Plain English: A Charter for Clear Writing©
(Part Two)

By Joseph Kimble

This article was originally published in April 1992, in the Thomas M. Cooley Law Review. *We have shortened it here. Some of the omissions are indicated; most are not.*

The article grew out of a resolution that I submitted two years ago to the Legal Writing Institute, whose membership includes writing teachers at almost all law schools in the United States. The resolution has now been adopted by the 1992 Conference of the Institute, and the vote was virtually unanimous. The resolution as adopted appears toward the end of Part One of this excerpt, and at the beginning of Part Two and Part Three.

The resolution is good news for plain writing, for if it is ever going to happen, we must poison the well of legalese at the source—which is law school.

—JK

Toward a Definition

You will notice that the resolution does not include a detailed definition of Plain English. In a general sense, we all know what it means to write plainly. Rather than worrying about the fine points of a definition, we might better lend our support to the campaign against the common enemy, which is legalese.

I give a detailed definition in the next section because critics, including thoughtful critics, often ask for one.[49] Here is an answer to the question, What do you mean by Plain English?

Resolution

At the 1992 Conference of the Legal Writing Institute, which has 900 members worldwide, the participants adopt the following resolution:

1. The way lawyers write has been a source of complaint about lawyers for more than four centuries.
2. The language used by lawyers should agree with the common speech, unless there are reasons for a difference.
3. Legalese is unnecessary and no more precise than plain language.
4. Plain language is an important part of good legal writing.
5. Plain language means language that is clear and readily understandable to the intended readers.
6. To encourage the use of plain language, the Legal Writing Institute should try to identify members who would be willing to work with their bar associations to establish plain language committees like those in Michigan and Texas.

Besides that, I want you to understand that the vision of supporters goes beyond short sentences, simple words, and active voice. *Of course* we appreciate the value and demands of variety, rhythm, and euphony, to say nothing of rhetorical figures.[50] *Of course* plain writing is not necessarily inspired prose or even good prose. *Of course* what it requires is different in a consumer form or a client letter, say, as compared with a law review article.

At the same time, supporters would say that the long sentence has in fact always plagued legal writing and that sentence length has to be addressed somehow.[51] The same goes for inflated diction. As for style and literary value, there is precious little in most legal writing. Take any reporter, pick a page at random, and start reading. Would you not rather have Plain English?

Professor John Lindsey says that lawyers suffer from a "chronic ailment" because they are "continuously exposed to law books, the largest body of poorly written literature ever created by the human race."[52]

I do not intend to add much to the huge pile of examples that others have offered.[53] Perhaps just one from law school, where the envelopment begins.[54] Imagine, if you will, the student whose mind is irradiated by this passage from a property casebook:

> *Another fault commonly voiced in disapproval of conditional zoning is that it constitutes an illegal bargaining away of a local government's police power. Because no municipal government has the power to make contracts that control or limit it in the exercise of its legislative powers and duties, restrictive agreements made by a municipality in*

"Plain Language" is a regular feature of the **Michigan Bar Journal,** *edited by Joseph Kimble for the State Bar Plain English Committee. Assistant editor is George H. Hathaway. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901.*

conjunction with a rezoning are sometimes said to violate public policy. While permitting citizens to be governed by the best bargain they can strike with a local legislature would not be consonant with notions of good government, absent proof of a contract purporting to bind the local legislature in advance to exercise its zoning authority in a bargained-for manner, a rule which would have the effect of forbidding a municipality from trying to protect landowners in the vicinity of a zoning change by imposing protective conditions based on the assertion that that body is bargaining away its discretion, would not be in the best interests of the public. The imposition of conditions on property sought to be rezoned may not be classified as a prospective commitment on the part of the municipality to zone as requested if the conditions are met; nor would the municipality necessarily be precluded on this account from later reversing or altering its decision.[55]

Is the following a fair translation?

Conditional zoning is sometimes criticized because local governments cannot bargain away their police power. They cannot make a contract that limits how they exercise their legislative duties. But that criticism would be valid only if the contract bound the local government in advance; that is, it bound the local government to approve the rezoning if the conditions were met. But if the local government is not bound in advance, then it should be able to impose conditions in order to protect neighboring landowners.

Remember how intimidating law school was? To all but the most self-confident and critical-minded student, the old way of writing must somehow seem right, because it is so pervasive. If it goes unchallenged, most students will pick up its trappings as a dog picks up fleas, without even trying.

Again, the countermeasure, all that stands between most students and the abyss, is the kind of legal writing program described last month, in Part One. And having in mind the need for consistency throughout the program, I believe the Legal Writing Institute should consider developing a set of recommendations, a charter, for legal writers, with brief commentary. They would have some weight, coming from the Institute. They could also do some good even beyond law school. None of the items below will be news to writing teachers, but I must say that while I was in practice, the idea of a thesis paragraph, for instance, never occurred to me, and it does not seem to occur to a good many lawyers. Nor does the idea of putting known information near the beginning of the sentence, and using strong verbs, and many of the other items. Moreover, even old news can serve as a reminder and a prod to legal writers.

Finally, if the idea of "definition" seems too strong or limiting, then call

the items "elements," or call them "guidelines."

The Elements of Plain English

A. In General

1. As the starting point and at every point, design and write the document in a way that best serves the reader. Your main goal is to convey your ideas with the greatest possible clarity.
2. Make a table of contents for long documents.
3. Use examples as needed to help explain the text.
4. Whenever possible, test consumer documents on a small group of typical users.

B. Design (for consumer documents especially)

1. Use at least 8- to 10-point type for text, and a readable typeface.
2. Try to use between 50 and 70 characters a line.
3. Use ample white space in margins, between sections, and around headings and other special items.
4. Use highlighting techniques such as boldface, underlining, and bullet dots. But don't overuse them, and be consistent throughout the document.
5. Avoid using all capital letters, except possibly for main headings.
6. Use diagrams, tables, and charts as needed to help explain the text.

C. Organization

1. Divide the document into sections, and into smaller parts as needed.
2. Put related material together.
3. Order the parts in a logical sequence. Usually, put the more important before the less important, the general before the specific, and the ordinary before the extraordinary.
4. Omit unnecessary detail. Try to boil down the information to what your reader needs to know.
5. Use informative headings for the main divisions and subdivisions.

(The next four items apply to analytical documents, such as briefs and memorandums, and to most informational documents.)

6. Try to begin the document and the main divisions with a paragraph that introduces and summarizes what follows, and states your conclusion.
7. Use a topic sentence to summarize the main idea of each paragraph, or of a series of paragraphs on the same topic.
8. Make sure each paragraph develops the main idea through a logical sequence of sentences.
9. Use transitions to link your ideas and to introduce new ideas.

D. Sentences

1. Prefer short and medium-length sentences. As a guideline, keep the average length under 25 words.
2. In most sentences, put the subject near the beginning; keep it short and concrete; make it something the reader already knows about; and make it the agent of the action in the verb.
3. Put the central action in strong verbs, not in abstract nouns. ("If the seller delivers the goods late, the buyer may cancel the contract." Not: "Late delivery of the goods may result in cancellation of the contract.")
4. Keep the subject near the verb, and the verb near the object (or complement). Avoid intrusive phrases.
5. Put your strongest point, your most important information, at the end.
6. Prefer the active voice. Use the passive voice if the agent is unknown or unimportant. Or use it if, for continuity, you want to focus attention on the object of the action instead of the agent. ("No more legalese. It has been ridiculed long enough.")
7. Connect modifying words to what they modify.
8. Use parallel structure for parallel ideas. Consider using a list or tabulation if the items are at all complicated, as when you have multiple conditions or rules.

E. Words

1. Prefer familiar words—usually the shorter ones.
2. Avoid legal jargon: stuffy old formalisms (*Now comes; In witness whereof*); *here-, there-,* and *where-* words (*hereby, therein*); unnecessary Latin (*arguendo, inter alia*); and all the rest (*and/or, provided that, pursuant to, the instant case*).
3. Avoid doublets and triplets (*any and all; give, devise, and bequeath*).
4. In consumer documents, explain technical terms that you cannot avoid using.
5. Omit unnecessary words.
6. Replace wordy phrases (*prior to, with regard to, in the event that*).
7. In consumer documents, consider making the consumer "you."
8. Avoid multiple negatives.
9. Be consistent; use the same term for the same thing, without guilt.

About Definitions

Definitions of Plain English have ranged from the general and subjective to the precisely objective, and they have involved varying degrees of detail.

On the more general side, Bryan Garner defines plain language as "the idiomatic and grammatical use of language that most effectively presents ideas to the reader."[56] The original Plain English law, in New York, requires simply that a consumer contract be "(1) [w]ritten in a clear and coherent manner using words with common and every day meanings; (2) [a]ppropriately divided and captioned by its various sections."[57] A few years ago, I described Plain English as "a collection of principles in the service of simple, direct, economical writing and drafting."[58] Professor Robert Eagleson, a leading expert from Australia, gives this definition:

> *Plain English is clear, straightforward expression, using only as many words as are necessary. It is language that avoids obscurity, inflated vocabulary and convoluted sentence construction. It is not baby talk, nor is it a simplified version of the English language.*
>
> *Writers of plain English let their audience concentrate on the message instead*

of being distracted by complicated language. They make sure that their audience understands the message easily.[59]

Now, it is no criticism that Plain English cannot be precisely, mathematically defined. Neither can "reasonable doubt" or "good cause." Like so many legal terms, it is inherently and appropriately vague. And we have to settle for making it as clear and precise as possible.

In fact, commentators recommend that Plain English laws not adopt the precise standards associated with readability formulas.[60] Commentators recommend "general performance standards of clarity and readability, bolstered, perhaps, by suggested, otherwise neglected specifics to be taken into account . . . ."[61]

[Omitted here are definitions that are more precise and objective.]

In the definition that I propose, you may recognize the influence of three main sources: the Document Design Center of the American Institutes for Research;[62] Joseph Williams's *Style: Ten Lessons in Clarity and Grace* (3d ed. 1989);[63] and Richard Wydick's *Plain English for Lawyers* (2d ed. 1985). None of the proposed elements, or guidelines, seem new or radical. I just tried to choose well.

The definition should apply to almost all legal documents and to most government and business writing. It avoids formulas (although formulas do have value as indicators[64]). It gives special attention to sentence structure and at least some attention to coherence among sentences. All in all, it tries to address the criticism that proponents are unduly concerned with readability to the detriment of accuracy and clarity.

In fact, I hope that calling it "The Elements of Clear Writing" might be as valid as calling it "The Elements of Plain English." The use of "clear" instead of "plain" has been suggested by Mark Mathewson, who formerly wrote the *Verbatim* column for the ABA's *Student Lawyer*. He would use "Plain English" only when talking about consumer contracts. He thinks that because of associations with populism and simplemindedness, the term has for some persons become a red flag.[65] I think of it more as a banner, but his suggestion is fine with me.

Of course, this is not to say that clarity is the same as readability or simplicity. But as Mathewson says, "any writer knows that simplicity and economy of expression are at the heart of clarity."[66] What's more, simplifying often leads to greater accuracy as well. Barbara Child points out that "one of the common side-effects of converting complex material into Plain English is that the drafter ends up re-thinking the content as well as the form. Restructuring produces reconceptualizing. Ultimately the substance improves."[67]

When Citibank rewrote its promissory note, for instance, the bank decided to eliminate many of the "events of default" in the old note, because they arose so rarely or added so little real protection.[68] When Sentry Insurance drafted its Plain Talk Car Insurance Policy, it reduced from eight to two the number of definitions for different kinds of vehicles.[69] The company also decided that all family members should be able to use the policyholder's car without permission, and to give others permission to use the car. The requirement that the policyholder give permission was not worth keeping.[70] These are examples of the self-defeating overprecision and overelaboration that legal documents are so prone to.

What we need is a balanced view of writing. We should treat precision and clarity as equally important. At the same time, we should look at the underlying substance, along with the language, to see if they can be simplified.

More often than not, these three goals are complementary.

At any rate, I'm aware of deficiencies in the definition, and possible criticisms.

- No set of guidelines can capture the subtleties of writing, of "style."
- For every guideline, there are exceptions.
- There is such a thing as false economy: leaving out the relative pronoun plus verb, or so-called "whiz-deletions" ("the report [that was] prepared by the faculty committee"); leaving out *that* after verbs ("the court held the plaintiff"); initialisms (ELCRA = Elliott-Larsen Civil Rights Act); noun strings (Legal Services Delivery Improvement Program).[71]
- Some of the guidelines are vague, as guidelines tend to be.
- They probably don't give enough attention to audience and purpose.
- They don't include persuasive writing techniques (although I think clarity is its own best persuader).
- They do not address the conceptualizing that is fundamental to legal drafting.[72]
- Guidelines need to be accompanied by examples and explanation.

The question, I suppose, is whether guidelines are useful to begin with. According to experts in linguistic research, they are.[73] "Guidelines distill research and good practice into chunks of useful advice."[74] Guidelines are suggestions, not inflexible rules, so writers must use judgment in applying them.[75] But guidelines can "help writers think about what they are doing."[76] And all writers use guidelines whether they realize it or not—either explicit guidelines or ones they have internalized.[77] ■

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Footnotes

49. *See, e.g.,* Veda Charrow, Document Design Center, What is "Plain English," Anyway? (1979); Paul R. Timm & Daniel Oswald, *Plain English Laws: Symbolic or Real?* J. Bus. Comm., Spring 1985, at 31, 37 (1985) (arguing that Plain English laws "must themselves communicate reasonable and valid criteria for measuring plain English").
50. *See, e.g.,* Richard A. Lanham, Revising Prose (2d ed. 1987). This highly regarded book is explicitly concerned with "translating the Official Style into plain English." *Id.* at v. But the book also devotes one of six chapters to sentence length, rhythm, and sound. *Id.* at 31-44.
51. *See, e.g.,* Veda R. Charrow & Myra K. Erhardt, Clear and Effective Legal Writing 95-96 (1986) ("Probably no other single characteristic does more to needlessly complicate legal writing than these long sentences."); David Mellinkoff, Legal Writing: Sense and Nonsense 58 (1982) (describing "the long, long sentence" as "lawsick's oldest curse").
52. John M. Lindsey, *The Legal Writing Malady: Causes and Cures,* N.Y. L.J., Dec. 12, 1990, at 2.
53. For extensive collections, see Charrow & Erhardt, *supra* note 51; Mellinkoff, *supra* note 51.
54. *See* Joseph Kimble & F. Georgann Wing, *Protecting Your Writing from Law School: An Open Letter to Law Students,* 65 Mich. B.J. 576 (1986) (discussing the legalese in Hawkins v. McGee, 146 A. 641 (N.H. 1929), which appears as the first case in two popular contracts books, Thomas D. Crandall & Douglas J. Whaley, Cases, Problems, and Materials on Contracts 3 (1987), and John P. Dawson et al., Cases and Comment on Contracts 2 (5th ed. 1987)); Steven Stark, *Why Judges Have Nothing to Tell Lawyers About Writing,* 1 Scribes J. of Legal Writing 25, 26 (1990) (suggesting that if law schools want to improve lawyers' writing, they should abolish the case method, because "most judges write terribly").
55. Collard v. Incorporated Village of Flower Hill, 421 N.E.2d 818, 821-22 (N.Y. 1981) (citations omitted), *reprinted in* Jesse Dukeminier & James E. Krier, Property 1172, 1174-75 (2d ed. 1988).
56. Bryan A. Garner, The Elements of Legal Style 7 (1991).
57. N.Y. Gen. Oblig. Law § 5-702(a) (McKinney 1989). The statutes in five other states use the same language: Haw. Rev. Stat. § 487A-1(a) (1985); Me. Rev. Stat. Ann. tit. 10, § 1124 (West 1980); Minn. Stat. Ann. § 325G.31 (West 1981); Mont. Code Ann. § 30-14-1103(2)(a)-(b) (1991); W. Va. Code Ann. § 46A-6-109(a) (Michie 1986).
58. Joseph Kimble, *Protecting Your Writing From Law Practice,* 66 Mich. B.J. 912, 913 (1987).
59. Robert D. Eagleson, Writing in Plain English 4 (1990).
60. *See, e.g.,* Reed Dickerson, The Fundamentals of Legal Drafting § 8.10 (2d ed. 1986); Mellinkoff, *supra* note 51, at 217.
61. Dickerson, *supra* note 60, at 175 (footnote omitted).
62. In particular, Charrow & Erhardt, *supra* note 51; Daniel B. Felker et al., Guidelines for Document Designers (1981).
63. This version is published by Scott, Foresman. A new version, Style: Toward Clarity and Grace, was published in 1990 by the University of Chicago Press.
64. Robert W. Benson, *The End of Legalese: The Game is Over,* 13 N.Y.U. Rev. L. & Soc. Change 519, 551-58 (1984-1985).
65. Mark Mathewson, *Verbatim,* Student Law., Oct. 1989, at 12.
66. *Id.* at 13.
67. Barbara Child, Drafting Legal Documents 100 (1988).
68. Carl Felsenfeld & Alan Siegel, Writing Contracts in Plain English 58-62 (1981); Office of Consumer Affairs, U.S. Dep't of Commerce, How Plain English Works for Business 4-5 (1984) [How Plain English Works].
69. How Plain English Works, *supra* note 68, at 66; *see also* Law Reform Commission of Victoria (Australia), Report No. 9, Plain English and the Law 29-33 (1987; repr. 1990) (noting the recurring problem of "unnecessary concepts").
70. How Plain English Works, *supra* note 68, at 66.
71. *See* Edward P. Bailey, Jr., Writing Clearly 101-07 (1984) (leaving out *that,* initialisms, noun strings); Felker et al., *supra* note 62, at 39-40, 63-65 (whiz-deletions, noun strings). *But see* Thomas N. Huckin et al., *Prescriptive Linguistics and Plain English: The Case of "Whiz-Deletions," in* Plain Language: Principles and Practice, 67 (Erwin R. Steinberg ed., 1991) (arguing that whiz-deletions are common, useful, and not especially difficult).
72. *See* Child, *supra* note 67, at 5, 125-28; Dickerson, *supra* note 60, §§ 2.4-2.5, 4.4.
73. Janice C. Redish & Susan Rosen, *Can Guidelines Help Writers? in* Plain Language: Principles and Practice, *supra* note 71, at 83.
74. *Id.*
75. *Id.* at 83-85.
76. *Id.* at 85.
77. *Id.* at 86-87.