Plain Language

Protecting Your Writing from Law School: An Open Letter to Law Students©

By *Joseph Kimble and F. Georgann Wing*

WARNING!

What you read in law school may be hazardous to your writing.

Example:

It is our opinion that in the instant case the provision in question pertaining to forfeiture in event of failure or refusal to perform, and fixing $1,900 as liquidated damages therefor, was in the nature of a penalty and that the plaintiffs are not prevented thereby from recovering their actual damages.

Now let's put it in plain English:

We think that the forfeiture provision quoted above was in the nature of a penalty. So it does not prevent the plaintiffs from recovering their actual damages.

The example is taken from an appellate court opinion. Law school brings with it a daily diet of appellate court opinions to read. Unless you guard against their corrupting influence, your writing may turn fat and flabby, clogged and lifeless, like the opinions themselves.

So be advised that appellate opinions are generally not models of good writing. In fact, more than a few are models of bad writing. As impressive as they may sound, you should not try to imitate them. What's more, you should consciously resist picking up their bad habits.

The way judges and lawyers write has been criticized for centuries as unclear, wordy, pompous, archaic, and dull. Finally, though, things are starting to change. The move is toward plain English. Naturally, many lawyers are stuck on the old style, and they question the change and what it means. But when the discussion turns to specific examples of the old style compared with the plain English versions, the old style loses every time — and by every measure of good writing.

If you want to see for yourself, look through the November, 1983, issue of the *Michigan Bar Journal*, devoted entirely to plain English. Or read Benson, *The End of Legalese: The Game is Over*, XIII *NYU Review of Law and Social Change* 519 (1984-85), which shows that the only rationale left for the old style is a tenuous notion of self-interest. And if you want further practice in protecting your writing from law school, read Wydick, *Plain English for Lawyers*, the most popular book on the subject.

In the meantime, let's take a closer look at just one opinion. All the examples below are from the famous case of *Hawkins v McGee*, 84 N.H. 114, 146 A. 641 (1929) (the hairy-hand case). It is the first case in the contracts book that many of you will use. As you read this opinion, and others, notice how often you stop at the end of a sentence and ask, "What did I just read? What does it mean?" In part, you hesitate because the ideas are new. But you hesitate also because the opinions are not written in plain English. Here are some of the faults they exhibit.

Too Long

Notice how long the sentences are (the paragraphs, too). Clause follows clause in never-ending compound sentences, to the point where the reader cannot hold all the ideas together and must reread. And reread. Take the six sentences in paragraph six of *Hawkins*: 67 words, 78 words, 78 words, 47 words, 72 words, and 15 words, for an average of 60. Talk about arduous!

True, if you make every sentence short, the writing gets choppy. And for variety or effect, the occasional long sentence may work, especially one with parallel elements and without parenthetical interruptions. Hence Wydick's emphasis on "average."

RULE: Keep the average length of your sentences below 25 words.

Too Wordy

This is another way in which legal writing becomes too long. A few extra words in a lot of places can add up to a ton of deadweight. Examples:

- "It cannot be held that the trial court decided this question erroneously in the present case."

  Why not just: *"The trial court decided this question correctly."*?

- "The substance of the charge to the jury on the question of damages appears in the following quotation:"

  Why not: *"Here is the substance of the charge to the jury on damages."*?

Wydick's book contains good lessons on how to omit needless words.

RULE: Be concise; omit needless words.

Although it was prepared for law students, this discussion of plain English may be of interest (or even value) to practitioners, most of whom had to make their way through law school without the benefit of such sage advice.

— The Editor

"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by George H. Hathaway, Chairperson of the State Bar Plain English Committee. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a Plain English article? Contact Mr. Hathaway at The Detroit Edison Co., Room 688 WCB, 2000 Second Ave., Detroit, MI 48226.

Too Contorted

As Wydick says, lawyers like to test the agility of their readers by making them leap wide gaps between the subject and the verb, especially, and between the verb and the object.

- "By 'damages,' as that term is used in the law of contracts, is intended compensation for a breach"

  In the law of contracts, "damages" means compensation for a breach.

- "It is unnecessary to determine at this time whether the argument of the defendant, based upon 'common knowledge of the uncertainty which attends all surgical operations,' and the improbability that a surgeon would even contract to make a damaged part of the human body 'one hundred percent perfect' would, in the absence of countervailing considerations, be regarded as conclusive, for there were other factors in the present case which tended to support the contention of the plaintiff."

  The defendant's argument is based on . . . . Would this argument, without evidence to the contrary, be regarded as conclusive? We need not decide, for there was evidence to the contrary, supporting the plaintiff.

RULE: Put the verb close to the subject, and the object close to the verb. Move intervening words to the beginning or end of the sentence, or break the sentence in two.

Too Lofty

Lawyers tend to like big words (a fault shared by people who write other kinds of official prose).

- "in the absence of countervailing considerations"

  without evidence to the contrary

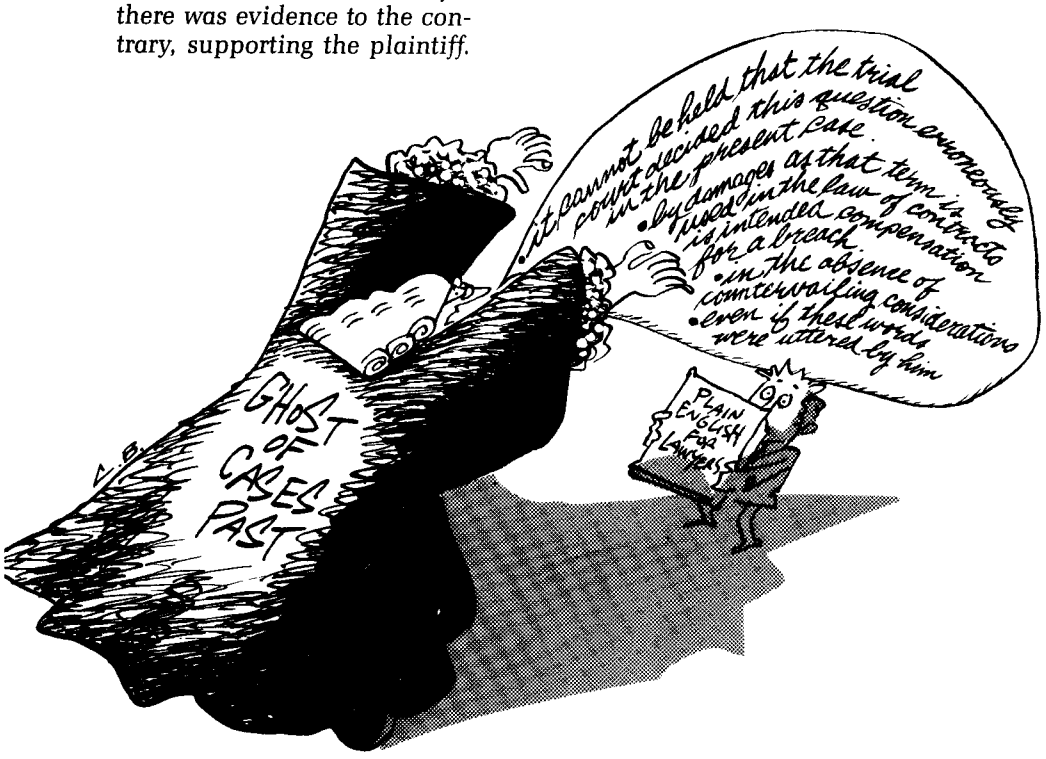
- "the theory was advanced by plaintiff's counsel in cross-examination of defendant"

  the plaintiff's counsel suggested in cross-examining the defendant

- "the pain necessarily incident to a serious surgical operation"

  the pain from a serious surgical operation

Think about the plain English equivalents of the following: prior to, in the event that, for the reason that, with regard to, approximately, frequently, consequently, utilize, numerous, concept, objective, initiate.



RULE: Prefer the short, simple, everyday word, the word you would use in speaking.

Too Archaic

The legal vocabulary includes words that non-lawyers rarely use except in parody. These are the junk antiques of the legal vocabulary, the lawyerisms: aforesaid, hereinafter, thereto, wherein, said (party), and/or, inter alia, arguendo, viz., to wit, and a slew of others.

Law, like other professions, needs its true terms of art ("plaintiff," for instance). But lawyerisms are not terms of art. Not every Latinism is a term of art. And some old terms of art (like "assumpsit") you don't need to know anymore. You will have to learn to distinguish between true living terms of art and lawyerisms. Be discriminating.

RULE: Do not use lawyerisms.

Too Nouny

Another fault that legal writing shares with other kinds of official prose: it relies too much on nouns. It tends to link nouns together through weak verbs ("is," "have"), generally in the passive voice. Obviously you need nouns. But verbs give life to writing. And in the best writing, strong verbs carry the load.

- "made an order"

  ordered

- "even if these words were uttered by him"

  even if he spoke these words

- "even if there was no evidence that his condition was made worse as a result of the operation"

  even without evidence that the operation made the condition worse

In the first example, the writer used a noun instead of the verb "ordered." And in the other two examples, the writer used the passive voice of the verb instead of the stronger active voice. ►

Again, consider how using strong verbs improves these examples:

- "there would be a reasonable basis for the further conclusion"
  the jury could reasonably conclude
- "as an inducement for the granting of consent to the operation by the plaintiff and his father"
  to induce the plaintiff and his father to consent to the operation

RULE: Try to use strong action verbs. Do not turn verbs into nouns. And prefer the active voice of the verb to the passive.

Now, you have not seen the worst of it. All these faults reach extremes in the legal documents that lawyers draft — wills, contracts, leases, and the like. So a number of states have passed laws that require consumer documents, at least, to be written in plain English. Another sign, another agent, of change.

For now, try to resist the influence of old-style appellate opinions. The rules above should help. Observing them will not guarantee good writing, for writing is more than a technique or skill grounded in rules. Writing is grounded in thought and purpose. And yet, ignoring the rules will inevitably lead to bad writing of the legal kind.

Resist the influence of opinions, and you will be ready to deal with the other influences that threaten your writing — like the books of legal forms, and then the lawyers you will encounter in practice who are stuck on the old style.

You are among the first generation of students to witness what promises to be a great change in the language of the law. You can help break the cycle of centuries of legalese. Remember: plain English. Your reader will like your style.

Good luck. ■

Joseph Kimble and F. Georgann Wing direct the legal research and writing program at Thomas M. Cooley Law School. Mr. Kimble graduated from Amherst College and the University of Michigan Law School. He has worked on the staff of the Michigan Court of Appeals and the Michigan Supreme Court, and practiced with the Flint firm of Gault, Davison, Bowers & Hill.

Ms. Wing graduated from Cooley Law School after obtaining a masters degree from Michigan State University. She was a partner in the Lansing firm of Hildebrandt & Wing.

Joseph Kimble

F. Georgann Wing