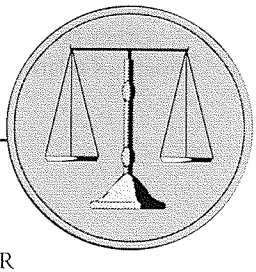
# GUIDELINES FOR DRAFTING AND EDITING COURT RULES



BY BRYAN A. GARNER

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In January 1996, the Standing Committee on Federal Rules of Practice and Procedure authorized the Secretary of the Rules Committee to publish for comment a revised draft of the Federal Rules of Appellate Procedure. To help explain the drafting and editing choices reflected in the Appellate Rules, the Standing Committee also authorized the Secretary to publish *Guidelines for Drafting and Editing Court Rules.*

As consultant to the Rules Committees, Bryan A. Garner skillfully constructed these Guidelines to help all those working on the Appellate Rules, as well as those engaged in other drafting and editing projects.

Publication of the Guidelines promotes openness of the rulemaking process to public scrutiny and participation. It is my hope that people who comment on the proposed Appellate Rules — either favorably or unfavorably — will also take time to comment on any of the Guidelines relating to their views.

–ALICEMARIE H. STOTLER, CHAIR
Committee on Rules of Practice and Procedure
Judicial Conference of the United States

# Preface by Robert E. Keeton

## 1.

Federal Rules of Practice and Procedure ought to be user-friendly. This is the prime characteristic of good rules of procedure. They should be easy to read and understand — as clear in content and meaning as it is possible to make them, and as crisp and readable as clarity permits.

Of almost equal importance is another characteristic. Rules of procedure should be that and no more. They should be substantively neutral. In other words, we should draft procedural rules that neither favor nor disfavor any particular legal interest. To that end, we should do our best to foster institutional arrangements for resolving disputes about substantive issues in the appropriate forums for substantive lawmaking, and to keep substantive issues out of procedural rulemaking. Rules of practice and procedure are used in resolving individual cases and, at their best, are as fair, impartial, and substantively neutral as we can make them.

## 2.

Even superbly drafted rules are at risk of becoming less consistent, clear, and readable as they are amended. And the need for amendments is inevitable. The only effective remedy for the risks incident to amendment is twofold — eternal vigilance and a commitment to excellence in style as well as content. Fortunately, good style and good content reinforce each other.

## 3.

The first of the Federal Rules were the Rules of Civil Procedure, drafted in the 1930s. By the year 1990, we had five sets of Federal Rules — Appellate, Bankruptcy, Civil, Criminal, and Evidence — and five Rules Committees of the Judicial Conference of the United States, one each for Appellate, Bankruptcy, Civil, and Criminal (not for Evidence), and a coordinating committee commonly called the Judicial Conference Standing Committee on Rules. Each committee had its own set of consultants and drafters and its own set of stylistic preferences. The predictable result was five sets of

rules that sometimes said almost the same thing, but in different ways and without being clear about whether they meant the same thing. In addition, substantial differences existed both within and among the different sets of rules, without any explanation of why lawyers and judges should have to adjust to so many different ways of behaving in different court proceedings.

Lawyers and judges necessarily have spent — or wasted — precious time thinking, conversing, and writing about ambiguities in the rules. Occasionally a lawyer falls into a procedural trap and a client suffers an injustice that trial and appellate courts, giving due respect to the rules as construed, are unwilling or unable to redress.

## 4.

When I came to chair the Standing Committee in the fall of 1990, I was tempted by the thought that some of the enormous resources of time and talent being committed to making and interpreting rules might better be redirected. Some resources might be directed toward a long-term aim of combining all the separate sets of rules into one set, integrated in both style and content: the Federal Rules of Practice and Procedure.

Substantive integration would have the benefits of (1) reducing length by stating only once a rule of general application; (2) reducing complexity, even where repetition is warranted, by using precisely the same phrasing when expressing the same idea; and (3) improving clarity by explaining why different phrasing is used to address analogous problems in the different settings — for example, in bankruptcy, civil, and criminal rules. But substantive integration may prove to be an elusive ideal.

Stylistic integration, however, is a different matter: even with different sets of rules, there is much that rulemakers can do to sharpen style. Having a consistent drafting style in all the rules carries major benefits. Foremost among these, of course, is that clear expression promotes clear thought. Variation, elegant or not, impairs clarity: it is seldom commendable where clarity of meaning is paramount.

## 5.

Good writing of any kind is labor-intensive. Good legal writing is even harder work because content is paramount. One simply cannot arrive at good content without mastery of the subject matter.

Good drafting of a contract, statute, or procedural rule is at least as labor-intensive as good drafting of a judicial opinion, a lawyer's opinion letter, or an article because contracts, statutes, and rules serve as prescriptions for ongoing conduct and relationships. In this context, there must be a heightened sensitivity to such matters as striking an appropriate balance between rigor and flexibility, choosing between hard-edged rules and guidelines for discretion, and determining who among foreseeable actors is to be allowed discretion.

Undertaking to draft all federal rules so that they excel in style as well as content is, to say the least, daunting. The predictable reaction to the proposal to do so runs along these lines: "The federal rulemaking process, even though vested finally in Congress and the Supreme Court, depends in the first instance on volunteer committee members and overloaded staff — including reporters and Administrative Office support staff. Trying to make all federal rules consistent in style asks too much of both the volunteers and the staff." I fully agree that members and staff of the Judicial Conference Rules Committees are overloaded and underappreciated.

## 6.

Now that I am no longer a member of any of the Rules Committees, I feel free to add that, with two exceptions, I believe no other entities in our legal culture rival the Rules Committees for the impartial drafting of proposals for legislation or rules. The two exceptions are the American Law Institute and the National Conference of Commissioners on Uniform State Laws — both of which are committed to excellence in drafting.

With a view to the importance of style, in 1991 the Standing Committee on Rules of Practice and Procedure created a Style Subcommittee. Its charge was to review the drafting style of all amendments to federal rules. Because of the importance of this new undertaking, we needed a leader with a demonstrated sense of good writing style. Fortunately, Charles Alan Wright, a dedicated stylist whose writings rank with the best in legal literature, was then serving on the Standing Committee. He accepted the appointment to chair the Style Subcommittee. To serve as the original members of the Subcommittee, I invited Judge George C. Pratt, of the Second Circuit; Judge Alicemarie H. Stotler, of the United States District Court in Santa Ana, California, who now chairs the Standing Committee; and Joseph F. Spaniol, Jr., the former Clerk of the United States Supreme Court. I participated in the Subcommittee's work, ex officio, during 1991–93.

Not long after the Subcommittee began its work, we realized just how time-consuming — and arduous — the detailed work on the rules would be. We saw the need for a style consultant, and with the support of L. Ralph Mecham, Director of the Administrative Office of the United States Courts, we were able to engage Bryan A. Garner, whose books on legal writing the members of the Style Subcommittee were frequently consulting.

Initially, the Style Subcommittee worked on amendments only, but the value of the work was so readily apparent that the Style Subcommittee was asked to produce fully restyled drafts of two sets of rules: the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. The Style Subcommittee finished preliminary versions of the Civil Rules in 1992, and of the Appellate Rules in 1994.

In the course of those two major projects, however, the membership of the Style Subcommittee had changed. When Professor Wright asked to be relieved of this responsibility upon assuming the presidency of the American Law Institute in 1993,

Judge George C. Pratt became the new chair. And when, that same year, Judge Stotler began chairing the Standing Committee, she likewise resigned from the Style Subcommittee. To fill the two open positions, Judge Stotler appointed Judge James A. Parker, of the United States District Court in New Mexico, and Professor Geoffrey G. Hazard, Jr., of the University of Pennsylvania.

In the fall of 1995, Judge Pratt's term on the Standing Committee expired, and Judge Parker became chair of the Style Subcommittee. Meanwhile, Judge Stotler appointed Judge William R. Wilson, Jr., as a member.

Every member of the Style Subcommittee has served with extraordinary skill and energy.

An important part of the subcommittee's work is to call attention to ambiguities of substantive meaning. But the subcommittee does not make substantive recommendations because the Standing Committee and the five Rules Committees (a Committee on Evidence having been added) are responsible for substantive recommendations.

Despite some initial reservations among committee members about the scope of this undertaking regarding style, the several committees have cooperated generously. This team effort has already developed restyled drafts of Civil Rules and Appellate Rules. These drafts dramatically illustrate how readable and easily comprehensible court rules can be — if, that is, the drafters devote themselves to the clearest possible style.

7.

Out of this team effort has evolved, in addition to early model drafts, another product — the *Guidelines for Drafting and Editing Court Rules.* I am delighted and encouraged that this publication will now be available to everyone who has an interest in improving the quality of legal writing.

Improving and maintaining the style of Federal Rules of Practice and Procedure is a long-term project. The early drafts have already demonstrated, in my view, that benefits far outweigh costs. Also, I believe we can maintain a continuing enterprise whose primary resources are the time and energy of talented professional volunteers — members of the Rules Committees of the Judicial Conference of the United States. This is the group who, with painstaking care, will examine every proposal suggested to them by the Style Subcommittee and will then recommend to the Judicial Conference and the enacting authorities proposed Rules that excel in style and readability as well as fair and impartial content.

–Robert E. Keeton
U.S. District Judge
Boston, Massachusetts

# Introduction by George C. Pratt

When Judge Robert E. Keeton, then Chair of the Judicial Conference's Standing Committee on the Rules of Practice and Procedure, asked me to join Professor Charles A. Wright, Judge Alicemarie H. Stotler, and Joseph F. Spaniol, Jr., on a new Style Subcommittee, I expected the work to be a relatively mundane experience of scouting for inconsistencies, typographical errors, and occasional grammatical slipups in the existing rules of practice. Working with Professor Wright, however, was an opportunity I couldn't pass up. His treatise on federal courts had been my bible for many years on both the district and circuit courts, and I envied his clarity of expression and his simple, direct style. I knew I could learn a lot, and perhaps our work might be useful to the entire rules process.

## Developing the Guidelines

The Style Subcommittee began its work by reviewing a series of amendments that were being proposed by the four advisory committees. Very soon, however, we recognized a need for guiding principles and a more systematic process. With the aid of our consultant, Bryan A. Garner, we initially agreed on and outlined some basic goals, and then more specific guides for achieving those goals. Our goals, which should apply to all legal writing, were clarity, brevity, and readability.

For clarity, we sought to express each rule in terms and in a form that could most accurately express the idea behind the rule. This meant avoiding ambiguities and developing consistent modes of expression. Readability, we found, could be enhanced by using an outline format, applying it consistently, keeping sentences relatively short, and adhering to a series of conventions on how to treat exceptions, conditions, and qualifying phrases. Brevity is always a hallmark of good legal writing. While we consciously worked for it by eliminating all unnecessary words and searching for shorter, more accurate expressions, in many instances we found that our quest for clarity and readability had automatically given us brevity through shorter, more tightly written rules.

We reached a turning point when the subcommittee agreed to undertake a complete reworking of two set of rules — civil and appellate. We began with the civil rules. Our procedure was to have Bryan Garner first do a restyled version of an entire set of rules. Then the subcommittee would separately review his work, looking first for any inadvertent substantive changes but also making further suggestions on style. Next, we would put our collective thoughts into a final version, which the subcommittee, with an occasional additional edit, would approve for eventual submission to the Civil Advisory Committee.

Having successfully followed that process, we have now completed a restyled version of the appellate rules and substantial work on the civil rules. For various reasons, the appellate rules have moved more swiftly through the Advisory Committee, and in January 1996 the Standing Committee voted unanimously to publish those rules for comment by the bench and bar. As of early 1996, the appellate rules represent a bellwether for the desirability of revising sets of federal rules for clarity and consistency. Ultimately, a restyled set of rules is subject to approval by the Judicial Conference and the Supreme Court, and to review by Congress.

When the Style Subcommittee first went to work, we realized after a few conferences that the matters we were discussing, debating, and agreeing upon represented valuable conventions for our work, and that they needed to be preserved and collected in a coherent, organized manual. We asked Bryan Garner to undertake that task, using his notes from the hundreds of edits and decisions that the subcommittee had already made. Bryan has now formalized his work into this manual, *Guidelines for Drafting and Editing Court Rules.*

## Using the Guidelines

The subcommittee has found the Guidelines to be invaluable. They provide a handy reference to the conventions we have previously addressed and agreed on. When Professor Wright and Judge Stotler left us for higher callings, their replacements, Judge James A. Parker and Professor Geoffrey G. Hazard, Jr., quickly picked up the nature and direction of our work by referring to the Guidelines, which permit us to operate from a common base of understanding.

Bryan Garner has always worked closely with the reporters of the respective advisory committees. Using the Guidelines, the reporters now draft their proposed amendments and new rules following what has rapidly become the accepted style for federal rules.

The potential value of these Guidelines is not restricted to federal rulemaking. They could fruitfully be applied to the practice codes and even the substantive statutes of the various states. Even local ordinances would benefit from their use. When clarity and readability of statutes and rules increase, the need for litigation over meaning decreases and voluntary compliance increases.

Outside the rulemaking area, many types of legal drafting — contracts, opinion letters, and even judicial opinions — might be improved if legal writers followed these Guidelines. And it goes without saying that these Guidelines could provide a core for teaching legal writing and legal drafting — areas in which law-school graduates are notoriously deficient.

## Lessons Learned from the Style Process

Working on the Style Subcommittee has underscored a number of lessons for many of us. Three in particular stand out in my mind. First, legal drafting is not easy; it is a demanding, exacting discipline that requires careful and constant attention. Second, if the result of any drafting effort is to be successful, style must be an integral part of the process. Third, paying attention to writing style requires us to clarify our own thinking. Clear style demands clear thinking, which is a prerequisite to any effective legal writing.

The Style Subcommittee is grateful to Bryan Garner for his inspiration and guidance through our labors on restyling the rules. His *Guidelines for Drafting and Editing Court Rules* will not only help us as we continue working through demanding, exacting revisions of all the rules; they also will provide continuing benefit to future members of the rules committees and ultimately, through the clarity and readability that these Guidelines can produce, to the legal profession as a whole.

–George C. Pratt
Retired Judge of the U.S. Court
of Appeals for the Second Circuit and Former
Chair of the Style Subcommittee

# Author's Note

The reader might consider these Guidelines a stylesheet for rule-drafters. In a sense, they are just that.

But calling them a "stylesheet" might minimize some of the innovative ideas that the Style Subcommittee, in its work on federal rules, has elaborated. For example, the principles on placing conditions and exceptions (2.4(A), 2.4(B)) are entirely fresh. To my knowledge, they have no precedent in the literature on legal drafting. The same might be said of the principles on using the double-dash construction (2.4(C)(2)); on placing adverbs in relation to verb phrases (2.4(C)(3)); and on enumerating only at the end of the sentence, not in midsentence (3.3(B)). Several principles of good drafting, then, make their debut in these pages.

Many other principles are fairly standard, and their value here lies primarily in illustrating how to carry out those principles in the context of rule-drafting.

The Guidelines contain only a "blackletter" statement of principles, followed by illustrations. I have omitted any detailed explanation of their rationale, which must await publication of *The Elements of Legal Drafting,* forthcoming from Oxford University Press. In any event, there is much to be said for a cleanly stated set of principles uncluttered by pro-and-con arguments and extended rationales.

–Bryan A. Garner
Dallas, Texas

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# Basic Principles

## 1.1 Be clear.

A. Identify instances of vagueness and ambiguity and sharpen the wording.

B. If you need substantive directions, consider alternative wordings and set them out as possibilities for the decision-maker.

## 1.2 Make the draft readable.

A. Prefer short sentences. The average sentence length in good drafting is no more than 30 words.

B. Use the simplest possible words to express the idea clearly. Avoid legal jargon.

C. Use a word or phrase consistently to express a single idea. Do not vary your terminology for the sake of "elegant variation."

## 1.3 Be as brief as clarity and readability permit.

## 1.4 Organize the rule to serve clarity, readability, and brevity.

A. Organize the draft logically, with headings and subheadings, so that the reader has bearings.

B. Use structure to enhance readability and reinforce meaning.

# 2 General Conventions

**2.1 Number.** Draft in the singular number unless the sense is undeniably plural.

| Before | After |
|---|---|
| When *issues* not raised by the pleadings *are* tried by express or implied consent of the parties, *they* shall be treated in all respects as if *they* had been raised in the pleadings. Fed. R. Civ. P. 15(b). | When *an issue* not raised by the pleadings *is* tried by the parties' express or implied consent, *it* must be treated in all respects as if raised in the pleadings. |
| *Papers* filed by an inmate confined in an institution are timely filed if . . . . Fed. R. Civ. P. 25 (a). | A *paper* filed by an inmate confined in an institution is timely filed if . . . . *(Rule as published for comment in Oct. 1993.)* |

**2.2 Tense.** Generally, draft in the present tense, not in the past or future.

| Before | After |
|---|---|
| No additional fees *will be required* for filing an amended notice. Fed. R. App. P. 4(a)(4). | No additional fee *is necessary* for filing an amended notice. |
| The pendency of such a suggestion whether or not included in a petition for rehearing *shall not affect* the finality of the judgment of the court of appeals or stay the issuance of the mandate. Fed. R. App. P. 35(c). | A pending suggestion for a rehearing en banc *does not affect* the finality of the appellate judgment or stay the issuance of the mandate. |

**2.3 Voice.** Prefer the active over the passive voice.

A. When feasible, rephrase a passive-voice verb by putting it in active voice.

| Before | After |
|---|---|
| . . . costs *must be taxed* by the clerk against the losing party . . . . Fed. R. Civ. P. 76(c) (intermediate draft). | . . . the clerk *must tax* costs against the losing party . . . . |
| A stay in a criminal case *shall be had* in accordance with the provisions of Rule 38 of the Federal Rules of Criminal Procedure. Fed. R. App. P. 8(c). | Rule 38 of the Federal Rules of Criminal Procedure *governs* a stay in a criminal case. *(Rule as published for comment in April 1996.)* |

B. When feasible, rephrase a passive-voice verb by using an adjective.

| Before | After |
|---|---|
| . . . the parties may . . . file a joint statement that shows how the issues *presented by the appeal* arose . . . . Fed. R. Civ. P. 75(b)(1) (intermediate draft). | . . . the parties may . . . file a joint statement that shows how the *appellate* issues arose . . . . |

C. Use passive voice primarily in two circumstances: (1) when naming the actor would unduly narrow the meaning or impede the flow of the sentence; and (2) when changing to active voice would undesirably shift the emphasis from one subject to another.

Examples

When the constitutionality of a statute affecting the public interest *is questioned* in any action, the court must. . . .
Fed. R. Civ. P. 24(c)(2) (revised for style).

A party who *has been permitted* to proceed in a district-court action in forma pauperis, or who *was considered* financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization . . . .
Fed. R. App. P. 24(a)(2) (revised for style).

**2.4 Syntax.** Use a syntactic arrangement that enhances clarity, logic, and readability.

A. *Conditions.* Place conditions where they can be read most easily, preferably using the word *if.* Use *when* (not *where)* if the sentence needs an *if* to introduce another unrelated clause or if the condition is something that may occur with regularity.

| Before | After |
|---|---|
| In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case *on application of a party or on its own motion.* | *On its own motion or a party's motion,* a court of appeals may — to expedite its decision or for other good cause — suspend the provisions of any of these rules in a particular case, except as otherwise provided in Rule 26(b). |

Fed. R. App. P. 2.

1. If a condition is just a few words, and seeing it first would help the reader avoid a miscue, then put it at the beginning of the sentence.

2. If a condition is long and the main clause is short, put the main clause first and move directly into the condition.

| Before | After |
|---|---|
| *When without the parties' consent, either a prisoner petition challenging the conditions of confinement or a pretrial matter dispositive of a party's claim or defense is referred to a magistrate judge,* the magistrate judge must promptly conduct the required proceedings. | A magistrate judge must promptly conduct required proceedings *when assigned, without the parties' consent, to hear either a prisoner petition challenging the conditions of confinement or a pretrial matter dispositive of a party's claim or defense.* |

Fed. R. Civ. P. 72(b) (intermediate draft)

3. If a condition and the main clause are both long, foreshadow the condition and put it at the end of the sentence. If there are several conditions, a phrase such as *in the following circumstances* will serve to foreshadow the conditions at the end.

### Before

(b) *Interlocutory Sales.* If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, or other person or organization having the warrant, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.

Supp. R. Adm. & Mar. Claims E(9)(b).

### After

(2) *Interlocutory Sales.*

(A) *In any of the following circumstances,* the court may, on application of a party or some other warrant-holder, order the property or any part of it sold:

(1) if the attached or arrested property is perishable, or liable to deterioration, decay, or injury by being detained in custody pend-ing the action;

(2) if the expense of keeping the property is excessive or disproportionate; or

(3) if there is an unreasonable delay in securing the release of property.

(B) The proceeds, or as much of them as will satisfy the judgment, may be ordered brought into court to await the disposition. Alternatively, the court may, upon a party's motion, order the property delivered to the party, who must give security under these rules.

### Before

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it.

Fed. R. Civ. P. 58.

### After

(a) Subject to Rule 54(b), *the following rules* govern entry of judgment:

(1) When the jury returns a general verdict or the court decides that a party may recover only a sum certain or costs, or that all relief should be denied, the clerk shall, unless the court orders otherwise, promptly prepare, sign, and enter the judgment without awaiting the court's direction.

(2) When the court grants other relief or the jury returns a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, which the clerk shall enter.

4. If a condition states a definitional test to be met — not a standard of applicability — put it at the end of the sentence.

### Example

A paper required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the paper within the time fixed for filing, except that a brief is timely filed *if it is mailed to the clerk by first-class mail, postage prepaid, and bears a postmark showing that the document was mailed on or before the last day for filing.*

Fed. R. App. P. 25(a) (as revised and published for comment in October 1993).

5. Unearth hidden conditions to make them explicit, using the word *if.*

| Before | After |
|---|---|
| A party must make advance arrangements with the clerk for the transportation and receipt of *exhibits of unusual bulk or weight.* Fed. R. App. P. 6(b)(2)(iii). | *If the exhibits are unusually bulky or heavy,* the party must arrange with the clerk in advance for their transportation and receipt. |
| The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial *on application of any party,* unless the court orders that the hearing and determination thereof be deferred until the trial. Fed. R. Civ. P. 12(d). | *If a party so requests,* the defenses listed in Rule 12(b)(1)-(7) — whether made in a pleading or by motion — and any motion for judgment on the pleadings under Rule 12(c)(1) must be heard and determined before trial unless the court orders that the hearing and determination be deferred until trial. |

B. *Exceptions.* Place exceptions where they can be read most easily.

1. If an exception needs to be generally alluded to before the sentence can be read without a miscue, allude to it or state it briefly at the beginning of the sentence.

| Before | After |
|---|---|
| (a) 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 the jurisdiction of the court. . . .* Fed. R. Civ. P. 9(a). | (a) Capacity.<br>(1) *Except when necessary to show that the court has jurisdiction,* a pleading need not aver:<br>(A) a party's capacity to sue or be sued;<br>(B) a party's authority to sue or be sued in a representative capacity; or<br>(C) the legal existence of a named party.<br><br>(2) . . . . |

2. If an exception cannot be stated briefly, put it at the end.

### Example

(a) **Compulsory Counterclaim.** A pleading must state as a counterclaim any claim that, at the time of its service, the pleader has against an opposing party, if the claim arises from the transaction or occurrence that is the subject matter of the opposing party's claim and does not require, for adjudication, the presence of a third party over whom the court cannot acquire jurisdiction. *But the pleader need not state the claim:*

*(1) if, when the action began, the claim was the subject of another pending action; or*

*(2) if the opposing party sued upon its claim by attachment or other process by which the court did not acquire personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.*

Fed. R. Civ. P. 13(a) (revised for style).

C. *Interruptive Phrases*

1. Avoid an interruptive phrase between the subject and the verb by moving it to the beginning or end of the sentence.

| Before | After |
|---|---|
| The court, *on motion of the Government made within one year after the imposition of the sentence,* may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense . . . . Fed. R. Crim. P. 35(b). | *If the Government so moves within a year after sentence is imposed,* the court may reduce a sentence to reflect a defendant's later substantial help in investigating or prosecuting another person who has committed an offense . . . . |
| The court *at every stage of the proceeding* must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. Fed. R. Civ. P. 61. | *At every stage of the proceeding,* the court must disregard all errors or defects that do not affect a substantial right of any party. |

2. For an interruptive phrase that must appear in midsentence — because of what it modifies — use a double-dash construction instead of commas.

| Before | After |
|---|---|
| These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. | These rules govern procedure in the United States district courts in all civil actions — whether arising at law, in equity, or in admiralty — except as stated in Rule 81. |

Fed. R. Civ. P. 1.

3. Put an adverbial interruptive phrase in the midst of the verb phrase, not before it; if a modal verb such as *must* or *may* appears in the verb phrase, put the adverbial phrase immediately after that modal verb.

| Before | After |
|---|---|
| If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule *may allow* the action to be continued by or against the party's representative. | If a party becomes incompetent, the district court *may*, on motion served according to (a)(3), *allow* the action to be continued by or against the party's representative. |

Fed. R. Civ. P. 25(b).

D. *Modifiers*

1. To avoid ambiguity, place a modifier next to the word or phrase it modifies.

| Before | After |
|---|---|
| The notice shall be published in such newspaper or newspapers as the court may direct *once a week for four successive weeks* prior to the date fixed for the filing of claims. | Before the date fixed for the filing of claims, the notice must be published *once a week for four successive weeks* in a court-designated newspaper or newspapers. |

Supp. R. Adm. & Mar. Claims F(4).

2. If moving a misplaced modifier will not cure the ambiguity, rephrase the sentence.

| Before | After |
|---|---|
| In an action begun by seizure of property, *in which no person need be or is named as a defendant,* any service . . . . Fed. R. Civ. P. 5(a). | If an action is begun by seizing property *and* no person is named as a defendant, service . . . . |

E. *Prepositional Phrases*

1. Minimize *of*-phrases. They tend to encumber sentences.

| Before | After |
|---|---|
| The content *of* the notice *of* appeal, the manner *of* its service, and the effect *of* the filing *of* the notice and *of* its service shall be as prescribed in Rule 3. Fed. R. App. P. 13(c) — (six *ofs*). | Rule 3 prescribes what a notice *of* appeal must contain, how it should be served, the effect *of* its filing, and the effect *of* its service. (Three *ofs*.) |
| If a notice *of* appeal is mistakenly filed in the court *of* appeals, the clerk *of* the court *of* appeals shall note thereon the date on which it was received and transmit it to the clerk *of* the district court and it shall be deemed filed in the district court on the date so noted. Fed. R. App. P. 4(a)(1) — (five *ofs*). | If a notice *of* appeal is mistakenly filed in the court *of* appeals, the circuit clerk must note on the notice the date when it was received and send it to the district clerk. It is then considered filed in the district court on the date so noted. (Two *ofs*.) |

2. When feasible, change prepositional phrases to adjectives.

| Before | After |
|---|---|
| . . . violation of a statute *of the United States* . . . . Supp. R. Adm. & Mar. Claims E(9)(a). | . . . violation of a *federal* statute . . . . |
| Unless provided otherwise by statute or order *of the court,* . . . . Fed. R. Civ. P. 54(d)(2)(B). | Unless a statute or *court order* provides otherwise, . . . . |

### Before

The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to *the action in the district court.*

Fed. R. App. P. 5.1(a).

### After

The petition must be filed with the circuit clerk within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to *the district-court action.*

3. When feasible, change prepositional phrases to possessives.

### Before

*Failure of an appellant* to take any step other than the timely filing of a notice of appeal does not affect the *validity of the appeal* . . . .

Fed. R. App. P. 3(a).

### After

*An appellant's failure* to take any step other than the timely filing of a notice of appeal does not affect the *appeal's validity* . . . .

F. *Antecedents*

1. Ensure that an antecedent precedes a referent, not vice versa; use a noun twice rather than having a referent precede its antecedent.

2. Ensure that an antecedent agrees in number with its referent.

### Before

[T]he court may, on motion, order any person having possession or control of such *property or its proceeds* to show cause why *it* should not be delivered into the custody of the marshal or other person or organization having a warrant for the arrest of the property, or paid into court to abide the judgment . . . .

Supp. R. Adm. & Mar. Claims C(5).

### After

[T]he court may, on motion, order any person possessing or controlling the property or its proceeds to show cause:

(A) if the property has not been sold, why a marshal or other person or organization having an arrest warrant should not take the property into custody; or

(B) if the property has been sold or consists of U.S. currency, why the proceeds should not be paid into court pending judgment.

G. *Sentence Length.* Strive for an average sentence length of fewer than 25 words — 30 words at most.

1. Break long compound sentences into two or more sentences.

| Before | After |
| --- | --- |
| Sentence shall be imposed without unnecessary delay, but the court may, when there is a factor important to the sentencing determination that is not then capable of being resolved, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved.<br>Fed. R. Crim. P. 23(a)(1), before 1994 amendments. | Sentence *must* be imposed without unnecessary delay. But if some factor important to sentencing cannot be resolved promptly, the court may postpone sentencing for a reasonable time until that factor becomes resolvable. |
| A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.<br>Fed. R. Civ. P. 23(e). | A class action must not be dismissed or compromised without court approval. Notice of a proposed dismissal or compromise must be given to all class members as the court directs. |

2. For purposes of computing sentence length, count a tabulated or set-off subpart as a separate sentence.

## H. *Punctuation*

1. End each subpart (except the last) with a semicolon. After the next-to-last subpart, put a conjunction — either *and* or *or*.

| Before | After |
|---|---|
| Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant | Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: |
| (A) who could be subjected to the jurisdiction in the state in which the district is located, or | (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located; |
| (B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or | (B) who is a party under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place where the summons issues; |
| (C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or | (C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335; or |
| (D) when authorized by a statute of the United States. | (D) when authorized by a federal statute. |
| Fed. R. Civ. P. 4(k)(1). | |

2. Place a comma after an introductory phrase or subordinate clause.

| Before | After |
|---|---|
| When a transfer is ordered the clerk shall transmit . . . . | When a transfer is ordered, the clerk must send . . . . |
| Fed. R. Crim. P. 21(c). | |

3. In an enumerated series, use the serial comma before the conjunction.

| Before | After |
|---|---|
| . . . books, documents or tangible things . . . .<br>. . . possession, custody or control . . . .<br>Fed. R. Civ. P. 45(a)(1). | . . . books, documents, or tangible things . . . .<br>. . . possession, custody, or control . . . . |

4. Prefer long dashes to parentheses.

| Before | After |
|---|---|
| All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if . . . .<br>Fed. R. Civ. P. 20(a). | Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — may be joined in the same action as defendants if . . . . |

5. Eliminate hyphens separating a prefix from a root word: *nonparty* and *pretrial,* not *non-party* and *pre-trial.*

6. Hyphenate phrasal adjectives.

| Before | After |
|---|---|
| civil process clerk | civil-process clerk |
| district court order | district-court order |
| trial preparation material | trial-preparation material |

I. End sentences emphatically — with a word or phrase that most naturally receives stress.

| Before | After |
|---|---|
| Each party adverse to the National Labor Relations Board in an enforcement or a review proceeding shall proceed first on briefing and at oral argument unless the court orders otherwise.<br>Fed. R. App. P. 15.1. | Unless the court orders otherwise, a party adverse to the National Labor Relations Board in an enforcement or a review proceeding must, in briefing and at oral argument, proceed first. |

# Structure 3

## 3.1 Organization of Rules

A. Organize rules logically and clearly so that referring to them is relatively easy. Do this by adhering as much as possible to these organizational principles:

- Put the broadly applicable before the narrowly applicable.
- Put the general before the specific.
- Put more important items before less important.
- Put rules before exceptions.
- Put contemplated events in chronological order.

B. Group similar items together, preferably introducing them with parallel headings and subheadings.

### Before

**(9) Disposition of Property; Sales.**

(a) *Actions for Forfeitures.* In any action in rem to enforce a forfeiture for violation of a statute of the United States the property shall be disposed of as provided by statute.

(b) *Interlocutory Sales.* If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, or other person or organization having the warrant, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.

(c) *Sales, Proceeds.* All sales of property shall be made by the marshal or a deputy marshal, or by other person or organization having the warrant, or by any other person assigned by the court where the marshal or other person or organization having the warrant is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

Supp. R. Adm. & Mar. Claims E(9) (in full).

### After

**(9) Disposition of Property; Sales.**

[Reorganize section as follows:]

(a) Action for Forfeiture.

(b) Sale.

(1) *Generally.*

(2) *Interlocutory Sale.*

(c) Proceeds.

(d) Alternative Interlocutory Remedies.

## 3.2 Structural Divisions

A. The parts of a rule are as follows:

Fed. R. Crim. P. 6(e)(3)(A)(ii)

Rule 6

(e) [subdivision]

(3) [paragraph]

(A) [subparagraph]

(ii) [item]

B. At any level, use a subpart only if there is at least one corresponding subpart.

C. Preface a subdivision with a brief descriptive heading. Headings are optional with paragraphs, subparagraphs, and items. Add headings when they will help orient readers.

## Before

**Rule 23.1. Derivative Actions by Shareholders**

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court desires.

Fed. R. Civ. P. 23.1 (in full).

## After

**Rule 23.1. Derivative Actions by Shareholders**

(a) **Prerequisites.** One or more shareholders of a corporation or members of an unincorporated association may, on behalf of the corporation or association, bring a derivative action to assert and enforce a right that the corporation or association has failed to enforce. A derivative action may be maintained only if the plaintiff fairly and adequately represents the interests of similarly situated shareholders or members.

(b) **Pleading Requirements.** The complaint must be verified and must alege:

(1) that the plaintiff was a share holder or member at the time of the transaction complained of, or that the plaitiff's share or membership devolvedd on it after that time by operation of law.

(2) that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and

(3) the particular efforts, if any, made by the plaintiff to obtain the desired action from the directors or similar authority and, if necessary, from the shareholders or members, and the reasons for not obtaining the action or not making the effort.

(c) **Dismissal and Compromise.** A derivative action must not be dismissed or compromised without court approval. Notice of a proposed dismissal or compromise must be given to shareholders or members as the court directs.

D. If redrafting results in new subparts, ensure that the numbering of oft-cited rules — such as Rule 12(b)(6) of the Civil Rules — does not change.

E. As part of the official format, use so-called "hanging indents," which reveal structure cleanly.

**Before**

**(c) Relation Back of Amendments.** An amendment of a pleading relates back to the date of the original pleading when:
(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . .

Fed. R. Civ. P. 15(c).

**After**

**(c) Relation Back of Amendments.**
(1) An amendment of a pleading relates back to the date of the original pleading when:
(A) the applicable statute of limitations permits relation back; or
(B) the amendment asserts a claim or defense that arose from the conduct, transaction, or occurrence set forth . . . .

## 3.3 Enumerations

A. Set off enumerated items into subparts when feasible. Create new paragraphs, subparagraphs, and items in the order in which they naturally occur.

**Before**

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written question; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admissions.

Fed. R. Civ. P. 26(a)(5).

**After**

Parties may obtain discovery by one or more of the following methods:
(A) depositions upon oral examination or written question;
(B) interrogatories;
(C) production of documents or things or permission to enter upon land or other property, under Rule 34 or 45(a)(1)(C), for inspection and other purposes;
(D) physical or mental examinations; and
(E) requests for admissions.

### Before

The front covers of the briefs and of appendices, if separately printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 12(a)); (3) the nature of the proceeding in the court (e.g., Appeal; Petition for Review) and the name of the court, agency, or board below; (4) the title of the document (e.g., Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.

Fed. R. App. P. 32(a).

### After

The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal; Petition for Review) and the name of the court, agency, or board below;

(E) the title of the document, identifying the party or parties for whom the document is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the document is filed.

*(Rule as published for comment in April 1996.)*

## B. Enumerate at the end — not at the beginning — of a sentence.

### Before

(a) The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

Fed. R. App. P. 10.

### After

(a) The following items constitute the record on appeal:

(1) the original papers and exhibits filed in the district court;

(2) the transcript of proceedings, if any; and

(3) a certified copy of the docket entries prepared by the district clerk.

C. When introducing an enumeration, consider using a phrase such as *the following* to foreshadow what will follow.

### Before

Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties.

Fed. R. Civ. P. 5(a).

### After

Except as these rules provide otherwise, *the following papers* must be served on every party:

(A) an order required by its terms to be served;

(B) a pleading filed after the original complaint, unless the court orders otherwise because of numerous defendants;

(C) a discovery paper required to be served upon a party, unless the court orders otherwise;

(D) a written motion, other than one that may be heard ex parte; and

(E) a written notice, appearance, demand, offer of judgment, designation of record on appeal, or similar paper.

D. When stating more than one requirement — and the requirements can be stated in parallel form — put them in parallel enumerations.

### Before

A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies.

Fed. R. Civ. P. 8(b).

### After

In pleading, a party must:

(A) state in short and plain terms the party's defenses to each claim asserted; and

(B) admit or deny the averments on which the adverse party relies.

E. Avoid unnumbered "dangling" sections — that is, flush-left text that, following an enumeration, has no numbered designation.

### Before

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

*A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.*

Fed. R. Civ. P. 45(a)(1).

### After

(1) (A) A subpoena must:

(i) state the court in whose name it is issued;

(ii) state the title of the action, the name of the court in which it is pending, and its civil-action number;

(iii) command the person to whom it is directed to attend and testify; or to produce and permit inspection and copying of designated books, documents, or tangible things in that person's possession, custody, or control; or to permit inspection of premises at a specified time and place; and

(iv) set forth the text of Rule 45(c) and (d).

(B) A command to produce evidence or to permit inspection may be included in a subpoena commanding appearance at a trial, hearing, or deposition, or may be issued by a separate subpoena.

F. Use bullets to ease the reading of a list when no citation to any individual item is likely. "Dangling" text is unobjectionable after a list of bulleted items.

### Before

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Fed R. Civ. P. 8(c)

### After

In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- discharge in bankruptcy;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

If a party has mistakenly designated a defense as a counterclaim, or a counterclaim as a defense, the court must — if justice requires — treat the pleading as if the party had used the correct description.

# Words and Phrases 4

## 4.1 Verbose Phrasing

A. Omit every superfluous word.

| Before | After |
|---|---|
| *Subdivisions (a) through (c)* of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to *the provisions of* Rules 26 through 37. Fed. R. Civ. P. 11(d). | This rule does not apply to disclosures and discovery requests, responses, objections, and motions that are subject to Rules 26 through 37. |
| Each court of appeals *by action* of a majority of *the circuit* judges in regular active service may . . . . Fed. R. App. P. 47. | Each court of appeals acting by a majority of its judges in regular active service may . . . . *(Rule as published for comment in Oct. 1993.)* |
| . . . a judgment for a sum of money . . . . Fed. R. Civ. P. 67. | . . . a money judgment . . . . |
| . . . a judgment for the payment of money . . . . Fed. R. Civ. P. 69. | . . . a money judgment . . . . |
| The forms *contained* in the Appendix *of Forms are sufficient* under these rules and *are intended to* indicate the simplicity and brevity *of statement* which the rules contemplate. Fed. R. Civ. P. 84(a). | The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate. *(Rule as published for comment in Oct. 1993.)* |
| When the owner complies with *the requirements of* Rule F(1), . . . . Supp. R. Adm. & Mar. Claims F(2) *(intermediate draft).* | When the owner complies with Rule F(1), . . . . |

B. Uncover so-called "buried verbs" — i.e., abstract nouns usually ending in the suffixes *-tion, -sion, -ment, -ence, -ance, -ity* — and make them into verbs. Doing so has several advantages:

- it saves words by helping eliminate prepositional phrases;
- it increases readability by forcing the writer to be explicit about implied actors; and
- it makes sentences more vivid by substituting action verbs in place of stagnant *be*-verbs.

| Before | After |
|---|---|
| *Application* for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on all parties to the action in the trial court. Fed. R. App. P. 21(a). | *A party applying* for a writ of mandamus or of prohibition must file a petition with the circuit clerk, with proof of service on all parties to the district-court action. |
| Upon *receipt of* the record, the clerk . . . . Fed. R. App. P. 6(b)(2)(iv). | Upon *receiving* the record, the clerk . . . . |
| If without substantial justification a certification *is made in violation of* this rule . . . . Fed. R. Civ. P. 26(g)(2). | If a certification *violates* this rule without substantial justification . . . . |
| The complaint shall contain a short and plain *statement* of . . . . Fed. R. Civ. P. 71A(c)(2). | The complaint must briefly and plainly *state* . . . . |

C. Collapse clauses into phrases when possible. For example, instead of *case to be tried without a jury,* use *nonjury trial* or *nonjury case.*

## 4.2 Words of Authority*

A. Use words of authority in accordance with the following glossary:

| | | |
|---|---|---|
| *must* | = | is required to |
| *must not* | = | is required not to |
| *may* | = | has discretion to<br>is permitted to<br>has a right to |
| *is entitled to* | = | has a right to |
| *will* | = | (expresses a future contingency) |
| *should* | = | (denotes a directory provision) |

B. Replace *shall* with *must*, *may*, or some other, more appropriate term. [For an alternative, see (C).]

| Before | After |
|---|---|
| The clerk *shall*, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.<br>Fed. R. App. P. 36. | On the date judgment is entered, the clerk *must* mail to all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered. |
| No response *shall* be filed unless the court *shall* so order.<br>Fed. R. App. P. 35(b). | No response *may* be filed unless the court orders it. |

C. In the alternative to (B), use *shall* exclusively to mean "has a duty to." Avoid it when it does not impose a duty on the subject of the clause. [Note: Either the convention in (B) or this convention (C) should appear consistently in one set of revisions: the two should not be mixed.]

*For the rationale underlying these conventions, see BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 939-42 (2d ed. 1995).

D. Avoid roundabout wordings to create a duty.

| Before | After |
|---|---|
| A party who has made a disclosure under Rule 26(a) or responded to a request for discovery *is under a duty to* supplement or correct . . . . Fed. R. Civ. P. 26(e) (intermediate draft). | A party who has made a disclosure under Rule 26(a) or responded to a request for discovery *must* supplement or correct . . . . |

E. Change *may not* to *must not* or *cannot.*

| Before | After |
|---|---|
| (A) Monetary sanctions *may not* be awarded against a represented party for a violation of subdivision (b)(2).<br>(B) Monetary sanctions *may not* be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned. Fed. R. App. P. 11(c)(2). | The court *must not* impose monetary sanctions:<br>(A) against a represented party for violating Rule 11(b)(2); or<br>(B) on its own initiative, unless it issued the show-cause order before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned. |
| In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ *may not* proceed unless a district or a circuit judge issues a certificate of probable cause. Fed. R. App. P. 22(b). | If the detention complained of in a habeas corpus proceeding arises from process issued by a state court, the applicant *cannot* take an appeal unless a district or circuit judge issues a certificate of probable cause. *(Rule as published for comment in April 1996.)* |

## 4.3 Relative Pronouns

A. Use *that,* not *which*, as a restrictive relative pronoun.

| Before | After |
|---|---|
| Any such motion *which* is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Fed. R. App. P. 4(a)(5). | Any such motion *that* is filed before the prescribed time expires may be ex parte unless the court requires otherwise. |

| Before | After |
|---|---|
| A pleading *which* sets forth a claim for relief . . . shall contain . . . . Fed. R. Civ. P. 8(a). | A pleading *that* includes a claim for relief . . . must contain . . . . |
| The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement *which* the rules contemplate. Fed. R. Civ. P. 84. | The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity *that* these rules contemplate. |

B. Use *which* as a nonrestrictive relative pronoun. The word should almost always follow a comma.

Example

A judge or other person designated by the court may preside over the conference, *which* may be conducted in person or by telephone.
Fed. R. App. P. 33 (revised for style).

C. To avoid the problem of the so-called "remote relative," place the relative pronoun *that* or *which* directly after the word it modifies.

| Before | After |
|---|---|
| [A] party shall, without awaiting a discovery request, provide to other parties . . . a copy of . . . all documents, data compilations, and tangible things in the possession, custody, or control of the *party that* are relevant . . . . Fed. R. Civ. P. 26(a)(1)(B). | [A] party must, without awaiting a discovery request, provide to other parties . . . a copy of . . . all documents, data compilations, and tangible *things that* are in the possession, custody, or control of the party and are relevant . . . . |

## 4.4 Conjunctions

A. Use *but* instead of *and* to introduce a contrasting idea.

| Before | After |
|---|---|
| The remedy herein provided is in addition to *and* in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules. Fed. R. Civ. P. 22(2). | This remedy . . . supplements — *but* does not supersede or limit — the remedy provided by 28 U.S.C. §§ 1335, 1397, and 2361, and these rules govern actions under those statutes. |

B. For a contrast, use *But* to begin a sentence instead of *However.*

| Before | After |
|---|---|
| A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. *However,* in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. Fed. R. App. P. 40(a). | Unless the time is shortened or extended by order or local rule, a petition for rehearing may be filed within 14 days after entry of judgment. *But* in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time. *(Rule as published for comment in April 1996.)* |

**4.5 Ambiguity and Undesirable Vagueness.** Sharpen the wording when doing so more clearly achieves the same result.

| Before | After |
|---|---|
| Demurrers, pleas, and exceptions for insufficiency of a pleading *shall not be used.* Fed. R. Civ. P. 7(c). | Demurrers, pleas, and exceptions for insufficiency of a pleading *are abolished.* |
| The discovery plan must *indicate* the parties' views . . . . Fed. R. Civ. P. 26(f) (intermediate draft). | The discovery plan must *state* the parties' views . . . . |
| The plaintiff *shall* also give security for costs and, *if the plaintiff elects* to give security, for interest at the rate of 6 percent per annum from the date of the security. Supp. R. Adm. & Mar. Claims F(1). (This wording first makes the security compulsory [*shall*], but then suggests that the plaintiff may choose not to give it [*if the plaintiff elects*]. The rule can bear only one of these meanings.) | An owner *must* give security for costs and, when doing so, must include 6 percent annual interest from the date of the security. [Or:] An owner who elects to give security for costs must include 6 percent annual interest from the date of the security. |

## 4.6 Specific Words and Forms to Avoid

- *as to*: prefer *about, for, of, on, with, to, by,* or *in.* E.g., "If any difference arises *as to* [read *about*] whether the record truly discloses what occurred in the district court, . . . ." Fed. R. App. P. 10(e)./ "The parties are encouraged to agree *as to* [read *on*] the contents of the appendix." Fed. R. App. P. 30(b).

- *every*: prefer *a* or *an.*

- *except as*: use *unless* when referring to some future action by the court or by the parties. E.g., "*Except as* [read *Unless*] otherwise stipulated or directed by the court, . . . ." Fed. R. Civ. P. 26(a)(2)(B).
  *Except as* is appropriate when referring to something that an existing rule does. E.g., "*Except as* otherwise provided in Rule 26(b), . . . ."

- *except that*: use *but* or some other, more pointed term. E.g., "[T]he parties may by written stipulation . . . modify other procedures . . . , *except that* [read *but*] stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may . . . be made only with the approval of the court." Fed. R. Civ. P. 29.

- *except when*: use *unless.* E.g., "*Except when* [read *Unless*] a federal statute or these rules provide otherwise, . . . ."

- *except with* [+ *noun*]: use *unless* [+ *verb*]. E.g., "*Except with the written consent of the defendant,* [read *Unless the defendant consents in writing,*] the report *shall* [read *must*] not be submitted to the court . . . ." Fed. R. Crim. App. 32(b)(1).

- *following*: if it means "after," write *after.*

- *hereof, herein, thereof, therein,* and the like: use everyday words instead — usually a demonstrative pronoun such as *that, this, these,* or *those.*

- *if any*: try placing *any* before the noun. E.g., "[T]he complaint must further show . . . *what voyages or trips, if any,* [read *any voyages or trips*] *she* [read *the ship*] has made since the voyage or trip on which the claims sought to be limited arose." Supp. R. Adm. & Mar. Claims F(2).

- *in the event that*: use *if.*

- *limitation*: unless referring to a statute of limitations, use *limit.*

- *not later than*: use *no later than* or *within.* The phrasing "*within* 10 days after entry of judgment" is usually better than "*no later than* 10 days after entry of judgment," but the latter may be needed if you want to allow the act to be done before the entry of judgment as well as in the following 10 days.

- *partially*: use *partly.*

- *portion*: use *part.*

- ***prior to***: use *before.* E.g., "The court shall inform counsel of its proposed action upon the requests *prior to* [read *before*] their arguments to the jury." Fed. R. Crim. P. 30.

- ***provided that, provided however that***: reword to eliminate all provisos, usually with *if* (for conditions), or *except* or *but* (for exceptions).

- ***pursuant to***: use *under Rule 3*, not *pursuant to Rule 3*; *as authorized by* or *in accordance with* 26 U.S.C. § 1333, not *pursuant to* 26 U.S.C. § 1333. E.g., "Depositions may be taken in a foreign country . . . *pursuant to* [read *under*] any applicable treaty or convention . . . ." Fed. R. Civ. P. 28(b).

- ***said,*** **adj.**: use *the, this,* or *that.*

- ***subsequent to***: use *after.* E.g., "Immediately upon the entry of an order made on a written motion *subsequent to* [read *after*] arraignment[,] the clerk . . . ." Fed. R. Crim. P. 49(c).

- ***such,*** **adj.**: use *the, this, that,* or *those.* E.g., "Copies of the reporter's transcript and other papers . . . may be inserted in the appendix; *such* [read *those*] pages may be informally renumbered if necessary." Fed. R. App. P. 32(a).

- ***such*** [***noun*** + *s*] ***as***: use *any* [*noun*] *that* or *a* [*noun*] *that.* E.g., "At the close of the evidence or at *such earlier time during the trial as the court reasonably directs* [read *an earlier time during the trial, as the court reasonably directs*], any party may file written requests . . . ." Fed. R. Crim. P. 30./ "[T]he court may, on *such terms and conditions as are just* [read *on just terms*], order . . . ." Fed. R. Civ. P. 26(c)(2).

- ***therefor***: avoid altogether, often merely by deleting it, sometimes by writing *for it* or *for them.*

- ***there is, there are***: delete when possible. Use only if you are referring to the existence of something.

- ***transmit***: use *send* or *forward.* E.g., "The clerk *shall transmit* [read *must send*] the notice to the chief judge . . . ." Fed. R. Crim. P. 49(e).

- ***upon***: prefer *on.* Thus, *service on a defendant,* not *service upon a defendant.* But use *upon* when introducing a condition or event — e.g.: "*Upon* being served with a request, a party must . . . ."

- ***whenever***: use *when.* E.g., "*Whenever* [read *When*] a deposition is taken at the instance of the government, or *whenever* [read *when*] a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct . . . ." Fed. R. Crim. P. 15(b).

## 4.7 Other Stylistic Preferences

A. *Cross-References.* Omit the full reference to a rule number when not needed for clarity. For example, typically when referring to a provision on the same level within the same rule, subdivision, or paragraph, you might state:

(a) Except as provided otherwise in (b), a party must . . . .

But include an appropriate reference when needed for clarity — particularly if the other provision is on a different level or is not near the reference. Repeating the rule number — *subject to Rule 4(h)* — is shorter and better for courts' and practitioners' quotations than *subject to subdivision (h) of this rule.*

B. *Particular Words*

- *may . . . only*: this is an alternative to *must not . . . except* for a conditional prohibition. E.g., "A request *may* be served *only* after . . . ."

- *only*: place this word carefully before the word it modifies.

- *otherwise*: for emphasis, this adverb should usually end a clause — e.g., "Unless this court *directs otherwise* . . . ," not "Unless this court *otherwise directs.*" But sometimes, for the sake of parallel phrasing, this term should precede the verb — e.g.: "Unless *otherwise* directed by the court or stipulated by the parties . . . ."

- *will*: use for the future tense, not as an imperative.