How to Mangle Court Rules and Jury Instructions

Joseph Kimble

On any list of the most important kinds of writing done by the legal profession, you would have to include court rules and jury instructions. They are the beginning and end of the process for doing business in our courts. Lawyers have to live by them, and some defendants may have to die by them.[1] And yet, not surprisingly, they are often infected by the same attitudes and practices that have brought legal writing to grief for four centuries.[2]

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[1] *See, e.g.*, Weeks v. Angelone, 528 U.S. 225 (2000) (involving contextual ambiguity in death-penalty instructions: one half-sentence said jurors "may" impose death for an aggravating factor; the other half-sentence said they "shall" choose life imprisonment if the death penalty is not "justified," possibly suggesting that death is always justified by an aggravating factor); Buchanan v. Angelone, 522 U.S. 269 (1998) (the same as *Weeks*); California v. Brown, 479 U.S. 538 (1987) (involving syntactic ambiguity in death-penalty instructions: in the phrase "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," does *mere* modify *sympathy*?); Free v. Peters, 12 F.3d 700 (7th Cir. 1993) (involving possible juror confusion over the technical terms *aggravating factor* and *mitigating factor*, as demonstrated by an academic study of the instructions); Gacy v. Welborn, 994 F.2d 305 (7th Cir. 1993) (the same as *Free*); PETER M. TIERSMA, LEGAL LANGUAGE 235, 236 (1999) (noting at least ten capital cases in which jurors asked for clarification of *mitigating* or *aggravating*, and concluding that "there have probably been dozens of people who have been condemned to die by juries who poorly understood the legal principles that were supposed to guide their decision").

[2] *See* BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE 2 (2d ed. 2002) ("[W]e have a history of wretched writing, a history that reinforces itself every time we open the lawbooks."); DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 24-29 (1963) (concluding, in his classic study, that traditional legal language has four main characteristics: it's wordy, unclear, pompous, and dull); John M. Lindsey, *The Legal Writing Malady: Causes and Cures*, N.Y. L.J., Dec. 12, 1990, at 2 (asserting that lawbooks are "the largest body of poorly written literature ever created by the human race").

Jury instructions are notoriously incomprehensible to the public.[3] Court rules have not been empirically tested the way jury instructions have, but a glance at most of them will confirm their familiar murky style:

> Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination.[4]

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[3] *See, e.g.*, AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 45-46 (1982) (describing a study in which revising two different sets of jury instructions into plain language improved the level of comprehension from 51% and 65% to 80% on both sets); Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1072, 1076 (2001) (describing a study in which about half the jurors who had imposed death sentences mistakenly believed that the death penalty was required for an aggravating factor, that a mitigating factor had to be proved beyond a reasonable doubt, and that all jurors had to agree on the mitigating factor); Sherry Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 230 (1996) (describing a study in which revised instructions on mitigating factors led to substantially higher comprehension); Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 219 (1989) (describing a study of videotaped jury deliberations in which half of the jurors' references to the law were inaccurate); Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401, 429 (1990) (concluding that the authors' study "supports a growing body of literature suggesting that jury instructions are often lost on jurors, and can sometimes even backfire"); Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 550 (1992) ("Overall, jurors . . . responded correctly to questions of law less than half the time."); Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 86 (1998) (describing a broad study in which jurors were able to correctly answer 70% of the questions about civil and criminal instructions — a better result than in most studies).

[4] FED. R. CRIM. P. 5(c) (the old version, as it read before the restyling project on criminal rules that was completed in 2001 and approved by the Supreme Court in April 2002).

Is there any reason on Earth to write a sentence like that? Or like this?

> Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant release from the waiver.[5]

Now for the good news: things are slowly but steadily changing. The Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States deserves a standing ovation for its decision to rewrite federal rules. Its Advisory Committee on Rules of Appellate Procedure rewrote those rules, and the Supreme Court approved the new ones in 1998. More recently, the Advisory Committee on Criminal Rules completed a three-year effort to restyle those rules. (They were approved by the Supreme Court in April 2002, just after I finished this article.) No doubt the final products are not perfect, but they are much cleaner and clearer than the old versions of these federal rules. And the Rules of Civil Procedure are next in line for restyling.

As for jury instructions, a few states have taken the needed plunge. Delaware, Minnesota, and Michigan have developed plain-English instructions, and California's Judicial Council has created civil and criminal task forces to work on plainer sets for that state.[6] On the federal side, the District Judges Association of the Sixth

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[5] FED. R. CRIM. P. 12(f) (old version).

[6] SUPERIOR COURT OF DELAWARE, PATTERN JURY INSTRUCTIONS FOR CIVIL PRACTICE, *at* http://courts.state.de.us/superior/pattern_online.htm#contents (2000 ed.); COMMITTEE ON JURY INSTRUCTION GUIDES, MINNESOTA DISTRICT JUDGES ASSOCIATION, MINNESOTA JURY INSTRUCTION GUIDES: CIVIL (1999); STANDING COMMITTEE ON STANDARD CRIMINAL JURY INSTRUCTIONS, STATE BAR OF MICHIGAN, MICHIGAN CRIMINAL JURY INSTRUCTIONS (2d ed. 1989–1991); *see* Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1099-118 (2001) (describing the California work, especially that of the criminal task force).

Circuit has written jury instructions designed to "state the law in an understandable way."[7]

Important revisory projects like these involve huge amounts of time and effort — most of it volunteered by judges, lawyers, and law professors. The success of a project will depend on having the right leadership, the right blend of personalities, the right kinds of expertise, and the right operating procedures. Having served as a writing consultant on three projects (Sixth Circuit Criminal Jury Instructions, Michigan Criminal Jury Instructions, and Federal Criminal Rules), I can at least offer some thoughts on expertise and operating procedures. Here, then, are some surefire ways to go *wrong*.

1. Do not adopt a drafting guide or a style guide.

No lawyer would argue law without citing authority. No lawyer would say, "I think the rule is such-and-such because that's what I seem to remember from law school." But we are willing to do something quite like that — rely on half-remembered principles or on instinct — when it comes to writing.

No writer, let alone a committee, can be heedless of accepted guidelines and preferred usage. On countless matters, from formatting to handling conditions to using the serial comma, your committee needs to adopt a few reference sources. Otherwise, you are flying blind. True, even the experts may disagree on some matters, but the committee should not spend time discussing where to use hyphens or whether to write "a witness' testimony" or "a witness's testimony."

So what to use? For usage and style generally, the choice is easy: Bryan Garner's superb *Dictionary of Modern Legal Usage*. More specifically, for court rules I'd also adopt Garner's *Guidelines for*

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[7] COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, SIXTH CIRCUIT DISTRICT JUDGES ASSOCIATION vii (1991 ed.).

Drafting and Editing Court Rules, a handy booklet published by the Administrative Office of the United States Courts. Every committee member should have it. There is nothing comparable for jury instructions, but a good starting point is Appendix A to the Federal Judicial Center's *Pattern Criminal Jury Instructions*. Again, every committee member should have a copy. For greater depth, the drafter should probably be familiar with Elwork, Sales & Alfini's *Making Jury Instructions Understandable*.

2. Do not use a writing expert.

Even with your adopted guides, your committee and reporter will still need the help of a writing expert. Naturally, I would say that, but operating without one is probably the worst mistake of all. Here's why.

First, no drafting guide is likely to be complete, to cover every question that may arise. A writing expert will have the answers in his or her head, or will know where to go for the answers. The expert will be steeped in *all* the literature on drafting.

Second, the writing expert will bring to the project a heightened concern for clarity and brevity. Committee members may sometimes lose sight of these goals in pursuit of substantive accuracy. All these goals are important, and in my opinion they are usually complementary.[8]

Third and most obvious, the writing expert will bring the experience and skill needed to achieve — or more closely approach — these goals. No matter how accomplished and knowledgeable the

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[8] *See* Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEGAL WRITING 1, 2 (1996–1997) ("If anything, plain language is *more* precise than traditional legal writing because it uncovers the ambiguities and errors that traditional style, with all its excesses, tends to hide."); Carol Ann T. Mooney, *Simplification of the [Federal] Rules of [Appellate] Procedure*, 105 DICK. L. REV. 237, 239 (2001) ("[T]he rewriting process inevitably uncovers ambiguities and, at least in the [federal] appellate rules . . . , ambiguities which had never been litigated and never been resolved.").

committee members and the reporter are, they are probably not schooled in drafting or editing. Their expertise lies in substantive law and in procedure, not in clear communication. A good lawyer does not a good drafter make.

An expert will turn a trained eye on inconsistencies and ambiguities, on sentence and paragraph thickets that need untangling, on inflated diction and wordiness, and even on grammatical blunders. Please get yourself one.

3. Ignore your adopted guides and your writing expert.

It's one thing to have good resources available; it's another thing to use them. It may seem too obvious for words that your committee should follow the guides it adopts and should trust its writing expert, but what's obvious is not always what's done.

Example: when an inconsistency was pointed out during a committee meeting, one member said, "I don't think we have to be consistent every time, with all the *t*'s crossed and *i*'s dotted the same way." Well, I'm sorry, but consistency is the cardinal rule of drafting. If you say *cannot* in one place and *is unable to* in another, or if you aimlessly switch from *intent* to *intention* or from *adverse party* to *opposing party*, then you invite someone to puzzle over the difference — and perhaps try to make something out of it.

Or suppose you ignore the guideline to draft in the singular. Suppose you write that a party "must disclose in writing the names, addresses, and telephone numbers of the witnesses the party intends to rely on." If a witness has more than one telephone number, do they all have to be disclosed? (Change it to "the name, address, and telephone number of each witness.")

Your committee should have a good reason for departing from a drafting guideline. And it's not a good reason, usually, that a committee member thinks the different way "sounds better." Likewise, the committee should have a good reason for disregarding the writing expert. Of course, much of what he or she suggests may

be style changes that have little consequence — individually. But a lot of little things add up. Clear writing, like a clean house, is not achieved in a few strokes. If your committee is not accepting 75% of the expert's edits, then the committee needs a new expert or a new attitude.

4. Use the writing expert late in the process.

As the committee's work proceeds, the committee becomes increasingly invested in what it has done and, on the flip side, less inclined to take another look at one part or another. So the writing expert who is brought in late will have to contend with inertia. Besides that, late use suggests that the expert is viewed as someone who deals in verbal cosmetics, someone who performs a kind of final inspection to smooth over the surface blemishes. In fact, the expert's work will always improve substantive accuracy and clarity.

The writing expert should be used early and often. If the committee is completely rewriting a set of court rules or jury instructions, the expert should do the first draft, then let the reporter have at it before it goes to the committee. The expert should mark those places where there may be a substantive question or an unintended change. If the committee is writing new or amended rules — a task that presumably requires substantive knowledge — the reporter should do the first draft and give it to the expert. One way or the other, the reporter and the expert should work closely together. That's the ideal.

5. Exaggerate the risk of change.

In these next two sections, I want to step back and encourage those who are contemplating a revisory project and reassure those who are engaged in one. Don't worry. Don't be tentative. Go ahead

and transform that legalese. The potential benefits far outweigh the risk.

The risk, of course, is that you might unintentionally change meaning. It's a risk that lawyers grossly exaggerate. Let me illustrate with some examples from the style revision of the Federal Rules of Criminal Procedure. Ask yourself whether, in anyone's wildest imagination, we have changed the meaning.

- *Before:* "in the absence of such consent by the defendant." *After:* "if the defendant does not consent."[9]

- *Before:* "shall not utilize that grand jury material for any purpose other than assisting [X]." *After:* "may use that information only to assist [X]."[10]

- *Before:* "This rule shall be in addition to and shall not supersede the authority of the court to issue appropriate protective orders . . . ." *After:* "This rule does not limit the court's authority to issue appropriate protective orders . . . ."[11]

- *Before:* "Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court." *After:* "The parties may by agreement take and use a deposition with the court's consent."[12]

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[9] FED. R. CRIM. P. 5(c) (old version, before the restyling project); 5.1(d) (restyled version), *at* http://www.uscourts.gov/rules/newrules6.html (last visited Apr. 19, 2002).

[10] FED. R. CRIM. P. 6(e)(3)(B) (both versions).

[11] FED. R. CRIM. P. 12.3(d) (both versions).

[12] FED. R. CRIM. P. 15(g) (old version); 15(h) (restyled version).

- *Before:* "An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment." *After:* "The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment."[13]

In most revisory projects, you can make changes like this repeatedly, in sentence after sentence.

Of all the possible dangers, the one that seems to worry us most is that we might change a term of art. But true terms of art, technical terms with a fairly precise meaning, are far less common than lawyers tend to think.[14] Granted, distinguishing between a term of art and a piece of jargon, or lawyers' shorthand, can be difficult.[15] As a practical matter, though, the distinction either does not have to be made at all or should not normally create a problem.

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[13] FED. R. CRIM. P. 6(b)(2) (both versions).

[14] *See* MELLINKOFF, *supra* note 2, at 278-79, 375 ("[T]he formbooks . . . were decorated with decisions that had never passed on the language or arrangement of the form. . . . [Moreover,] that vast storehouse of judicial definitions known as *Words and Phrases* . . . is an impressive demonstration of lack of precision in the language of the law. And this lack of precision is demonstrated by the very device supposed to give law language its precision — precedent."); Benson Barr et al., *Legalese and the Myth of Case Precedent*, 64 MICH. B.J. 1136 (1985) (finding that less than 3% of the words in a real-estate sales contract had significant legal meaning based on precedent); Robert W. Benson, *The End of Legalese: The Game Is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 561 (1984–1985) ("a small island of true terms of art"); Stanley M. Johanson, *In Defense of Plain Language*, 3 SCRIBES J. LEGAL WRITING 37, 39 (1992) ("the small subcategory comprising terms of art").

[15] *See* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 873 (2d ed. 1995) ("Many such questions [about terms of art] are debatable . . . .").

In court rules addressed to lawyers, you would not need to replace *affidavit* with *sworn statement*. You would not need to change *nolo contendere* or *in camera* or *subpoena* or *peremptory challenge* or *mistrial* — whether you called them terms of art or jargon. (I'd call them jargon.) On the other hand, in jury instructions you would avoid most terms like that because they are probably jargon. In the rarer instance where you might have a term of art — *reasonable doubt*, *proximate cause*, *negligence* — you would try to carefully explain it to your lay audience.[16]

But the point remains that lawyers tend to exaggerate what counts as a term of art. They often resist changing mere inflated diction or eliminating redundancy. Professor Peter Tiersma, who serves on the California criminal-instructions task force, gives two examples: not changing *aids, facilitates, promotes, encourages, or instigates* (the commission of a crime) to *helps or encourages*; and not changing *harbors, conceals, or aids* (a principal in a felony) to *helps or hides*.[17]

At any rate, even if you never change anything that remotely looks like it might be a term of art, you can go right on making the kinds of improvements illustrated at the beginning of this section.

6. Slavishly follow the exact language of statutes and opinions.

As I just suggested, moving judges and lawyers off linguistic dead center is a challenge. And the ultimate challenge is moving them off the language of statutes and opinions. Consider: "the Los Angeles judges say that jury instructions should repeat the law the way it exists, legalese or no legalese, and fear that altering words can change

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[16] *See* Tiersma, *supra* note 6, at 1101-07 (discussing how the task force avoids some "technical terms" and defines others).

[17] *Id.* at 1106-07, 1109.

their legal meaning."[18] Yes, it can — but done right, it won't. What we need is good judgment, not blind fear.

Let me offer a few more examples, this time from a quick check in Volume 2 of the *Michigan Criminal Jury Instructions:*[19]

- *Statute:* "[W]hether the defendant was driving at an immoderate rate of speed shall not depend upon the rate of speed fixed by law for operating such vehicle."[20]

  Jury instruction: "Whether the defendant was driving at an unreasonable speed does not depend on the speed limit."[21]

- *Statute:* "Any person who shall endeavor to incite or procure any person to commit the crime of perjury, though no perjury be committed, shall be guilty of a felony . . . ."[22]

  Jury instruction: "The defendant is charged with the crime of attempting to persuade another person to commit perjury."[23] [Note: Could you omit *the crime of*? Also, the instruction goes on to plainly set out the elements of the crime.]

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[18] Caitlin Liu, *Say What, Your Honor?*, L.A. TIMES, Sept. 7, 2000, at A26; *see also* Rosemary J. Park & Ruth M. Harvey, *Putting Jury Instructions in Plain English:* The Minnesota Jury Instruction Guides, CLARITY No. 44, Dec. 1999, at 13, 16 ("Some judges and lawyers felt that we must use the exact words and terms used in a law or in an appeals court opinion . . . .").

[19] MICH. CRIM. JURY INSTR., *supra* note 6.

[20] MICH. COMP. LAWS ANN. § 750.326 (West 1991).

[21] MICH. CRIM. JURY INSTR. 16.19(1).

[22] MICH. COMP. LAWS ANN. § 750.425 (West 1991).

[23] MICH. CRIM. JURY INSTR. 14.4(1).

- *Case:* "[G]ross negligence [requires] . . . (3) The omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another."[24]

  Jury instruction: "Third, that the defendant failed to use ordinary care to prevent injuring another when, to a reasonable person, it must have been apparent that the result was likely to be serious injury."[25] [Or: "Third, that the defendant failed to use ordinary care to prevent injuring somebody else when a reasonable person would have known that a serious injury was likely."]

Any translation into plain language involves some risk — whether you are translating a term of art, a legal rule, or what should be an ordinary idea. And sometimes a committee will not take the risk. During the restyling of the federal criminal rules, for instance, I recommended changing this formulation in the old rules: "probable cause to believe that an offense has been committed and that the defendant has committed it."[26] My change: "probable cause to believe that the defendant committed an offense" (or "the offense charged"). Admittedly, this is important language. A colleague at my school told me: "Your suggestion is not illogical, but it goes against so many years of entrenched practice that it will never fly. The defense attorney wants the fact-finder to have to make both [?] decisions; it makes the fact-finder more careful."[27] He was right that my suggestion did not fly. But were his reasons — entrenched practice and two decisions — good reasons? Are there really two decisions?

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[24] People v. Rettelle, 433 N.W.2d 401, 403 (Mich. Ct. App. 1988) (citations omitted).

[25] MICH. CRIM. JURY INSTR. 16.18(4).

[26] FED. R. CRIM. P. 4(a), 5.1(a), 58(d)(3).

[27] E-mail from Professor Ronald Bretz, Thomas Cooley Law School (Oct. 3, 2000) (on file with author).

One last example — and it may take the prize for not budging. The restyled criminal rules are still littered with the phrase *an attorney for the government*. Why not *a government attorney*? you might ask. Can't do it, because federal statutes use the former.[28] Never mind that the latter doesn't change the significant words. And never mind that the criminal rules, which actually define *an attorney for the government*, could just as easily have defined *a government attorney*.[29]

Let me summarize this section and the previous section with a list of bullets that may help to fortify reformers everywhere:

- In any project, most of the changes will involve the kind of basic style changes illustrated in the list on pages 46–47.

- The cumulative effect of those style changes will be a striking improvement in clarity.

- Where translation and risk may be involved, the committee can get it right, as many other groups have done.[30]

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[28] *E.g.*, 18 U.S.C. §§ 2516(3), 3127(5), 3552(d) (2000).

[29] *See* FED. R. CRIM. P. 54(c) (old version); 1(b)(1) (restyled version).

[30] *See* DIV. OF CORP. FINANCE, U.S. SEC. & EXCH. COMM'N, BEFORE & AFTER PLAIN ENGLISH EXAMPLES AND SAMPLE ANALYSES (1998); DAVID ST. L. KELLY & CHRISTOPHER J. BALMFORD, LIFE INS. FED'N OF AUSTRALIA, SIMPLIFYING DISABILITY INCOME INSURANCE DOCUMENTS (1994); LAW REFORM COMM'N OF VICTORIA, PLAIN ENGLISH AND THE LAW app. 2, PLAIN ENGLISH REWRITE — TAKEOVERS CODE (1987); Bryan A. Garner, *The Substance of Style in Federal Rules*, CLARITY No. 42, Sept. 1998, at 15 (discussing the work on the new Federal Rules of Appellate Procedure); Steven O. Weise, *Plain English Comes to the Uniform Commercial Code*, CLARITY No. 42, Sept. 1998, at 20 (discussing the work on new Article 9); *see also Symposium on the UCC, SEC, ALI, Federal Rules and Federal Government Simplification Experiences — Is It Time for a Model Set of Drafting Principles?*, 105 DICK. L. REV. 205 (2001) (discussing some of these same projects and their value).

- If we are paralyzed by the risk, nothing will change; our profession will be forever buried under mountains of legalese.

- In jury instructions, nothing could be more futile than sacrificing clarity. What is the point if jurors don't understand?

- If a revised jury instruction is disapproved on appeal, well, so are legalistic instructions often disapproved. And was the revised instruction disapproved just because of the new language, or was there an underlying fault in the original instruction?

- Any mistakes the committee makes will be more than offset by the ambiguities and uncertainties that it uncovers and fixes — even apart from the overall improvement in clarity.

7. Ignore your audience.

Jury instructions are a unique form of legal writing. They don't involve legal analysis and argument as briefs and memos do. Yet they fit under the category of legal drafting — with statutes, rules, and contracts — only in a loose sense. Like statutes and court rules, they set out law, they form a self-contained whole, they are meant to govern conduct, and they are devoid of any writer's voice. But rather than creating law, they restate it. What's more, while statutes may have several audiences (courts, lawyers, administrators, the public) and court rules are addressed to judges and lawyers, jury instructions are directed primarily to a lay audience and, in most cases, are still delivered orally.

So jury instructions carry a heavier burden than almost any other form of communication you can think of: they deal with a fairly

difficult subject that has to be understood by the public through listening to them all at once. They need to be as clear as humanly possible. They should be conversational. And they should do what may be unusual for other kinds of drafting. For instance:

- Address the jurors directly. (Not "one test that may be helpful" but "one test you can use.")

- Use first person for the judge. (Not "the court ruled that" but "I ruled that.")

- Use contractions.

- Use questions. ("To find the defendant guilty, you would have to answer 'yes' to two questions. First, . . . ? Second, . . . ?")

- Use controlled repetition. ("So again, the government must prove . . . ." "Let me remind you that . . . .")

- Similarly, state things in alternative ways, such as positively and negatively. ("In other words . . . ." "This means that . . . ." "A person must take some affirmative steps to renounce or defeat the purpose of the conspiracy. This would include things like . . . . But some affirmative step is required. Just doing nothing, or just avoiding the other members, would not be enough.")

- Use signposting and summarizing techniques. ("Now I want to explain to you about . . . ." "One last point about . . . ." "What all this means is that . . . ." "So, to summarize, you must decide whether . . . .")

- Use language that is case-specific. ("As I explained to you earlier, the defendant, _____, is on trial here because

the government has charged that [brief description of the crime]." "During the trial, you've heard the testimony of _____, who is described to us as an expert in _____.")

- Use concrete examples to illustrate how the law applies. ("If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.")

Committees that write jury instructions should take two other steps to make them understandable. A committee should include one or two lay members. And it should spot-test its work on members of the public, with a target goal of, say, 75 to 80% comprehension overall.

8. Fail to see ambiguity.

To start, let's be sure about the distinction between vagueness and ambiguity. The distinction is fundamental to legal drafting and interpretation, although judges and lawyers are forever calling vague language ambiguous.

Vagueness presents uncertainty at the margins of application. We could apply the term *in good health* to most persons without much disagreement. But we would still have the in-between cases, say someone with high (itself vague!) cholesterol. Of course, some terms are more vague than others — *vehicle* as compared with *car*. But even *car* is vague; does it include the PT Cruiser? In fact, all natural language is vague to some degree (a truth that seems lost on many a "textualist" or "strict constructionist").

In drafting, vagueness is both unavoidable and a potential benefit. It allows flexibility and spares the drafter from the impossible task of having to identify, and include or exclude, every conceivable

particular. The goal is to arrive at the right degree of vagueness: not too vague or too specific. Thus, the drafter shapes vagueness according to the intended meaning. Suppose you want to collect a fee from cars, trucks, vans, SUVs, motorcycles, and the like. *Motor vehicle* is too broad if you don't want to include lawn tractors or golf carts. So maybe you say *a motor vehicle that is driven on the public roadways* (itself vague!). But that is too broad if you want to exclude farm tractors. So maybe you say *a motor vehicle that is normally* (vague) *driven on the public roadways* (vague). But what if you want to exclude commercial buses? Maybe you have to create an exception. And so on, depending on what you want to cover.

Here is a quick sampling of vague terms from the Federal Rules of Criminal Procedure: *unjustifiable expense, essential facts, reasonably available, with reasonable certainty, without unnecessary delay, suitable age and discretion, promptly, extraordinary circumstances, probable cause, good cause, hearing-impaired, unintentional, appropriate official, reasonable opportunity, if feasible, in the public interest.* These are from just the first six rules.

Ambiguity is different: it presents an either–or choice between alternative meanings. With ambiguity, you might as well flip a coin, although courts try to rationalize their choice. Ambiguity is always unintended, always avoidable, and always a sin — the worst sin in drafting. Good drafters have a sharp eye for it.

Perhaps the most common type of ambiguity is syntactic, and the most common syntactic ambiguity is caused by modifiers in a series (even a two-part series):

- Tall women and men. (Does *tall* modify *men*?)
- Men and women who are tall. (Does *who are tall* modify *men*?)

Below are some syntactic ambiguities in the old criminal rules or in the proposed style revision that was published for comment in August 2000, or in both.[31]

- "participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."[32] (Does *constituting an offense or offenses* modify *the same act or transaction*?)

- "a warrant returned unexecuted and not canceled or a summons returned unserved or a duplicate thereof."[33] (What does *thereof* refer to?)

- "(B) advise the defendant personally in open court — or, for good cause, in camera — that the court may not follow the plea agreement; and
(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated."[34] (Should the *in open court* modifier in (B) apply to (C) as well?)

- "any designated book, paper, document, record, recording, or other material not privileged."[35] (Does *not privileged* modify all the items in the series?)

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[31] August 2000 version: COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED STYLE REVISION OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, *available at* http://www.uscourts.gov/rules/newrules6.html; after December 2002, *available at* http://www.uscourts.gov/rules/archive.htm.

[32] FED. R. CRIM. P. 8(b) (old version and August 2000 version).

[33] FED. R. CRIM. P. 4(d)(4), 9(c)(2) (old version only).

[34] FED. R. CRIM. P. 11(c)(5) (August 2000 version only).

[35] FED. R. CRIM. P. 15(a) (old version and August 2000 version).

- "If . . . a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection . . . ."[36] (Does the *which* clause modify *additional evidence*?)

- "a search warrant . . . for a search of property or for a person within the district."[37] (Does *within the district* modify *property*?)

- "copy of the return, inventory, and all other related papers."[38] (Does *copy of* modify *all other related papers*?)

I think these ambiguities are now fixed in the final version of the restyled rules.[39]

9. Believe in myths.

I have written and written about the myths that bedevil any effort to convert legalese into plain language.[40] But this is no time to give them a pass. They are persistent and pernicious. And by keeping us from reforming our strange talk, they create disrespect for lawyers and for law.

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[36] FED. R. CRIM. P. 16(c) (old version only).

[37] FED. R. CRIM. P. 41(a) (old version only).

[38] FED. R. CRIM. P. 41(g) (old version, which did not use the word *related*); 41(h) (August 2000 version).

[39] FEDERAL RULES OF CRIMINAL PROCEDURE, COMPREHENSIVE STYLE REVISION, AMENDMENTS SUBMITTED TO THE SUPREME COURT, *at* http://www.uscourts.gov/rules/newrules6.html (Nov. 2001); after December 2002, available in print as the FEDERAL RULES OF CRIMINAL PROCEDURE.

[40] Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51 (1994–1995); *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEGAL WRITING 1 (1996–1997); *The Great Myth That Plain Language Is Not Precise*, 7 SCRIBES J. LEGAL WRITING 109 (1998–2000).

If only I could replace these bullets with a symbol for blank cartridges:

- Plain language means baby talk or dumbing down the language.
- Plain language is not precise.
- Plain language is just about simple words and short sentences.
- There is no hard evidence to show that readers prefer plain language or that plain language is more understandable or more persuasive than traditional legal style.

Not one of these is true.

10. Continue to graduate law students who are untrained in legal drafting.

The other big obstacle to change, besides the myths about plain language, is the state of legal-writing programs at the law schools. Although many schools have improved these programs in the last decade, many other schools continue to disrespect their programs and professors in one way or another — such as the number of required credit hours for legal writing or the salary and status of the professors.[43]

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[43] Jo Anne Durako et al., Association of Legal Writing Directors & Legal Writing Institute, 2001 Survey Results 4 (Question 12), 27 (Question 65), 30 (Question 75) (released Aug. 2001) (on file with author) (indicating that most legal-writing directors and teachers make significantly less than other law professors, that most teachers are on short-term contracts, and that most of the 143 schools surveyed require no more than four hours of legal writing), *available at* http://www.alwd.org/resources/survey_results.htm; Jan M. Levine, *Legal Research and Writing: What Schools Are Doing, and*

More specifically and just as shamefully, the schools have neglected legal drafting. According to the 2001 survey by the Association of Legal Writing Directors and the Legal Writing Institute, only 10 or 15 of the 143 schools surveyed require legal drafting as a substantial part of their programs, although a majority do offer it in their elective writing courses.[44] Likewise, in an earlier survey of practicing lawyers designed to rate lawyering skills, only about 20% of 1,200 lawyers thought that enough attention was given to drafting documents in law school — one of the lowest numbers for all the lawyering skills surveyed.[45] In addition, legal drafting showed the largest gap between what, in the lawyers' opinion, the law schools can effectively teach and what they do teach.[46]

But now comes an incongruity — actually, two of them. First, despite these numbers, most lawyers apparently regard themselves as quite good at drafting. Second, they regard the drafting done by all other lawyers as quite poor. So says Bryan Garner, who has been teaching lawyers for many years:

> In my CLE seminars on legal drafting, I routinely ask audience members to answer two questions:
>
> (1) What percentage of the legal drafting that you see is of a genuinely high quality?
>
> (2) What percentage of legal drafters would claim to produce high-quality drafting?
>
> Although there's some variation within any audience, the consensus is quite predictable: the lawyers say that 5% of the legal drafting they see

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Who Is Doing the Teaching, 7 SCRIBES J. LEGAL WRITING 51, 60-78 (1998–2000) (indicating that, in 2000, only about 50 law schools of the 185 surveyed had at least one legal-writing teacher in a tenure-track position, that most of these people are directors of their programs, and that only 8 schools have all their full-time writing faculty on tenure track).

[44] Durako et al., *supra* note 43, at 6 (Question 20), 10 (Question 33), 11 (Question 35).

[45] Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 479, 481 (1993).

[46] *Id.* at 478.

> is of a genuinely high quality, and that 95% of the drafters would claim to produce high-quality documents.
>
> There's a big gap there. It signals that there's still much consciousness-raising needed within the profession . . . .[47]

As long as law schools continue to neglect drafting and as long as lawyers have no sense of their own deficiencies, then most court rules and jury instructions will stay mangled.

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[47] Bryan A. Garner, *President's Letter*, THE SCRIVENER (Scribes — Am. Soc'y of Writers on Legal Subjects, Fayetteville, Ark.), Winter 1998, at 1, 3.