; and (5) transactional lawyers seem more indifferent to the skill of drafting than litigators are to the skill of analytical and persuasive writing.

Let me add another reason, a cousin to #2: with rare exceptions, the apparent models that law students and lawyers have to work with are poorly drafted. Think of the Uniform Commercial Code, the United States Code, the Code of Federal Regulations, the Federal Rules of Civil Procedure until late 2007, most state statutes and regulations, the Federal Rules of Evidence (available for public comment at www.uscourts.gov/rules), most model jury instructions, municipal ordinances by the tens of thousands—the entire bunch. So pervasive is the old style of drafting that, unless we’ve somehow seen the light, we can’t help but regard it as perfectly normal and good, and we can’t help but internalize it.

But a remarkable thing happened in the early 1990s: the Standing Committee on (Federal) Rules of Practice and Procedure saw the light. The Committee recognized that the federal court rules were in a bad way, and it undertook the daunting task of “restyling” them set by set. It created a Style Subcommittee, which enlisted the help of a drafting consultant (first Bryan Garner, then me). The consultant prepared the drafts; they were meticulously reviewed by the Style Subcommittee and by the Advisory Committee for each set of rules; they were approved by the Supreme Court; and we now have new Federal Rules of Appellate Procedure (1998), Criminal Procedure (2002), and Civil Procedure (2007), and proposed new Federal Rules of Evidence.

I think it’s fair to say that the appellate, criminal, and civil restylings have been remarkably successful. Everyone seems to agree that the new rules are much clearer and more consistent, and since they took effect, only a few corrections have been needed—out of three complete rewrites. Still, during the public-comment periods, we heard from some quarters that “mere” restyling was not worth the effort or that restyling was a solution in search of a problem or that some other such objection loomed large. Never mind that the old rules were riddled with inconsistencies, ambiguities, disorganization, poor formatting, clumsy paragraphs, uninformative headings, unwieldy sentences, verbosity, repetition, abstractitis, unnecessary cross-references, multiple negatives, inflated diction, and legalese. (For dozens of examples, see the August–December 2007 columns.) Never mind that the old rules were a professional embarrassment. Never mind that those who would dismiss the restylings as unneeded must (as most lawyers do) have little regard for good drafting—or ease of reading. Never mind that they’d be willing to consign us to the old models forever.

So now the evidence rules have been restyled. Last month, I offered an example—a current rule with detailed comments, followed by the restyled rule. I’ll do the same this month. Try to put yourself in the place of a law student reading the current rule for the first time. And remember that just about all the evidence rules—certainly those of any length—can be given the same treatment.

The restyled version, besides fixing 30-odd drafting deficiencies, uses 41 fewer words, breaks the rule down into subdivisions, and converts four long sentences to six that are shorter by almost half.
Drafting Deficiencies

1. Whose memory? Also, just glance at the rule. How discouraging is it to see such a stretch of unbroken text?
2. Wordy phrasing with a clunky citation. Note the three prepositional
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3.3(B) (Admin. Of-

drafting experts allow it, but our guidelines for federal rules require

(1) while testifying, or
(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Current Rule 612
Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either—

(1) while testifying, or
(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Restyled Rule 612
Writing Used to Refresh a Witness’s Memory

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:
(1) while testifying; or
(2) before testifying, if the court decides that justice requires a party to have those options.

(b) Adverse Party’s Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness’s testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness’s testimony or—if justice so requires—declare a mistrial.
Last Month’s Contest

Last month, I invited you to revise current Rule 606(a):

A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

The winner is Drew Slager, an associate with Mancini, Schreuder, Kline & Conrad. His revision, slightly edited:

A juror may not testify at trial before the jury on which he or she sits. If a party calls a juror to testify, the opposing party may object out of the jury’s presence. [Note: you won’t find he or she in the restyled rules, but it has its place in some drafting—used sparingly.]

Compare that version with the restyled version published for comment:

A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury’s presence.

Now I wonder: do we really need as a witness? And could we just say that “an adverse party may object outside the jury’s presence,” without the bit about the court’s giving an opportunity? We’ll see.

A New Contest

Once again, I’ll send a copy of Lifting the Fog of Legalese: Essays on Plain Language to the first person who sends me (kimblej@cooley.edu) an “A” revision of the single sentence below. I’m deliberately picking short examples to encourage participation. The deadline is September 24.

The sentence is from current Rule 608(b):

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused’s or the witness’ privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

A little hazy, right? The main subject and verb—giving and operate—are abstract, and when examined does not connect well with what it modifies. So here’s a hint: start with a strong verb—waive—and then find a concrete subject. Besides clearing the haze, you should be able to cut almost half the words. No fair peeking online at the restyled version.

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