

Still Another Example from the Proposed New Federal Rules of Evidence

By Joseph Kimble

In August, after a three-year project, the completely “restyled” Federal Rules of Evidence were published for comment. They are available at www.uscourts.gov/rules. The project’s goal was to redraft the rules in a modern, plain-language style—making them clearer, more consistent, and more readable—without changing their substantive meaning. An even broader goal has been to make the drafting style consistent throughout all the federal rules. Remember that three other sets of rules—Appellate, Criminal, and Civil Procedure—have already been redrafted. In fact, the work began more than 15 years ago.

Now, this is the third column I’ve written on the restyled evidence rules. In August and September, I provided a little background on the restyling process, addressed the occasional complaint that the effort is not worth the trouble, and considered why our profession has made such a hash of legal drafting for so long. Then I set out a current evidence rule, noted the drafting deficiencies, and offered the restyled rule for comparison. I’ll do it again this month—and again ask you to judge the results.

This month’s example is shorter, so I won’t be able to identify as many deficiencies. I noted 33 in August’s example and 31 in September’s; this month, only 18, although they include a serious ambiguity. See whether you can spot it.



“Plain Language” is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee. Contact Prof. Kimble at kimblej@cooley.edu. For a list of previous articles, go to www.michbar.org/generalinfo/plainenglish/columns.cfm. 2009 is a notable year for the column.

Current Rule 806

Attacking and Supporting Credibility of Declarant¹

When a hearsay statement, or a statement defined² in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant³ may be attacked, and if attacked may be supported,⁴ by any evidence which⁵ would be admissible for those purposes if declarant⁶ had testified as a witness. Evidence of a statement or conduct by the declarant⁷ at any time, inconsistent⁸ with the declarant’s hearsay statement,⁹ is¹⁰ not subject to any requirement¹¹ that the declarant may¹² have been afforded¹³ an opportunity to deny or explain.¹⁴ If the party against whom a hearsay statement¹⁵ has been admitted¹⁶ calls the declarant as a witness, the party is entitled to¹⁷ examine the declarant on the statement as if under¹⁸ cross-examination.

Drafting Deficiencies

1. An unnecessary prepositional phrase. Make it *the Declarant’s Credibility*.
2. There’s no definition in Rule 801(d)(2)(C), (D), or (E).
3. Again, make it *the declarant’s credibility*.
4. A lot of words for *and then supported*.
5. Use *that*, not *which*, when the relative pronoun introduces a so-called restrictive clause, one that doesn’t simply provide supplemental information but rather is essential to convey the basic meaning. Typically, *which* is correct only if you can insert a comma before it, setting off the clause.
6. Why is it *the declarant* everywhere else? This may seem like a small point, but consistency is the first rule of drafting, and the drafter who makes small missteps is headed for larger ones.
7. Another unnecessary prepositional phrase. Make it *the declarant’s statement or conduct*.
8. *At any time*, *inconsistent* is rather clumsy, and the punctuation doesn’t save it. *Inconsistent* belongs with *statement or conduct*. We know that *inconsistent* means inconsistent with the statement admitted in evidence, so the *with*-phrase after *inconsistent* can go. And the paired commas after *time* and *statement* aren’t standard; they were probably inserted as a makeshift fix for the disruption caused by *at any time*.
9. A critical ambiguity crops up here. The previous sentence talks about two statements: (1) a hearsay statement and (2) a statement described in Rule 801(d)(2). But the 801(d)(2) statement is, by the very terms of 801(d), “not hearsay.” So when this second sentence of 806 refers to a “hearsay statement,” it seems to be referring only to the first “statement” in the previous sentence—a hearsay statement—and not an 801(d)(2) statement. Was that limitation intended?

10. Another thing that makes this sentence unwieldy: the verb, *is*, is too far from the subject, *evidence*.
11. Why is this nonrequirement stated so indirectly? Why not *the court may admit evidence of . . . even if . . .*? The restyled rule does it a little differently, but along the same lines.
12. Strike *may*. This whole verb phrase needs reworking.
13. How about *given*?
14. Deny or explain what? Readers are brought up short. Apparently, the drafters didn't want to use the pronoun *it*, sensing that the antecedent would be unclear, or to add *the inconsistent statement or conduct*. Trapped with no way out.
15. The ambiguity deepens. By again using *hearsay statement*, the sentence seems to invoke only the first "statement" in the first sentence. See note 9.
16. No need to use the present perfect tense. Make it *was admitted*.
17. Replace *is entitled to* with *may*.
18. Wouldn't *on* be more idiomatic—*as if on cross-examination*?

Note some of the more obvious improvements in the restyled rule below. It uses dashes, rather than commas, for the longish midsentence alternative in the first sentence. It smooths out the second sentence and states the meaning more directly. (The parallel structure of *regardless of when . . . or whether* helps considerably.) It's a little tighter overall. And most importantly, it fixes the ambiguity described in notes 9 and 15. The sentences are longer on average than I'd like (33 words), but the other restyled rules do better.

Restyled Rule 806

Attacking and Supporting the Declarant's Credibility

When a hearsay statement—or a statement described in Rule 801(d)(2)(C), (D), or (E)—has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Last Month's Contest

Last month, I invited you to revise the sentence below from current Rule 608(b). I suggested that you start with a strong verb—*waive*—and then find a concrete subject.

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

The winner is Kenneth Treece, a staff attorney with Miller, Canfield, Paddock & Stone, who submitted this:

A witness does not waive the privilege against self-incrimination by testifying to matters limited to character for truthfulness.

Compare that version with the restyled version:

A witness does not waive the privilege against self-incrimination by testifying about a matter that relates only to a character for truthfulness.

A New Contest

I'll send a copy of *Lifting the Fog of Legalese: Essays on Plain Language* to the first person who sends me (kimblej@cooley.edu) an "A" revision of current Rule 610, set out below. The deadline is October 26.

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

Big hint: try using *to attack or support* in your version. And I hope you'll go after the unnecessary prepositional phrases and multiword prepositions. Can you believe how many there are in a single 34-word sentence?



Joseph Kimble has taught legal writing for 25 years at Thomas M. Cooley Law School. He is the author of Lifting the Fog of Legalese: Essays on Plain Language, the editor in chief of The Scribes Journal of Legal Writing, the past president of the international organization Clarity, a founding director of the Center for Plain Language, and the drafting consultant on all federal court rules. He led the work of redrafting the Federal Rules of Civil Procedure and the Federal Rules of Evidence.