Lessons in Drafting from the New Federal Rules of Civil Procedure*

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December 1, 2007, was a historic day in the long, hard fight for better legal writing: the "restyled" Federal Rules of Civil Procedure — a top-to-bottom redraft — officially took effect. The project began in mid-2002 and was carried out by the Advisory Committee on Civil Rules. I was the drafting consultant, working with Joseph Spaniol. Bryan Garner had prepared an original draft in 1993, but the project was put on hold during restylings of the appellate and criminal rules.

Now, it's almost impossible to convey how excruciatingly careful our process was for redrafting the civil rules to improve their clarity, consistency, and readability — without making substantive changes. I outlined the process in a memo that accompanied the rules when they were published for comment in February 2005.[1] But even that outline doesn't capture the amount of work in my

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* Based on a five-part series in the *Michigan Bar Journal* (Aug.–Dec. 2007). Each part has a short introduction.

1 Joseph Kimble, *Guiding Principles for Restyling the Civil Rules*, in Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure* x (Feb. 2005) (available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf) (reprinted in 84 Mich. B.J. 56 (Sept. 2005) and 84 Mich. B.J. 52 (Oct. 2005)).

three 40- by 12-inch file drawers or the 775 documents in the archive at the Administrative Office of the United States Courts.

What I can do is offer some drafting tips and examples from the new rules. My February 2005 memo touched on formatting, consistency, outdated and repetitious material, and (broadly) "other kinds of changes." In this article, I'll revisit everything, develop some old points, add some new ones, and try to provide a little advice. At the same time, I hope to put to rest any lingering doubts about whether this redrafting project was needed.

Just three caveats. First, nobody would claim that the new rules are perfect. You can always go back and find things that could be further improved. That said, the difference between the old and new rules is dramatic. (During the public-comment period, a class of students at Thomas Cooley Law School rated the clarity and readability of the old rules at 4.8 and the new rules at 8.4 on a scale of 1 to 10.) Second, if any mistakes were made in the restyling project, they can easily be fixed. Third, the examples below are just that — examples. They could be multiplied by many others from the old rules.

1. Put the parts in a logical order.

This may seem like an obvious principle, but the old rules violated it repeatedly — and right from the start. In the very first rule with any length — Rule 4 — there were three glaring examples.

First, old 4(a) put the last parts of a summons first. New 4(a) fixes that and uses a handy vertical list besides. (I'll get to vertical lists in the next guideline.)

Old 4(a)	New 4(a)(1)
(a) Form. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. . . .	**(a) Contents; Amendments.** **(1)** ***Contents.*** A summons must: (A) name the court and the parties; (B) be directed to the defendant; (C) state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff; (D) state the time within which the defendant must appear and defend; (E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint; (F) be signed by the clerk; and (G) bear the court's seal.

Second, old 4(d)(2) did the same thing: jumbled the requirements for a notice and request to waive service. The method of mailing, for instance, should come last, but it appeared second in a seven-item list. (I'll skip the example.)

Third, the paragraphs in old 4(d) followed this illogical progression:

- the effect of defendant's waiving service on an objection to venue or jurisdiction;
- how plaintiff requests a waiver;

- one consequence of defendant's failing to waive;
- the time for defendant to file an answer after returning a waiver;
- the results of plaintiff's filing the waiver (proof of service is not required); and
- a second consequence of defendant's failing to waive.

The order of the paragraphs in new 4(d):

- how plaintiff requests a waiver of service;
- the consequences of defendant's failing to waive;
- the time for defendant to file an answer after returning a waiver;
- the results of plaintiff's filing the waiver (proof of service is not required); and
- the effect of defendant's waiver on an objection to venue or jurisdiction.

This new order, by the way, is reflected in the headings to 4(d)(1)–(5). Old 4(d)(1)–(5) used no headings. If it had, the disorder might have been more apparent. In addition, separating the consequences of failing to waive produced repetition and unnecessary cross-references.

Old 4(d)(2) (last sentence) & (5)	**New 4(d)(2)**
(2) . . . If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown. . . . **(5)** The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.	**(2)** ***Failure to Waive.*** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant: (A) the expenses later incurred in making service; and (B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

2. Use lists to the best advantage.

The vertical list is one of the drafter's — and reader's — best friends. Probably no other technique is more useful for organizing complex information, breaking it down into manageable chunks, avoiding repetition, and preventing ambiguity.

Take organization. Notice in this example how the exceptions are pulled together in the list and how the second sentence in the old rule is included within the third exception.

Old 6(d)	**New 6(c)(1)**
(d) For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. . . .	**(c) Motions, Notices of Hearing, and Affidavits.** **(1)** ***In General.*** A written motion and notice of the hearing must be served at least 5 days before the time specified for the hearing, with the following exceptions: (A) when the motion may be heard ex parte; (B) when these rules set a different time; or (C) when a court order — which a party may, for good cause, apply for ex parte — sets a different time.

In the next example, the list not only breaks up a ridiculously long sentence but also reorganizes the "failures" into two categories — failing to appear and failing to serve a paper.

Old 37(d)	New 37(d)(1)(A)
(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. . . .	**(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.** **(1)** ***In General.*** (A) *Motion; Grounds for Sanctions*. The court where the action is pending may, on motion, order sanctions if: (i) a party or a party's officer, director, or managing agent — or a person designated under Rule 30(b)(6) or 31(a)(4) — fails, after being served with proper notice, to appear for that person's deposition; or (ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

Notice, too, that (1) in the new rule the subject of the independent clause (*the court*) is placed at the beginning rather than appearing midsentence and (2) the needless elaboration at the end of the old rule — 29 words beginning with *may make such orders* — is tightened to *may . . . order sanctions*.

Now consider the value of a list for avoiding repetition. Two examples follow. In the first example, the 89-word sentence in the old rule referred four times to a party or its attorney. (And the items were, again, not in a logical order.)

Old 16(f)	**New 16(f)(1)**
(f) Sanctions. *If a party or party's attorney* fails to obey a scheduling or pretrial order, or *if* no appearance is made *on behalf of a party* at a scheduling or pretrial conference, or *if a party or party's attorney* is substantially unprepared to participate in the conference, or *if a party or party's attorney* fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). . . .	**(f) Sanctions.** **(1)** ***In General.*** On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party or its attorney: (A) fails to appear at a scheduling or other pretrial conference; (B) is substantially unprepared to participate — or does not participate in good faith — in the conference; or (C) fails to obey a scheduling or other pretrial order.

Similarly, in the second example the old rule referred three times to determining capacity to sue or be sued.

Old 17(b)	New 17(b)
(b) Capacity to Sue or Be Sued. *The capacity* of an individual, other than one acting in a representative capacity, t*o sue or be sued shall be determined* by the law of the individual's domicile. *The capacity* of a corporation *to sue or be sued shall be determined* by the law under which it was organized. In all other cases *capacity to sue or be sued shall be determined* by the law of the state in which the district court is held, except	**(b) Capacity to Sue or Be Sued.** Capacity to sue or be sued is determined as follows: (1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile; (2) for a corporation, by the law under which it was organized; and (3) for all other parties, by the law of the state where the court is located, except . . . .

Next, an example of the value of a list for avoiding ambiguity. In the old rule, the words *which are in the possession, custody or control of the party* seemed to modify only *any designated tangible things* and not the earlier *any designated documents or electronically stored information*. The new rule gets the modification right with a list. (If only I could show you all the ambiguities in the old rules.)

Old 34(a)	New 34(a)
(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any desig-	**(a) In General.** A party may serve on any other party a request within the scope of Rule 26(b): (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample *the following items*

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Old 34(a)	**New 34(a)**
nated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained — translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and *which are in the possession, custody or control of the party* upon whom the request is served; or (2) to permit entry upon designated land	*in the responding party's possession, custody, or control*: (A) any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or (B) any designated tangible things; or (2) to permit entry onto designated land . . . .

Besides the ambiguity, the old rule repeated *inspect, copy, test, or sample*, and the word *translated* after the second dash connected in a clumsy, broken way with *information* before the first dash.

3. Break up long sentences.

This is standard advice for all forms of legal writing, since the ultralong sentence is one of our oldest and worst linguistic vices. My goal here is to look at some specific ways to cure it.

First way: simply convert a compound sentence using *and* into two sentences.

Old 27(b)	New 27(b)(3)
(b) Pending Appeal. . . . If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, *and* thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.	**(3)** ***Court Order.*** If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action.

Second way: pull an exception into a new sentence, typically beginning with *But*.

Old 12(b)	New 12(b)
(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion	**(b) How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. *But* a party may assert the following defenses by motion . . . .

A variation on this second technique is to signal the main rule with a word like *Ordinarily* and put an exception or a condition in a second sentence beginning with *But*. The new rules may have innovated this technique; I have not seen it discussed in the literature.

Old 26(b)(3)	**New 26(b)(3)(A)**
(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. . . .	**(3)** ***Trial Preparation: Materials.*** (A) *Documents and Tangible Things. Ordinarily*, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). *But*, subject to Rule 26(b)(4), those materials may be discovered if: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

Third way, similar to the second one: pull a condition or conditions into a new sentence.

Old 12(f)	New 12(f)
(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.	**(f) Motion to Strike.** The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act: (1) on its own; or (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 20 days after being served with the pleading.

Fourth way: repeat a key word from the previous sentence at or near the beginning of the new sentence.

Old 7(b)(1)	New 7(b)(1)
(b) Motions and Other Papers. **(1)** An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. . . .	**(b) Motions and Other Papers.** **(1)** ***In General.*** A request for a court order must be made by motion. *The motion* must: (A) be in writing unless made during a hearing or trial; (B) state with particularity the grounds for seeking the order; and (C) state the relief sought.

Finally, note that the vertical list, even when it does not serve any of the larger purposes described in guideline 2, still provides structure to a long sentence and makes the items easy to sort out and identify.

Old 5(c)	New 5(c)(1)
(c) Same: Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained *therein* shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. . . .	**(c) Serving Numerous Defendants.** **(1)** ***In General.*** If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that: (A) defendants' pleadings and replies to them need not be served on other defendants; (B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and (C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

As a last little challenge, can you quickly tell what the italicized *therein* referred to in the old rule? Ah, the false efficiency and pseudo-precision of legalese.

The old Federal Rules of Civil Procedure, which expired on December 1, 2007, are a gold mine — or should I say a landfill? — for examples of how not to draft. And it's inexcusable that generations of law students and young lawyers have had to wade through the clutter and confusion to learn civil procedure. The same goes for the Federal Rules of Evidence (now being restyled!), the Bankruptcy Code, most of the UCC, the Restatements, and just about all the rules, codes, and statutes that lawyers draft. Such a professional embarrassment. Such a waste of readers' time and effort.

Let's keep looking at ways to combat our affliction.

4. Avoid needless repetition.

Some of the repetition in the old civil rules is amazing. Below are four ways to deal with it. In each example, I'll italicize the repetition on the left.

Try a pronoun. (Incidentally, notice how the italicized items in the second sentence of the old rule weren't even in parallel order with the same items in the first sentence.)

Old 9(a)	New 9(a)
(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show	**(a) Capacity or Authority to Sue; Legal Existence.** **(1)** ***In General.*** Except when required to show that the court has jurisdiction, a pleading need not allege: (A) a party's capacity to sue or be sued;

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Old 9(a)	**New 9(a)**
the jurisdiction of the court. *When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity*, the party desiring to raise the issue shall do so by	(B) a party's authority to sue or be sued in a representative capacity; or (C) the legal existence of an organized association of persons that is made a party. **(2)** ***Raising Those Issues.*** To raise any of *those* issues, a party must do so by . . . .

Similarly, try to shorten a second reference to the same thing. Old Rule 72(a), for instance, allowed a magistrate judge to issue an order and then referred three times to *the magistrate judge's order*; since there's no other order in sight, the new rule uses *the order* for the later references. Old Rule 23(e) used [*proposed*] *settlement, voluntary dismissal, or compromise* seven times; the new rule, after a first reference to *proposed settlement, voluntary dismissal, or compromise*, uses *the proposal*. Old Rule 45 referred six times to *the court from* [or *by*] *which the subpoena was issued*; the new rule, after a full first reference, uses *the issuing court*. New Rule 4(d)(1) allows the plaintiff to *request that the defendant waive service of a summons*; then in (d)(2), (3), and (4), that's shortened to *the request* or *a waiver*. These examples make an important point: rather than seeming to start over again with each successive subpart, as the old rules tended to do, we can generally trust the reader to read the subparts together as a coherent whole.

Another technique: try to merge two provisions that are essentially the same. The new rules do this many times.

Old 26(g)	New 26(g)
(g) Signing of Disclosures, Discovery Requests, Responses, and Objections. **(1)** Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is . . . . **(2)** Every discovery request, response, or objection *made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection* is	**(g) Signing Disclosures and Discovery Requests, Responses, and Objections.** **(1)** ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name — or by the party personally, if unrepresented — and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry: (A) with respect to a disclosure, it is . . . ; and (B) with respect to a discovery request, response, or objection, it is . . . .

Old 37(a)(2)(A) & (B)	New 37(a)(1)
(a) Motion For Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows: . . . **(2) Motion.** (A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action. (B) If a deponent fails to [make discovery in any of several ways], the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. *The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. . . .*	**(a) Motion for an Order Compelling Disclosure or Discovery.** **(1)** ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action. [Subparagraphs 3(A) & (B) describe the two motions more specifically.]

Old 71	New 71
When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party; *and, when obedience to an order* may be lawfully enforced against *a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if a party*.	When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

Finally, try a vertical list. As I illustrated in guideline 2, you can often pull repetitious language into the introduction to the list — and say it just once. Here's another example.

Old 30(g)	New 30(g)
(g) Failure to Attend or to Serve Subpoena; Expenses. **(1)** If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.	**(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses.** A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to: (1) attend and proceed with the deposition; or (2) serve a subpoena on a nonparty deponent, who consequently did not attend.

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Old 30(g)	New 30(g)
(2) *If the party giving the notice of the taking of a deposition of a witness fails* to serve a subpoena upon the witness and the witness because of such failure does not attend, *and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.*	

5. Don't state the obvious.

Lawyers are naturally careful in their drafting, trying to guard against the occasional reader in bad faith. But at some point, the misinterpretations become highly improbable, and the effort to prevent them is cumbersome and excessive. Some things are just too obvious for words.

Consider these examples from the old rules. I could go on and on.

- **5(e):** *The filing of papers ~~with the court as required by these rules~~ shall be made by . . .* (i.e., *A paper is filed by . . .*).

- **6(b):** *When ~~by these rules or by a notice given thereunder or by order of court~~ an act is required or allowed to be done at or within a specified time . . . .* (What are you trying to exclude? Why not simply *When an act may or must be done within a specified time*?)

- **7(b)(2):** *The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers ~~provided for by these rules~~.*

- **7.1(a):** *A nongovernmental corporate party ~~to an action or proceeding in a district court~~ must file . . . .* (We know the world we're in—the district court.)

- **26(b)(3)** (after a sentence about a party's showing a need for materials): *In ordering discovery of such materials ~~when the required showing has been made~~ . . . .*

- **30(b)(1):** *shall give . . . notice . . . to every other party ~~to the action~~.*

- **36(b):** *Any admission ~~made by a party~~ under this rule . . . .*

- **38(d):** *A demand for trial by jury ~~made as herein provided~~ may not be withdrawn without the consent of the parties.*

- **41(d):** *the court may* [order] *the payment of costs . . . and may stay the proceedings ~~in the action~~ until the plaintiff has complied ~~with the order~~.*

- **46:** *Formal exceptions to rulings or orders ~~of the court~~ are unnecessary; ~~but for all purposes for which an exception has heretofore been necessary~~ it is sufficient that a party . . . .*

- **55(b)(2):** *the party . . . shall be served with written notice of the application for judgment at least 3 days prior to* [ugh] *the hearing ~~on such~~* [ugh] *~~application~~.*

- **56(a):** *A party . . . may . . . move . . . for a summary judgment ~~in the party's favor~~ . . . .*

The old rules also contained a number of self-evident — or redundant — cross-references. Thus, Rule 7(b)(3) required that motions "be signed in accordance with Rule 11." But Rule 11 applies by its own terms to "every pleading, written motion, and other

paper." Rule 8(b) stated that a general denial is "subject to the obligations set forth in Rule 11." Of course it is; all pleadings are subject to Rule 11. Rule 33(b)(5) stated that a party submitting interrogatories "may move for an order under Rule 37(a)." But Rule 37(a) allows sanctions for any failure to make disclosure or to cooperate in discovery. So why include the cross-reference to Rule 37 in just one or two discovery rules? The trouble with redundant cross-references is that they may lead the reader to think they have special significance. Another trouble is that there's no logical end to them.

6. Be clear; say what you mean in normal English.

Often in the old rules, you got the gist of the intended meaning, but you wondered why the drafter said it in such an odd or oblique way. What in the world impels lawyers to write like this?

- **4(l):** *If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof.*
- **7(a):** *There shall be a complaint . . . .*
- **8(c):** *In pleading to a preceding pleading . . . .*
- **18(b):** *Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion . . . .*
- **24(b):** *When a party to an action relies for ground of claim or defense upon any statute . . . .*
- **25(a)(1):** *Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion . . . .*

- **34(b):** *The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection.*

- **36(a):** *A denial shall fairly meet the substance of the requested admission . . . .*

- **38(b):** *Such demand may be indorsed upon a pleading of the party.*

- **52(a):** *due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.* (See if you can rewrite without using a single *of*.)

That goes to show why legal writing has been ridiculed for centuries — and why the new civil rules are cause for celebration.

At this point, let me digress momentarily and pose a question: 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.[2] 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

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[2] *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).

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, 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.[3]

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.[4]

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[3] *See* Kimble, *The Great Myth That Plain Language Is Not Precise*, in *Lifting the Fog of Legalese*, *supra* n. 2, at 37, 45 n. 7 (citing authority for why forms are often unreliable and imprecise).

[4] Charles A. Beardsley, *Beware of, Eschew and Avoid Pompous Prolixity and Platitudinous Epistles*, 16 Cal. B.J. 65, 65 (Mar. 1941).

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.[5]

Fifth, transactional lawyers seem to be less interested in skilled drafting than litigators are in writing skilled briefs or other court papers.[6] 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.[7]

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 article tries to raise awareness and offer some 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.

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[5] *See* Bryan A. Garner, *Legal Writing in Plain English* 91 (U. Chi. Press 2001) (describing five reasons why the strategy is "wrongheaded").

[6] *See* Bryan A. Garner, *President's Letter*, The Scrivener (newsletter of Scribes — Am. Socy. of Legal Writers) 1, 1 (Winter 1998) (describing the author's CLE participants).

[7] *Id*. at 3 (5% of the documents are of high quality; 95% would claim to produce high-quality documents).

Interestingly, though, gaps between the subject and verb were much more common than gaps between the verb and object. So were 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 main subject and verb.

Old 32(a)(2)	**New 32(a)(3)**
(2) The *deposition* 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 *may be used* 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)**
(b) Lack of Record. A written *statement* 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	**(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.

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Old 44(b)	New 44(b)
record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, *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).

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

Old 16(b)	New 16(b)(1)
(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, *shall*, 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, *enter* a scheduling order	**(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.

Old 56(a)	**New 56(a)** [amendment pending, 2009]
(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment *may*, 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, *move* with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.	**(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.

New Rule 56(a) also illustrates two techniques, discussed in guideline 3, 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, guidelines 2 and 3 included some examples — old and new 37(d), 16(f), and 12(f). Here's one more (with the *if*s and the main subjects and verbs italicized).

Old 37(a)(2)(B)	**New 37(a)(3)(B)**
(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. . . .	**(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.

If the 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)
(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	**(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.

9. Try to put statements in positive form.

Avoid multiple negatives — that's another standard guideline the old rules often ignored. Below are several common patterns for multiple negatives. Remember that besides *no*, *not*, and words 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 *may not* be withdrawn *without* 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 — used *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 *shall not* be dismissed at the plaintiff's instance *save* 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 *no* judgment by default *shall* be entered against an infant or incompetent person *unless* 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, *nothing* in this rule *precludes* 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 *unless*, 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 *is not* 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 used 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 *not* made *insufficient* by the *insufficiency* 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)
(2) An objection is timely if: **(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 **(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. **(d) Assigning Error; Plain Error.** **(1)** A party may assign as error: **(A)** an error in an instruction actually given if that party made a proper objection under Rule 51(c), or **(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).	**(2)** ***When to Make.*** An objection is timely if: (A) a party objects at the opportunity provided under Rule 51(b)(2); or (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. **(d) Assigning Error; Plain Error.** **(1)** ***Assigning Error.*** A party may assign as error: (A) an error in an instruction actually given, if that party properly objected; or (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.

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

The advice in this next part, guidelines 11 through 13, 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% 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 it would be surprising to learn of a plain-language project that did not produce a significant reduction overall.

Finally, remember that two of the guidelines discussed earlier — avoid needless repetition (#4) and don't state the obvious (#5) — 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 *of* a summons does not thereby waive any objection *to* the venue or *to* the jurisdiction *of* the court *over* the person *of* the defendant.	**(5)** ***Jurisdiction and Venue Not Waived.*** Waiving service *of* a summons does not waive any objection *to* personal jurisdiction or *to* venue.

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

Old 16(b)(8)	New 16(b)(3)(B)(vi)
. . . The scheduling order . . . may include . . . any other matters appropriate *in* the circumstances *of* 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 *of* a report *of* an examiner or the taking *of* a deposition *of* the examiner *in accordance with* the provisions *of* any other rule.	**(6)** . . . This subdivision does not preclude obtaining an examiner's report or deposing an examiner *under* other rules.

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

Old 54(d)(2)(C)	**New 54(d)(2)(C)**
(C) . . . The court may determine issues *of* liability *for* fees *before* receiving submissions bearing *on* issues *of* evaluation *of* services *for* which liability is imposed *by* the court. . . .	**(C)** *Proceedings.* . . . The court may decide issues *of* liability *for* fees *before* receiving submissions *on* the value *of* 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); now 5(c)(1)(A):** *the pleadings of the defendants/defendants' pleadings.*
- **13(i):** *the claims of the opposing party/the opposing party's claims.*
- **24(b); now 24(b)(3):** *the rights of the original parties/the original parties' rights.*
- **26(a)(2)(B); now 26(a)(2)(B)(iv):** *the qualifications of the witness/the witness's qualifications.*

- **26(b)(3); now 26(b)(3)(C):** *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); now 26(b)(1):** *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); now 69(a)(1):** *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.[8] One writer calls them the "compost of our language."[9] 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.*

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[8] For a long list, see Kimble, *Plain Words*, in *Lifting the Fog of Legalese*, *supra* n. 2, at 170–71.

[9] C. Edward Good, *Mightier Than the Sword* 73 (Blue Jeans Press 1989).

- **16(c); now 16(c)(2):** *take appropriate action with respect to/take appropriate action on.*

- **16(c), last sentence; now 16(c)(1):** *in order to consider possible settlement/to consider possible settlement.*

- **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)(1), last paragraph; now 26(a)(1)(C):** *in the circumstances of the action/in this action.*

- **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); now 30(c)(1):** *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; now 64(a):** *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); now 14(a)(1):** *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); now 30(a)(2)(B):** *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 return to our general 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 12(a)(2)	New 12(a)(1)(B)
(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer . . . . [43 words]	**(B)** A party must serve an answer to a counterclaim or crossclaim within 20 days after being served with the pleading that states the counterclaim or crossclaim. [26 words]

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. . . . [49 words]	**(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 . . . . [24 words]

Old 35(b)(2)	New 35(b)(4)
(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition. [64 words]	**(4)** ***Waiver of Privilege.*** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have — in that action or any other action involving the same controversy — concerning testimony about all examinations of the same condition. [41 words]

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. [111 words]	**(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. [78 words]

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. [62 words]	**(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. [38 words]

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 . . . . [67 words]	**(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. . . . [38 words]

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. [23 words]	**(2)** ***Consolidating the Hearing with the Trial on the Merits.*** . . . But the court must preserve any party's right to a jury trial. [12 words]

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. [57 words]	**(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. [38 words]

How about that? Imagine the effect on generations of law students who, for three years, have had to labor through drafting bogs like those on the left, thinking they must be perfectly good and normal.

I'll end my drafting lessons with this fifth part. But there is still so much — so many improvements on the old civil rules — that I haven't been able to cover.

I haven't, for instance, covered the rampant inconsistencies in the old rules. Among them:

- *for cause shown*; *upon cause shown*; *for good cause*; *for good cause shown.*
- *on motion*; *on application.*
- *court orders*; *court directs.*
- *make orders*; *issue orders.*
- *counsel*; *attorney.*
- *costs, including reasonable attorney's fees*; *reasonable costs and attorney's fees*; *reasonable expenses, including attorney's fees*; *reasonable expenses, including a reasonable attorney's fee.*
- *no genuine issue as to any material fact*; *without substantial controversy*; *actually and in good faith controverted*; *not in controversy.*

Nor have I been able to catalogue the many syntactic ambiguities in the old rules. I offered several examples in my February 2005 *Guiding Principles* memo,[10] and there's one at the end of guideline 2, but those are only a start.

Some of the improvements in the new rules — especially the structural changes — can't be easily illustrated. But if you'd like to see the striking difference made by reorganizing jumbled provisions, compare the old rules with new 6(c), 8(b), 16(b), 23.1, 26(e), 30(b), 37(d), 44(a)(2), 45(c)(2)(B), 52(a), and 70. More specifically, let me offer just one example of the greater coherence that comes from grouping related items — here, general or routine authority (versus sanctioning authority).

Old 53(c) & (d)	**New 53(c)**
(c) Master's Authority. Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may by order impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty. **(d) Evidentiary Hearings.** Unless the appointing order expressly directs otherwise, a master conducting an eviden-	**(c) Master's Authority.** **(1)** ***In General.*** Unless the appointing order directs otherwise, a master may: (A) regulate all proceedings; (B) take all appropriate measures to perform the assigned duties fairly and efficiently; and (C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence. **(2)** ***Sanctions.*** The master may by order impose on a party any noncontempt sanction pro-

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[10] *See* Kimble, *supra* n. 1, at xvi–xvii.

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Old 53(c) & (d)	New 53(c)
tiary hearing may exercise the power of the appointing court to compel, take, and record evidence.	vided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

For more of the same, compare the old rules with new 30(c) & (d) (grouping the materials on objections in (c) only); new 37(b)(2)(A) & (B) (breaking out the illogical grouping in old (b)(2)(C) & (E)); new 37(c)(1) (grouping the sanctions into a list); and new 52(a) (grouping the last sentence of old (b) with the other material on findings and conclusions). The organizational changes — even without changing any of the main numbers — have significantly transformed the rules.

Finally, this article has barely touched on formatting. I'll do that in guideline 14 below, but the new rules are designed to make it much easier to see how everything fits together. They are broken down into more levels — hence the greater use of headings and subheadings; they use progressive, or cascading, indents to show subparts and sub-subparts; they use hanging indents so that all the lines in a subpart or a list are indented the same as the first word in the first line (see new 53(c) above); they use many more vertical lists; and the lists are always at the end of the sentence, never in the middle.

Unfortunately, in most of the academic pamphlets containing the new rules, the publishers have largely mangled the intended formatting. That's quite a disappointment after the concerted effort we made. But I have contacted the major publishers, urging them to adjust the formatting and offering to help them help their readers.

In any event, here are six more guidelines.

14. Use informative headings and subheadings.

Good headings and subheadings are vital navigational aids for the reader. The old rules had 359 of them; the new rules have 757. Just to illustrate their value:

Old 8(b)	New 8(b)
(b) Defenses; Form of Denials.	**(b) Defenses; Admissions and Denials.** **(1)** ***In General.*** **(2)** ***Denials — Responding to the Substance.*** **(3)** ***General and Specific Denials.*** **(4)** ***Denying Part of an Allegation.*** **(5)** ***Lacking Knowledge or Information.*** **(6)** ***Effect of Failing to Deny.***

Old 16(b)	New 16(b)
(b) Scheduling and Planning.	**(b) Scheduling.** **(1)** ***Scheduling Order.*** **(2)** ***Time to Issue.*** **(3)** ***Contents of the Order.*** **(A)** *Required Contents.* **(B)** *Permitted Contents.* **(4)** ***Modifying a Schedule.***

Old 26(a)	**New 26(a)** [amendment pending, 2009]
(a) Required Disclosures; Methods to Discover Additional Matter. **(1) Initial Disclosures.** **(2) Disclosure of Expert Testimony.** **(3) Pretrial Disclosures.** **(4) Form of Disclosures.** **(5) [Now deleted]**	**(a) Required Disclosures.** **(1)** ***Initial Disclosure.*** **(A)** *In General.* **(B)** *Proceedings Exempt from Initial Disclosure.* **(C)** *Time for Initial Disclosures — In General.* **(D)** *Time for Initial Disclosures — For Parties Served or Joined Later.* **(E)** *Basis for Initial Disclosure; Unacceptable Excuses.* **(2)** ***Disclosure of Expert Testimony.*** **(A)** *In General.* **(B)** *Written Report.* **(C)** *Time to Disclose Expert Testimony.* **(D)** *Supplementing the Disclosure.* **(3)** ***Pretrial Disclosures.*** **(A)** *In General.* **(B)** *Time for Pretrial Disclosures; Objections.* **(4)** ***Form of Disclosures.***

Old 31(a)	**New 31(a)**
(a) Serving Questions; Notice.	**(a) When a Deposition May Be Taken.** **(1) *Without Leave.*** **(2) *With Leave.*** **(3) *Service; Required Notice.*** **(4) *Questions Directed to an Organization.*** **(5) *Questions from Other Parties.***

Old 68 [about offer of judgment]	**New 68**
	(a) Making an Offer; Judgment on an Accepted Offer. **(b) Unaccepted Offer.** **(c) Offer After Liability Is Determined.** **(d) Paying Costs After an Unaccepted Offer.**

15. Be wary of intensifiers.

Intensifiers are expressions that may seem to add emphasis but that, as a matter of good drafting, should be minimized for any of several reasons: they state the obvious, their import is so hard to grasp that it has no practical value, or they create negative implications for other rules.

- **4(d)(2)(A):** *The notice . . . shall be in writing and shall be addressed directly to the defendant.* How would you address a written notice indirectly?

- **6(a):** *any period of time prescribed . . . by any applicable statute.* Are we concerned about an inapplicable statute?

- **6(b)** (and several other rules): *the court . . . may . . . in its discretion. May* means "has the discretion to"; *in its discretion* is a pure intensifier.

- **12(b):** *may at the option of the pleader*. Same theory.

- **15(d):** *If the court deems it advisable . . . , it shall so order*. Presumably, the court would not choose to do something inadvisable.

- **41(d):** *the court may make such order for the payment of costs . . . as it may deem proper*. Same theory.

- **53(c) & (d):** *Unless the appointing order expressly directs otherwise*. An order cannot implicitly direct; it means only what it says. And using *expressly* suggests that this order is somehow different from all the other orders in the rules.

- **56(e):** *affidavits . . . shall show affirmatively*. Likewise, this rule is not meant to be different from all the other rules that require a party or a document to merely show.

- **61:** *inconsistent with substantial justice. Substantial* seems to add nothing—or nothing appreciable.

- **70:** *The court may . . . in proper cases*. The same theory as in 15(d) above.

16. Hunt down nouners.

Nouners is a term I coined to describe abstract nouns that take the place of strong verbs.[11] The tendency to turn strong verbs into

[11] Joseph Kimble, *Hunting Down Nouners*, 86 Mich. B.J. 44 (Feb. 2007) (available at http://www.michbar.org/journal/pdf/pdf4article1124.pdf).

abstract nouns accompanied by weak verbs (*is*, *do*, *make*, *have*) is one of the worst faults in modern writing. And the old civil rules are full of nouners.

- **4(l); now 4(l)(3):** *failure to make proof of service/failure to prove service.*

- **6(b); now 6(b)(1)(A):** *before the expiration of the period originally prescribed/before the original time . . . expires.*

- **7.1(b)(2):** *upon any change in the information that the statement requires/if any required information changes.*

- **11(c)(2)(A); now 11(c)(5)(A):** *for a violation of subdivision (b)(2)/for violating Rule 11(b)(2).*

- **13(a); now 13(a)(2)(B):** *the opposing party brought suit upon the claim/the opposing party sued on its claim.*

- **15(c)(3); now 15(c)(1)(C)(i):** *maintaining a defense on the merits/defending on the merits.*

- **26(g)(3):** *if . . . a certification is made in violation of the rule/if a certification violates this rule.*

- **30(b)(2); now 30(b)(3)(A):** *any party may arrange for a transcription to be made . . . of a deposition/any party may arrange to transcribe a deposition.*

- **30(e); now 30(e)(1):** *before completion of the deposition/before the deposition is completed.*

- **30(f)(2); now 30(f)(3):** *upon payment of reasonable charges therefor, the officer shall/when paid reasonable charges, the officer must.*

- **41(b):** *for failure of the plaintiff to prosecute/if the plaintiff fails to prosecute.*

- **45(a)(1)(C); now 45(a)(1)(A)(iii):** *give testimony/testify.*
- **47(a):** *conduct the examination of prospective jurors/examine prospective jurors.*
- **49(b); now 49(b)(1):** *make answers to the interrogatories/answer the questions.*

There are lots more where those came from.

17. Simplify inflated diction.

There's no need to belabor this point — and I've had my say on it anyway.[12] Just ask yourself whether the plain words on the right below in any way cheapen, dumb down, debase, distort, oversimplify, or dull the new rules. Remember Walt Whitman's line: "The art of art, the glory of expression . . . is simplicity. Nothing is better than simplicity . . . ."[13]

- **4** (throughout): *effect service/make service* or *serve.*
- **4(d)(2), last sentence; now 4(d)(2)(A):** *subsequently incurred/later incurred.*
- **4(d)(2)(B); now 4(d)(1)(G):** *dispatched/sent.*
- **8(b); now 8(b)(4):** *remainder/rest.*
- **9(a); now 9(a)(2):** *specific negative averment/specific denial.*
- **12(e):** *interposing a responsive pleading/filing a responsive pleading.*

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[12] *See* Kimble, *Plain Words*, in *Lifting the Fog of Legalese*, *supra* n. 2, at 163–69.

[13] Preface to *Leaves of Grass*.

- **15(b); now 15(b)(1):** *will be subserved/will aid.*
- **30(b)(4); now 30(b)(5)(C):** *concerning/about.*
- **30(e); now 30(e)(1)(B):** *reciting such changes/listing the changes.*
- **30(e); now 30(e)(2):** *append/attach.*
- **32(a)(3), last sentence; now 32(a)(5)(B):** *demonstrates/shows.*
- **32(d)(3)(C):** *propounding* [the question]*/submitting the question.*
- **32(d)(4):** *ascertained/known.*
- **36(b):** *will be subserved/would promote.*
- **37(a)(2)(B); now 37(a)(3)(C):** *the proponent of the question/the party asking a question.*
- **37(b), last sentence; now 37(b)(2)(C):** *in lieu of/instead of.*
- **37(c)(2):** *thereafter/later.*
- **41(a)(2):** *deems/considers.*
- **49(b); now 49(b)(2):** *harmonious/consistent.*
- **62(d):** *procuring/obtaining.*
- **65(b); now 65(b)(2):** *be indorsed with the date/state the date.*

18. Banish *shall*.

The most telling indictment of most lawyers' drafting incompetence is that they fall apart over the most important words in the drafting lexicon — the words of authority, the words that are supposed to create a requirement or confer permission. The prime

offender, as it has been for centuries, is *shall*. The word has been so corrupted by misuse that it has become inherently ambiguous. It should mean "must," but too often it's used to mean or interpreted to mean "should" or "may" — not to mention those instances in which, because no requirement *or* permission is intended, the simple present tense of the verb is called for. No wonder, then, that *Words and Phrases* online cites more than 1,600 appellate cases interpreting *shall*.[14]

But a remarkable thing happened in the mid-1990s: the Standing Committee on Rules of Practice and Procedure, which reviews and must approve the work of all five advisory committees on federal rules (civil, criminal, appellate, evidence, and bankruptcy), decided to abolish *shall*. The decision was given effect in 4.2 of Bryan Garner's *Guidelines for Drafting and Editing Court Rules*, published by the Administrative Office of the United States Courts in 1996. That pamphlet has guided all four restylings of the federal rules (in order, appellate, criminal, civil, and now evidence), as well as all new and amended rules.

If the wisdom of deep-sixing *shall* needs any testament, you'll find it in statistics from the old and new civil rules. Some of the numbers are rounded off because the counting can be tricky and because my purpose is not to be exact but just to give a good idea of *shall*'s sloppiness.

The old rules contained almost 500 *shall*s, not including those in rules that were deleted (such as Rule 86(b)–(d)). Of the 500, some 375 were converted to *must* in the new rules; 25% of the time, then, *shall* was not converted to its presumed meaning of "must."

There are five categories to consider.

First, *shall* was changed to a present-tense verb about 50 times. The conversion was easier in some cases than in others.

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[14] Search in Westlaw, Words–Phrases database, using the search "shall" (Oct. 5, 2009) (yielding 1,632 results).

Old 2	**New 2**
There *shall be* one form of action to be known as "civil action".	There *is* one form of action — the civil action.

Old 27(a)(3)	**New 27(a)(3)**
(3) Order and Examination. . . . For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending *shall be deemed to refer to* the court in which the petition for such deposition was filed.	**(3)** ***Order and Examination.*** . . . A reference in these rules to the court where an action is pending *means*, for purposes of this rule, the court where the petition for the deposition was filed.

Old 57	**New 57**
The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., § 2201, *shall be in accordance with* these rules	These rules *govern* the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. . . .

Second, *shall* was twice changed to *will*. Example:

Old 27(a)(3)	New 27(a)(3)
(3) Order and Examination. . . . [T]he court . . . shall make an order . . . specifying . . . whether the depositions *shall* be taken upon oral examination or written interrogatories. . . .	**(3)** ***Order and Examination.*** . . . [T]he court must issue an order that . . . states whether the depositions *will* be taken orally or by written interrogatories. . . .

Third, *shall* was changed to *should* 14 times. Example:

Old 54(a)	New 54(a)
(a) Definition; Form. . . . A judgment *shall* not contain a recital of pleadings	**(a) Definition; Form.** . . . A judgment *should* not include recitals of pleadings . . . .

The fourth category is more complicated. *Shall* was converted to some kind of *may*-formulation about 25 times. But they fall into different patterns, different subcategories — four, in fact.

Pattern 1: a requirement was turned into mere permission. This happened five times that I found. Example:

Old 78	New 78
[E]ach district court *shall establish* regular times and places . . . at which motions requiring notice and hearing may be heard and disposed of	**(a) Providing a Regular Schedule for Oral Hearings**. A court *may establish* regular times and places for oral hearings on motions.

Pattern 2: the old rule used a clumsy *shall*-phrase to grant permission. This happened just once.

Old 71A(h)	**New 71.1(h)(2)(C)**
(h) Trial. . . . Each party *shall have the right to* object for valid cause to the appointment of any person as a commissioner or alternate.	(C) *Examining the Prospective Commissioners.* . . . The parties . . . for good cause *may* object to a prospective commissioner or alternate.

Pattern 3: the old rule used *shall . . . only* instead of *may . . . only* to create conditional permission. This happened at least four times. Example:

Old 16(e)	**New 16(e)**
(e) Pretrial Orders. . . . The order following a final pretrial conference *shall* be modified *only* to prevent manifest injustice.	**(e) Final Pretrial Conference and Orders.** . . . The court *may* modify the order issued after a final pretrial conference *only* to prevent manifest injustice.

Pattern 4: the old rule used *shall not* or *no* _____ *shall* to create a prohibition, usually a qualified prohibition. Note that a qualified prohibition is, in effect, conditional permission. What you can't do in certain circumstances you presumably can do if the circumstances don't exist. This pattern occurred more than 15 times. Examples:

Old 23.1	**New 23.1(c)**
. . . The [derivative] action *shall not* be dismissed or compromised *without* the approval of the court	**(c)** ***Settlement, Dismissal, and Compromise.*** A derivative action *may* be settled, voluntarily dismissed, or compromised *only* with the court's approval. . . .

Old 17(a)	**New 17(a)(3)**
(a) Real Party in Interest. . . . *No* action *shall* be dismissed on the ground that it is not prosecuted in the name of the real party in interest *until* a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest	**(3)** ***Joinder of the Real Party in Interest.*** The court *may not* dismiss an action for failure to prosecute in the name of the real party in interest *until*, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. . . .

Old 65(a)(1)	**New 65(a)(1)**
(1) Notice. *No* preliminary injunction *shall* be issued *without* notice to the adverse party.	**(1)** ***Notice.*** The court *may* issue a preliminary injunction *only* on notice to the adverse party.

Of course, *shall* should never be used to grant permission; that calls for *may*. For conditional permission, *may . . . only* is usually the logical choice. To deny permission, the drafter may either create a prohibition with *must not* or use *may not*; they typically come out to the same thing. Just be careful that *may not* can't plausibly be read as "might not."

Returning to our five main categories, we come to our fifth and last one: almost 35 times, a rule was tightened and transformed in a way that eliminated *shall* altogether. Examples:

Old 30(b)(5)	**New 30(b)(2)**
(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 *shall* apply to the request.	**(2)** ***Producing Documents.*** . . . The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

Old 79(a)	**New 79(a)(3)**
(a) Civil Docket. . . . These [docket] entries *shall* be brief but shall show the nature of each paper filed	**(3)** ***Contents of Entries; Jury Trial Demanded.*** Each [docket] entry must briefly show the nature of the paper filed . . . .

Here again are the overall totals for *shall*s that were not converted to *must* in the civil rules: 50 present-tense verbs, 2 *will*s, 14 *should*s, 25 *may*-formulations, and 35 disappearances through tightening.

Now, after all that, an incredible postscript. When the restyled rules took effect on December 1, 2007, they gloriously contained not a single *shall*. But that will probably change on December 1, 2010. One *shall* will be reintroduced.

Before restyling, the all-important rule on summary judgment, Rule 56(c), said that the judgment *shall be rendered . . . if . . . there is no genuine issue as to any material fact . . . .* The restyled rule changed the *shall* to *should*. After the restyling, the Advisory

Committee decided to amend the substance of Rule 56, and a battle ensued over whether the original *shall* meant "must" or "should."[15] And because the Advisory Committee could not decide on the meaning, they reinstated *shall* — while at the same time acknowledging that it is "inherently ambiguous."[16]

What a classic lesson in why *shall* should never appear in a legal document. It *is* inherently ambiguous, and ambiguity (not to be confused with vagueness) is the worst sin in legal drafting.[17]

19. Above all, avoid hardcore legalese.

We come at last to the kind of talk and writing that has brought endless ridicule on our profession — and rightly so.[18] There is no excuse for it. Thus, the new rules have done away with *pursuant to*. They have done away with *provided that* (provisos). They have done away with 500 — no, 499 — *shall*s. They don't use *such* when it means "a" or "the." They don't use *hereof* or *therefor* or *wherein*. In fact, the new rules have banished all the *here*-, *there*-, and *where*-words, with one painful exception. Rules 59(a)(1)(A) & (B) refer to "any reason for which a new trial [or rehearing] has heretofore been granted . . . in federal court." Can you guess why the Advisory Committee left these *heretofore*s? Because, here again, they could not decide whether it meant "up until 1937," when the rules were

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[15] *See* Mark R. Kravitz, *Report of Advisory Committee on Civil Rules* 215–33 (May 8, 2009) (available at http://www.uscourts.gov/rules/Agenda%20Books/Standing/ST2009-06.pdf) (summarizing the divided comments from the public).

[16] *Id*. at 111.

[17] *See* Kimble, *How to Mangle Court Rules and Jury Instructions*, in *Lifting the Fog of Legalese*, *supra* n. 2, at 105, 119–21 (distinguishing between vagueness and ambiguity).

[18] *See* Kimble, *Lifting the Fog of Legalese*, *supra* n. 2, at app. 1 (quoting centuries of criticism).

originally drafted, or "up until now," when a judge is applying the rules. And if that isn't another perfect example of the pseudo-precision of legalese, I don't know what is.

A few final examples from the old and new rules:

Old 4(l)	New 4(l)(1)
(l) Proof of Service. If service is not waived, the person effecting service shall make proof *thereof* to the court. If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit *thereof*. . . .	**(l) Proving Service.** **(1)** ***Affidavit Required.*** Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.

Old 12(g)	New 12(g)(1)
(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions *herein* provided for and then available to the party. . . .	**(g) Joining Motions.** **(1)** ***Right to Join.*** A motion under this rule may be joined with any other motion allowed by this rule.

Old 37(b)(2)	New 37(b)(2)
(2) Sanctions by Court in Which Action Is Pending. . . . [T]he court in which the action is pending may make *such* orders in regard to the failure [to obey certain orders] as are just, and among others the following: . . .	**(2)** ***Sanctions in the District Where the Action Is Pending.*** **(A)** *For Not Obeying a Discovery Order.* . . . [T]he court where the action is pending may issue further just orders. They may include the following: . . .

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Old 37(b)(2)	New 37(b)(2)
(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, *such* orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce *such* person for examination. In lieu of any of the *foregoing* orders or in addition *thereto*, the court shall	**(B)** *For Not Producing a Person for Examination*. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)–(vi), unless the disobedient party shows that it cannot produce the other person. **(C)** *Payment of Expenses*. Instead of or in addition to the orders above, the court must . . . .

Old 49(a)	New 49(a)(2)
(a) Special Verdicts. . . . The court shall give to the jury *such* explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. . . .	**(2)** ***Instructions.*** The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

Old 52(a)	**New 52(a)(1)**
(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law *thereon*, and judgment shall be entered *pursuant to* Rule 58	**(a) Findings and Conclusions.** **(1)** ***In General.*** In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. . . . Judgment must be entered under Rule 58.

Let's end where we began. The restyled civil rules are a dramatic improvement on the old rules. The new rules will be far easier for law students to learn and for lawyers and judges to use. If any inadvertent substantive changes were made, they can be fixed. And people who resisted this conversion probably did not appreciate how poorly drafted the old rules were, how they perpetuated the serious deficiencies that have plagued us for so long, how we should not be forever stuck in time, and how the new rules mark a long stride forward for legal writing and professional competence — not to mention the practice of law.