

# One Last Example from the Proposed New Federal Rules of Evidence

By Joseph Kimble

**T**his is the fourth and final article in my series on drafting examples from the restyled Federal Rules of Evidence (published for comment at [www.uscourts.gov/rules](http://www.uscourts.gov/rules)). I have tried to illustrate the improvement by pulling out a few current rules, briefly describing their deficiencies, and showing you the restyled rules for comparison. Thus, I noted 33 deficiencies in Rule 609(a)–(b), 31 in Rule 612, and 18 in Rule 806, and below I'll note 28 in Rule 404(a). Perhaps that's enough to make the case.

Before looking at 404(a), I'd like to do something different—and possibly surprising. I'd like to acknowledge some drafting flaws in the restyled rules. As I said in the first of these articles, nobody would claim that the restyled rules are perfect; you can always go back and find ways to improve on the improvements. Of course, any large-scale project like this will involve countless decisions and many compromises. And on some matters, the Advisory Committee on Evidence Rules had to decide whether to follow the best drafting practices in the face of other considerations.

So what could have been fixed in an ideal world, if we had been starting from scratch? We might have changed the structure of various restyled rules in several ways.

For one thing, the numbering in Rules 803 and 902 is unlike the numbering in the other restyled rules: you'll see that, as in the two current rules, 803 and 902 follow the rule number with another number—803(6), for instance. To achieve consistency, that could have been 803(a)(6) or (b)(6), although creating the new (a) or (b) might have required a little artfulness.

For another thing, those same two rules, along with 801(d), 804(b), and 901(b), use a hybrid format. Technically, they are set up as items in a list, but they look like subparts with headings. (Compare, for instance, Rule 807: it has two subparts, two subdivisions, each with a heading, and then a list without headings in subdivi-

sion (a). That's the norm in the restyled rules—the items in a list do not carry headings.) But the anomaly may be justifiable because the “lists” in those five rules are so long and complicated.

Another formatting anomaly: Rule 502 has a freestanding, undesignated, uncitable piece at the beginning, before the first subdivision. It should have been subdivision (a), but the Advisory Committee had reason to not adjust the version passed by Congress.

Finally, in Rule 801(d)(2), Rule 803(5), (6), (7), (8), (18), and (22), and Rule 804(a), you'll find so-called dangling text—a sentence that follows an enumerated vertical list. Although some drafting experts find this practice unobjectionable and even useful, the guidelines for drafting federal rules discourage it. Perhaps some of these danglers can still be fixed.

So much for structural imperfections—which hardly diminish the great leap forward taken by the restyled rules. And no doubt the public comments will lead to a number of further improvements in wording. Meanwhile, let's take up our last example.

## Current Rule 404(a) Character Evidence Not Admissible to Prove Conduct;<sup>1</sup> Exceptions; Other Crimes

**(a) Character evidence generally.** Evidence of a person's character or a<sup>2</sup> trait of character<sup>3</sup> is not admissible for the purpose of a<sup>4</sup> proving action in conformity therewith<sup>5</sup> on a particular occasion, except:

**(1) Character of accused.**<sup>6</sup> In a criminal case, evidence of a pertinent trait of character<sup>7</sup> offered<sup>8</sup> by an accused,<sup>9</sup> or by the prosecution to rebut the same,<sup>10</sup> or if evidence of a trait of character<sup>11</sup> of the alleged victim of the crime<sup>12</sup> is offered<sup>13</sup> by an accused and admitted under Rule 404(a)(2),<sup>14</sup> evidence of the same trait of character<sup>15</sup> of the accused offered by the prosecution;<sup>16</sup>

**(2) Character of alleged victim.**<sup>17</sup> In a criminal case,<sup>18</sup> and subject to the limitations imposed by<sup>19</sup> Rule 412, evidence of a pertinent trait of character<sup>20</sup> of the alleged victim of the crime offered by an accused,<sup>21</sup> or by the prosecution to rebut the same,<sup>22</sup> or evidence of a character trait of peacefulness of the alleged victim<sup>23</sup> offered<sup>24</sup> by the prosecution in a homicide case to rebut evidence that the alleged<sup>25</sup> victim was the first aggressor;

**(3) Character of witness.**<sup>26</sup> Evidence of the character of a witness,<sup>27</sup> as provided in Rules 607, 608, and 609.<sup>28</sup>



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## Drafting Deficiencies

1. This title does more than just describe what the rule is about; it announces that the rule will generally prohibit character evidence to prove conduct. That's not necessarily bad, just inconsistent with other titles.
2. Technically, the *a* makes this read *Evidence of a person's...a trait of character*. No good. Drop the second *a*.
3. An unnecessary prepositional phrase. Make it *character trait*. More substantively, what is the practical difference between "character" and "character trait"? Could a witness simply testify that someone is a bad man, without more? The restyled rule keeps both ideas, but should it?
4. *For the purpose of* is a multiword preposition. Make it *to prove*.
5. Legalese.
6. An unnecessary prepositional phrase? *Accused's Character* is probably not very speakable. But far more often than not, a possessive is better than an *of*-phrase.
7. Again, make it *character trait*. Also, recall that (a) refers to both "character" and "trait of character." Why both items there, but only the latter here?
8. A passive-voice verb, and none of the exceptions to preferring the active voice seem to apply here. To make it active—*the defendant may offer*—we need to restructure paragraphs (1), (2), and (3) into complete sentences.
9. Converting to the active voice eliminates *by an accused*. Another prepositional phrase bites the dust.
10. Legalese.
11. Once again, make it *character trait*. Also, paragraphs (1) and (2) use *trait of character* four times, then *character trait* the fifth time. But after saying *character trait* once, why not shorten to *trait* in all the later uses? We understand that that means "character trait."
12. Make it *alleged crime victim*. And note the four *of*-phrases in the 15 words beginning with *or* and ending with *crime*. Quite a feat.
13. Passive voice.
14. An unnecessary cross-reference that better organization would cure. The organization is seriously flawed. Here's why. Paragraph (1) purports to be about the accused's character, but in the middle we get a long condition having to do with a crime victim's character. That's what paragraph (2) is about—the victim's character. Hence the repetition in (2) of *evidence of a...trait of character of the alleged victim of the crime offered by an accused*. The restyled rule fixes the back-and-forth by creating three discrete categories in (2)(A), (B), and (C): the defendant's offering the defendant's own trait, and the prosecutor's responding; the defendant's offering the victim's trait, and the prosecutor's responding; and the prosecutor's offering the victim's trait of peacefulness in special circumstances.
15. See note 11.
16. For the record, paragraph (1) uses 15 prepositional phrases. The comparable, repetition-free parts of the restyled rule—believe it or not—use 3.
17. Don't change this heading to a possessive unless you also change the heading for paragraph (1). Parallelism rules.
18. *In a criminal case* also appears at the beginning of paragraph (1). The restyled rule uses the phrase once—a sign of better organization.
19. Change *imposed by* to *in*.
20. See note 11.
21. As pointed out in note 14, almost all the words beginning with *evidence* are repeated from paragraph (1). So we get another passive-voice verb and another blast of prepositional phrases.
22. Legalese.
23. Make it *the alleged victim's trait of peacefulness*.
24. Passive voice. The *be*-verb is implied: *evidence...[that is] offered*.
25. No need to repeat *alleged*.
26. See note 17.
27. One more time—make it *a witness's character*.
28. This paragraph, like (1) and (2), doesn't read well with the introductory language in (a): *Evidence of a person's...trait of character is not admissible...except:...Evidence of the character of a witness, as provided in Rules 607, 608, and 609*. The three paragraphs are technically items in a list (using the hybrid format mentioned earlier), but the list is ill-formed.

The restyled rule improves on the current rule in three basic ways. First, it restructures the rule. We now have certain exceptions in a criminal case and exceptions for a witness. And the exceptions in a criminal case are broken down into three categories. Second, those categories are set out in a list that reads smoothly with the introductory language and uses strong parallel constructions. Third, the restyled rule dispenses with the slew of passive-voice verbs and prepositional phrases that bedevil the current rule.

### Restyled Rule 404(a) Character Evidence; Crimes or Other Acts

#### (a) Character Evidence.

- (1) **Prohibited Uses.** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
- (2) **Exceptions in a Criminal Case.** The following exceptions apply in a criminal case:
  - (A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
  - (B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged crime victim's pertinent trait, and if the evidence is admitted, the prosecutor may:
    - (i) offer evidence to rebut it; and
    - (ii) offer evidence of the defendant's same trait; and
  - (C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.
- (3) **Exceptions for a Witness.** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

## Last Month's Contest

Last month, I invited you to revise current Rule 610. I suggested that you use *to attack or support* in your version, and that you go after the unnecessary prepositional phrases and multiword prepositions. There are eight prepositional phrases—or six if you take the two multiword prepositions (*for the purpose of* and *by reason of*) as units. Rule 610:

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

The winner is Robert Harvey, former vice president and general counsel for DTE Energy Technologies, Inc. His revision (with one slight edit) is identical to the restyled rule:

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

The entries this month raised two good questions. Do we need *Evidence of?* And do we need *or opinions?* Just goes to show that revision could last forever, although projects must eventually end.

I received one entry that deserves an honorable mention.

Dear Professor Kimble,

As a project for my 8th-grade English class, I decided that we would rewrite the rule of evidence for your October contest. We discussed what we understood the rule to mean and then rewrote it as plainly as possible. Besides advocating clear writing, I am trying to get my class to see that what they learn in English class is useful in the outside world. Thank you for your contest and for your consideration.

Rule 610: A witness's religious beliefs cannot be used to challenge or support his or her credibility.

Yours truly,  
Barbara Shafer (P34786) and  
the Dearborn Guardian Lutheran 8th grade

## A New Contest

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 current Rule 609(d) on juvenile adjudications. The deadline is November 24.

**(d) Juvenile adjudications.** Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

This one's a little tougher than the previous three. Try using a vertical list.



*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 led the work of redrafting the Federal Rules of Civil Procedure and the Federal Rules of Evidence.*