

# You Think the Law Requires Legalese?

By Joseph Kimble

**T**here's a sign that, in some configuration, appears on every gas pump in Michigan, although most drivers probably don't even notice it anymore. You can see one in this photo:



Let's put aside the all-capitals, which are notoriously hard to read. And never mind that the first and second items aren't exactly

parallel. ("Stop engine. Don't smoke.") The trouble—linguistically, stylistically, semantically—shows up in the third item.

Look at that little sentence. We get an explicit subject, *A person*, which really throws off the parallelism. The lawyer's *shall*—now corrupted and ambiguous from misuse—does not belong even in statutes or regulations, let alone on a gas pump. *Remain in attendance?* Oh, please. The first *of* is unnecessary. And for the big comedic finish, we're seemingly told that the nozzle must be able to see the person.

The fix isn't hard: "You must stay outside your vehicle and be able to see the nozzle." Or for parallelism with the first two items: "Stay outside your vehicle, and make sure you can see the nozzle."

Now, are people likely to misunderstand the pump version? No. Is this the worst public writing on the planet? Obviously not. But by tracing this mundane example to its source, anyone who cares about clarity in legal and official documents can learn a set of critical lessons.

## The limited force of statutes and regulations

Our gas-pump example has its origins in a Michigan regulation, Mich. Admin. Code R. 29.5325, § 9.2.5.4:

Warning signs shall be conspicuously posted in the dispensing area and shall

incorporate the following **or equivalent** wording: "WARNING. It is unlawful and dangerous to dispense gasoline into unapproved containers. No smoking. Stop motor. No filling of portable containers in or on a motor vehicle. The person shall remain in attendance outside of the vehicle and in view of the nozzle."<sup>1</sup>

The order of the items here is different from our sign, there's an additional item about not filling portable containers, and a few words have changed—probably because the regulation has been amended over time. But that doesn't matter. The point is that the sign essentially uses the regulatory language—even though it didn't have to. Note the language that I bolded above: the gas station could have used something *equivalent to* "A person shall remain in attendance outside of the vehicle and in view of the nozzle." The station could have written it simpler and shorter.

Now imagine a scenario, however unlikely, between some inquisitive station owner and an attorney for the Michigan Petroleum Association:

**Owner:** You know those signs we have to have on our pumps—about not smoking and standing outside when somebody pumps gas?

**Attorney:** Yup. You mean those standard warning signs that everybody buys from Signs-R-Us?

Lawyers tend to greatly exaggerate the extent to which the law requires specific, unalterable wording in legal and official documents.

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## Terms of art are more rare and more replaceable than lawyers like to think.

**Owner:** Right. The other day, some customer was jaggging me about the weird language—nozzles with eyes, or something.

**Attorney:** Well, it may be weird, but it's required by law. No choice. I think there's a state regulation that spells it out.

**Owner:** Wouldn't you know? Okay. Just wondering. I certainly wasn't going to order a new sign. Good thing the grammar police aren't licensed to give tickets.

This scenario has never happened and never will. But a variation on it happens all the time. I hear about it regularly from colleagues involved in plain language, I read about it, I've experienced it myself, and I've written about one typical instance—a project “derailed” by the legal team of New York City's Department of Transportation because “the revision did not use the same legal language as the original.”<sup>2</sup> All too often, legal departments either mistake what the law requires or can't be bothered with matters of “mere style.”

And there's a third impediment to clarity that falls somewhere in between: lawyers' reluctance to depart from statutory or regulatory language even when they know they can. That is, even those lawyers who are generally receptive to plain language may balk when they perceive that statutes or regulations are hovering around. For instance, one blemish on the restyled Federal Rules of Criminal Procedure is the repeated use of *the attorney for the government* instead of *the government attorney*. Why? Because federal statutes use the former. As if there were the slightest risk in changing... At one point during the restyling of the Civil Rules, I changed *Acts of Congress* to *federal statutes* (for consistency with other rules, no less), and an influential voice commented: “Although 28 U.S.C. § 2071 says ‘Acts of Congress,’ I will give you this one without protest.” What a concession. If you want one

setting where this attitude would be a disaster, look no further than jury instructions.<sup>3</sup>

I don't mean to suggest that the language of statutes and regulations is never mandatory. Michigan's Landlord—Tenant Relationship Act requires that the parties complete an inventory checklist, which “shall contain the following notice . . .”<sup>4</sup> There's no getting around the language that appears in quotes after *notice*.

But I'm willing to bet, without having done any kind of survey, that it would turn up at least as many statutes and regulations with language like this:

- *shall incorporate the following or equivalent language* (our gas-pump regulation)
- *shall state . . . a notice in substantially the following form*<sup>5</sup>
- *The statement shall be in a form similar to the following*<sup>6</sup>
- *a statement substantially similar to Model Form G-4*<sup>7</sup>
- *a written notice containing all of the following information*<sup>8</sup>
- *a statement specifying that*<sup>9</sup>
- *shall contain language that*<sup>10</sup>

None of these formulations says to “use these words.”

So what are the lessons to be drawn from all this? They number five. First, codified language will often get copied or at least cause second-guessing—so draft in plain language to begin with. Second, lawyers tend to greatly exaggerate the extent to which the law requires specific, unalterable wording in legal and official documents. Third, if you're told that certain unplain language is legally necessary, you should kindly ask for a citation, a reference. (Nonlawyers, do it!) Fourth, if you don't get one, the lawyer is either at a loss or indifferent. Finally, if you do get one,

check it out. Nonlawyers can usually get any needed help from law-school or university libraries. And when you find the cited law, look for the kind of language in the bullet points above—meaning that legalese is not required.

### The minimal and manageable force of terms of art

Another potent myth, or half-truth, or quarter-truth, commonly invades any discussion of legal writing: lawyers must use terms of art. Woe is them. Their hands are tied.

Once again, much exaggerated. I'll just briefly review points I've made elsewhere.

Even if we take the broad view that any term ever litigated is a term of art, they would count for a tiny part of most legal documents. (Obviously, this view is overinclusive: the term *herein* has been litigated many times, and it's hardly a term of art.) In one empirical study using a real-estate sales contract, researchers found that less than 3 percent of the words had significant legal meaning based on precedent.<sup>11</sup>

Now consider the tiny fraction of words that *have* been litigated. Can we say that they have been honed by precedent and are thus irreplaceable? That question prompts others. How many cases does it take before a term is well honed? Why couldn't we conclude that the more times a term has been litigated, the more troublesome it is? What do we do about inconsistent interpretations? Do drafters generally operate more from considered, thoughtful choice or from habit and imitation?

At any rate, we again have research that helps inform this discussion. In 1995, the Centre for Plain Legal Language at Sydney University's Faculty of Law published *Law Words: 30 Essays on Legal Words & Phrases*.<sup>12</sup> As the title suggests, the contributors carefully researched 30 terms that many lawyers would classify as terms of art. And for almost every one, the research showed that the term was unnecessary, troublesome, best used together with a plainer term, or replaceable with a plain equivalent. For example: *give*, not *give, devise, and bequeath*; *interest*, not *right, title, and interest*; *together and individually*, not *jointly and severally*. Surely, research in the U.S.

on these terms—and many more that we might pluck from *Words & Phrases*—would produce the same conclusions about their value and need in this country.

In fact, to take another example, how about the word *indemnify*? Isn't that a term of art—if anything is? Well, check out the September column.<sup>13</sup> A seasoned commercial lawyer says otherwise.

One point in closing. If you're uncomfortable with abandoning the traditional term entirely, you can usually still find a way to pair it with plain words or an explanation the first time you use it: “attached items (called ‘fixtures’)”; “I release, or give up, any legal claims”; “a default judgment—which means that the court will give the plaintiff what he is asking for.” Then try to stick with the plain term in any later uses. And don't be surprised if clients—especially consumers—sing your praises for helping them understand.<sup>14</sup>

Terms of art are more rare and more replaceable than lawyers like to think. But even when a drafter can't bear to part with a legal term, it need not stand alone, unclarified, and may often be dispensed with after a single use. So even a cautious drafter

requires only an occasional speck of legalese—explained in plain language.

The law is no serious obstacle to writing clearly and plainly. ■

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## ENDNOTES

- 2003 AACRS, R 29.5325.
- Kimble, *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* (Carolina Academic Press, 2012), p 34.
- See Kimble, *How to Mangle Court Rules and Jury Instructions*, in *Lifting the Fog of Legalese: Essays on Plain Language* (Carolina Academic Press, 2006), pp 105, 115–116 (giving examples of statutes converted to plain jury instructions).
- MCL 554.608(4)
- MCL 554.634(2).
- 21 CFR § 1304.40(b)(2).
- 12 CFR § 226.9(a)(2).
- MCL 339.918(1).
- MCL 339.918(1)(d).
- MCL 339.2515(1).
- Benson Barr *et al.*, *Legalese and the myth of case precedent*, 64 Mich BJ 1136, 1137 (October 1985), available at <[http://www.michbar.org/generalinfo/plainenglish/PDFs/85\\_oct.pdf](http://www.michbar.org/generalinfo/plainenglish/PDFs/85_oct.pdf)>. All websites cited in this article were accessed October 15, 2013.
- Available at <[http://www.clarity-international.net/downloads/law\\_words.pdf](http://www.clarity-international.net/downloads/law_words.pdf)>.
- See Ammon, *Indemnification: Banish the word!—And rebuild your indemnity clause from scratch*, 92 Mich BJ 52 (September 2013), available at <<http://www.michbar.org/journal/pdf/pdf4article2252.pdf>>.
- See Trudeau, *The public speaks: An empirical study of legal communication*, 14 Scribes J Legal Writing 121, 149–150 (2011–2012) (reporting on a survey in which, for one question, the public overwhelmingly preferred that legal terms be accompanied by an explanation).

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