PLAIN LANGUAGE

Celebrating plain English in Michigan

BY BRYAN A. GARNER

Editor's note: This article from the *ABA Journal* is reprinted with thanks for the recognition it brings to the Plain Language column and the *Michigan Bar Journal*. The article was first published in the October/November 2021 print issue of the *ABA Journal* and ran on the *Journal*'s website on Oct. 1.

In 2006, when interviewing Justice Ruth Bader Ginsburg about advocacy and writing, I asked her whether lawyers should become more dedicated to using plain English. "It would be a very good idea," she said, adding: "There have been movements about using plain English in contracts and wills. Those movements tend to start with great enthusiasm and then sort of fizzle out." Perhaps she was thinking of ABA President Charles A. Beardsley, who in 1940 dedicated his presidency to promoting sounder methods of drafting wills and contracts, as well as streamlined judicial opinions. His efforts were soon forgotten.

But we have a major exception to the idea that plain-language reforms tend to fizzle: the *Michigan Bar Journal*. It has just reached a landmark of 37 years in sustaining its monthly column on plain language in the law. Established in 1984 by George Hathaway, the column has been edited since 1988 by Professor Emeritus Joseph Kimble of Western Michigan University Thomas M. Cooley Law School.

The column is widely read outside Michigan. Contributors have included major figures in legal writing from throughout the English-speaking world, including the Bars of Australia, Canada, New Zealand, South Africa, and the United Kingdom. Among the guest writers have been federal judges and state high-court justices. Over the years, the Michigan column has exploded all the various myths about plain language in the law.

Part of its success has been Professor Kimble's consistent dedication to empirical testing of legal documents. In 1987, for example, he tested before-and-after versions of various jargon-laden passages, including one with variations of *Now comes the Plaintiff*. … Judges were asked whether they preferred the standard forms of court papers, with traditional jargon, or revised versions either translating the jargon or else jettisoning it altogether. The questions were posed as objectively as possible. Overwhelmingly, the judges showed a dislike for the traditional but unnecessary legal jargon.

That particular study was then replicated in three other states — Florida, Louisiana, and Texas — all of which had similar results.

In a groundbreaking 2011 study, the Michigan column tested footnoted citations in judicial opinions. A cross-section of the Michigan Bar was asked to consider two judicial opinions: one with legal citations strewn amid the text in the conventional way, and one written with all citations footnoted (but no substantive footnotes). Mind you, the text must be written a little differently when citations are footnoted so that little or no glancing down is necessary while reading. To the surprise of many, the revised opinion won resoundingly as being more readable and appealing: 58% to 42%.

That's an interesting point about empirical testing. If you just ask lawyers and judges, in the abstract, whether they'd like citations

"Plain Language," edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 37 years. To contribute an article, contact Prof. Kimble at WMU–Cooley Law School, 300 S. Capitol Ave., Lansing, MI 48933, or at kimblej@cooley.edu. For an index of past columns, visit www.michbar.org/plainlanguage.

up in the body or down in footnotes, they'll vote for the former. But if you show them actual examples of well-written opinions in which the citations are subordinated, the results are very different.

It's the difference between these two passages:

- In *Tanabe Seiyaku Co. v. United States International Trade Commission*, 109 F.3d 726, 732 (Fed. Cir. 1997), the court held that extrinsic evidence may be considered when ...
- In a 1997 case [footnote], the Federal Circuit held that extrinsic evidence may be considered when ...

Once you multiply that instance by 50, you see an extreme difference in the accessibility of the writing. The date and source of the authority often matter, but not necessarily the case name and certainly not the volume and page numbers. Not in the text.

Because the legal profession is unhurried about and often resistant to reform, the innovation has been slow to catch on. But there are salutary signs. In a few states, such as Delaware and Alaska, footnoted citations have been the norm for many years. Chief Justice Nathan Hecht of Texas has written that way for nearly 25 years (much to his credit). And Justice Neil Gorsuch has recently experimented with the idea.

Anyway, the *Michigan Bar Journal* was the first to publish empirical findings on the point.

In the rulemaking of federal courts, plain English has been at the forefront of revisions since the early 1990s. Since that time, the Standing Committee for Rules of Practice and Procedure — an arm of the U.S. Judicial Conference — has issued wholesale revisions of four sets of rules: Appellate, Civil, Criminal, and Evidence. Professor Kimble and I, together with Joseph F. Spaniol Jr. (former clerk of the U.S. Supreme Court), have been style consultants. We've done the initial revisions of all those rules and are currently reworking the Bankruptcy Rules.

How does this tie back to Michigan? Once again, the American Bar has been introduced to the streamlined revisions not just through the standing committee's published drafts put out for public comment but also through side-by-side examples in the *Michigan Bar Journal* column. The box at the bottom of this page contains an example that Professor Kimble published in November 2020.

The individual edits may seem trivial, but the cumulative effect greatly enhances readability and clarity for the law.

Plain language, you see, advances the rule of law and the sound administration of justice. It's not just about elegant expression. It's about clear thinking, as ABA President Beardsley was insisting in 1940.

For 37 years now, the *Michigan Bar Journal* has promoted the cause of clarity in law. There's no hint of flagging or fizzling, to use Justice Ginsburg's word. That's cause enough for celebration.

What's the ultimate benefit? Here's what the late beloved Justice said: Apart from shorter, more readable contracts, "the public would understand what lawyers do, what judges do. They might understand it even from reading an opinion or from reading a brief instead of getting it filtered through the lens of a journalist. ... I hope that, in most cases, what I write is clear enough for a lay audience."

That's something that every lawyer might aspire to.

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Rule 1003. Involuntary Petition

(a) TRANSFEROR OR TRANSFEREE OF CLAIM. A transferor or transferee of a claim shall annex to the original and each copy of the petition a copy of all documents evidencing the transfer, whether transferred unconditionally, for security, or otherwise, and a signed statement that the claim was not transferred for the purpose of commencing the case and setting forth the consideration for and terms of the transfer. An entity that has transferred or acquired a claim for the purpose of commencing a case for liquidation under chapter 7 or for reorganization under chapter 11 shall not be a qualified petitioner.

Rule 1003. Involuntary Petition: Transferred Claims; Joining Other Creditors; Additional Time to Join

(a) Transferred Claims. An entity that has transferred or acquired a claim for the purpose of commencing an involuntary case under Chapter 7 or Chapter 11 is not a qualified petitioner. A petitioner that has transferred or acquired a claim must attach to the petition and to any copy:

(1) all documents evidencing the transfer, whether it was unconditional, for security, or otherwise; and

(2) a signed statement that:

(A) affirms that the claim was not transferred for the purpose of commencing the case; and

(B) sets forth the consideration for the transfer and its terms.