

A Start Toward Clarity

By Joseph Kimble and Mark Cooney

Every year, the Center for Plain Language gives Clear-Mark Awards for documents and websites produced by North American companies, organizations, and government bodies. The event is held at the National Press Club. The winning entries must meet a high standard for clarity and simplicity. This year, WMU–Cooley Law School received the award in the Legal category for its revised bylaws, which your authors prepared.¹ Hats off to the school for setting the project in motion—and for having always supported the determined efforts of its Research & Writing professors to teach plain language.

Now we thought we'd write a short piece, using just one provision, to illustrate some drafting points. On the facing page, set out side by side, are the before-and-after versions of the indemnification provision. Please note: these kinds of provisions are typically dense, and this one is probably no worse than many or most others that you'll find in bylaws and contracts across the country. Drafting, after all, is not a skill that our profession excels at.²

We don't claim that the revised version is a perfect or complete provision, a model of its kind. Our job was to redraft, without substantively changing, the original. Nor do we claim that someone else couldn't improve it further; editing can go on endlessly. But we submitted it to a panel of judges as part of an effort that got high marks, and now we submit it to you.

Differences that you can see at a glance:

- The new version is broken down into subsections, with headings (critical for easy navigation).
- It does not use all capitals or underlining.
- It uses an indented list.
- The old version uses the ultralong sentences that readers have grown accustomed to seeing in legal documents. When you actually count, they average 83 words. The sentences in the new version average 34. Not great, but far better. And if you count the items in the vertical list as sentences, the average is 24.

“Plain Language,” edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 34 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, Google “Plain Language column index.”

- Definitions are used to sort out the first sentence, which checks in at 156 words.

Some differences (not all of them) that are less obvious:

- The old version has 334 words; the new version, 241 (without subheadings).
- The word *shall* for legal requirements is gone, replaced by *must* (hooray!). And false uses of *shall*—false imperatives—are expelled entirely. Thus, *shall not create a presumption* becomes *does not create a presumption*; *shall not have had reasonable cause* becomes *had no reasonable cause*; *shall not preclude* becomes *do not preclude*; and *shall inure to the benefit of* becomes *benefit*.
- Several common multiword prepositions are gone: *prior [to]*, *subsequent to*, *with respect to*, *by virtue of*. Similarly, *by reason of the fact that* becomes *because of*.
- Hard-core legalese is gone: *such action*, *[t]he foregoing right*, *any such director or officer*. (The immediately preceding provision, not shown here, had *said directors* and several uses of *and/or*.)
- Several *of*-phrases either are eliminated as obvious or are replaced with a possessive. Thus, *officer of the law school* becomes *officer* (what other officer would it be?). And *the best interest of the law school* becomes *the school's best interest*. (Alas, though, we missed one—in (C).)
- In the old version, note how the second sentence repeats virtually everything beginning with *he acted in good faith* at the end of the first sentence (45 words). The new version avoids the repetition with these nine words in (B): *the Director or officer failed to meet these conditions*.
- Of course, generic uses of *he*, *him*, and *his* are gone.

There you have it—from one section of one document, a dozen changes that can probably be made in just about all old-style legal documents. And what stands in the way? Certainly not the myths about plain language: that it's babyish or base or dumbed-down; that it's subverted by the need to use terms of art; that it's imprecise (actually, the reverse is true: it's *more* precise than traditional legal style).³

What really stands in the way? Inertia, indifference, habit, the endless recycling of old forms and models, the neglect (until recently) of legal drafting by law schools, and misconception

about the extent to which legal concepts have been honed by precedent and can't be safely expressed in plain language.⁴

We ask a simple question: how hard would it be to make the changes described above in most legal documents? There is, of course, a lot more than that to proficient drafting. But it would be a good start.

We call on every business, institution, and government agency to inventory your important forms and documents—and begin to improve them. The Centers for Disease Control, Blue Cross Blue Shield, JPMorgan Chase, and many more have already taken up the cause.⁵ Who knows? Like them, you just might hear your name called at the National Press Club. ■

(Continued on the following page.)

ARTICLE VI

Directors Liability

Section 2. INDEMNIFICATION. The Thomas M. Cooley Law School shall indemnify each member of the Board of Directors and each officer of the law school at any time in office, whether prior or subsequent to the adoption of this bylaw, who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that he is or was a director or officer of the law school, against expenses (including legal fees), judgments, fines, and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interest of the law school, and with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit, or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the law school; and, with respect to any criminal action or proceeding, shall not have had reasonable cause to believe that his conduct was unlawful. The foregoing right of indemnification shall not preclude any indemnification of any such director or officer or any employee or other person acting for or in the interests of the law school, to which such director, officer, employee, or other person may be entitled by law or by virtue of any document or agreement, or which may be legally provided or afforded by or under any action by the directors of this law school. All rights of indemnification shall inure to the benefit of the heirs, executors, administrators and personal representatives of the person involved.

Article 6—Director Liability

Section 2—Indemnification

(A) Scope. The Corporation must Indemnify each current or former Director or officer who is a party—or is threatened to be made a party—to an Action because of his or her conduct or status as a Director or officer for the school.

“Action” includes any threatened, pending, or completed lawsuit or proceeding, whether civil, criminal, administrative, or investigative.

“Indemnify” means to pay or reimburse for an expense (including legal fees), judgment, fine, or settlement amount if actually and reasonably incurred by the Director or officer in connection with an Action.

(B) Conditions. The indemnity described in subpart (A) applies only if the Director or officer:

- (1) acted in good faith;
- (2) acted in a manner that he or she reasonably believed was in, or was not inconsistent with, the school's best interest; and
- (3) if subject to a criminal proceeding, had no reasonable cause to believe that his or her conduct was unlawful.

The termination of an Action by any means does not, of itself, create a presumption that the Director or officer failed to meet these conditions.

(C) Other indemnification not excluded. The indemnity rights in this section do not preclude a Director, officer, employee, or other person acting for or in the interest of the school from seeking any indemnification granted by law, agreement, or other document, or which [better: *that*] may otherwise be provided by the Board of Directors.

(D) Application to successors. All indemnity rights in this section also benefit the Director's or officer's successors, including his or her heirs, administrators, and personal representatives.



*Joseph Kimble taught legal writing for 30 years at WMU–Cooley Law School. His third and latest book is *Seeing Through Legalese: More Essays on Plain Language*. He is senior editor of *The Scribes Journal of Legal Writing*, editor of the “Redlines” column in *Judicature*, a past president of the international organization *Clarity*, and a drafting consultant on all federal court rules. He led the work of redrafting the *Federal Rules of Civil Procedure* and *Federal Rules of Evidence*. Follow him on Twitter @ProfJoeKimble.*



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ENDNOTES

1. Center for Plain Language, *ClearMark Awards* <<https://centerforplainlanguage.org/awards/clearmark/>> (accessed August 2, 2018).
2. Kimble, *You Think Lawyers Are Good Drafters?*, in *Seeing Through Legalese: More Essays on Plain Language* (North Carolina: Carolina Academic Press, 2017), pp 3–12.
3. Kimble, *Writing for Dollars*, *Writing to Please: The Case for Plain Language in Business, Government, and Law* (North Carolina: Carolina Academic Press, 2012), pp 11–14, 39–43.
4. *Id.* at 39–40 (on the misconceptions point).
5. Center for Plain Language, *ClearMark Awards*.

A New Contest

Got your red pens ready?

Try revising the sentence below (while puzzling over why anyone would write one like that). Besides the fairly obvious need to break it up, consider using a horizontal list. And make some smaller improvements as well. No *regarding*, for instance.

Although establishing procedural due process is not a particularly high burden to meet, in light of the piecemeal fashion in which Plaintiff was provided notice of the allegations against her, lack of information provided to Plaintiff regarding the allegations and/or the subsequent investigation, as well as the court’s concerns regarding whether Plaintiff had a meaningful opportunity to be heard, the court finds Plaintiff has established a question of fact regarding whether she was afforded sufficient due process with regard to her demotion.

To the first two persons who email me an “A” revision, I’ll send a copy of *Seeing Through Legalese: More Essays on Plain Language* or my new children’s book, *Mr. Mouthful Learns His Lesson*. Address: kimblej@cooley.edu. Please put “Contest” in the subject line. The deadline is November 19.

A reminder: the online version of the column is usually posted before the print version is ready. To get the jump, Google “Plain Language column index.” Or follow me on Twitter: @ProfJoeKimble. I always try to tweet when a new column is posted.



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