

Strike Three for Legalese

By Joseph Kimble and Joseph A. Prokop Jr.

During this 30th-anniversary year of the column, we are reprinting some of the more memorable ones. This column, which I've updated a little, originally appeared in May 1990. It's one of several over the years that reported on readers' overwhelming preference for plain language, as measured by actual testing. —JK

In the October 1987 column, we reported on a survey of Michigan judges and lawyers in which they showed a strong preference for plain English over legalese.¹ The same survey has now been done in Florida and Louisiana—with strikingly similar results in favor of plain English. So geography makes no difference: plain English wins everywhere

The Survey

The survey form is shown in the box on the next page. The form invited readers



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to choose the A or B version of six paragraphs—one version in plain English and the other in traditional legal style. Neither the survey form nor the cover letter referred to “plain English” or “legalese.” Rather, the cover letter introduced the survey as part of an effort to “test language trends in the legal profession.”

Each of the six paragraphs in the survey was designed to test for specific aspects of plain English.

Paragraph 1

1A uses a wordy, obsolete formalism.
1B is simple and direct.

Paragraph 2

2A uses the first person (*I*) and strong, simple verbs (*received* and *signed*).

2B uses archaic and inflated words (*hereby*, *hereof*, and *prior to*), and it uses abstract nouns (*receipt* and *execution*) instead of the strong verbs.

Paragraph 3

3A is hard to read because of the long, intrusive clause between the subject (*petitioner's argument*) and the predicate (*is contrary to the facts*). And 3A again turns strong verbs into abstract nouns (*argument*, *exclusion*, and *suppression*).

3B removes the intrusive clause and puts the conclusion in a separate short sentence. 3B also uses stronger verb forms (*argued*, *to exclude*, and *[to] suppress*) instead of the abstract nouns.

Paragraph 4

4A uses long sentences again and a series of redundant pairs. It also defines “negligence” negatively (“not to avoid [the conduct]”).

4B uses shorter sentences. It addresses jurors in the second person (*you*) and walks them through the instruction step by step. 4B also defines “negligence” positively. 4B is no shorter than 4A, but plain writing does not always mean the fewest possible words.

Paragraph 5

5A uses positive form and strong verbs (*will pay* and *notifies*) in the active voice.

5B uses two negatives (*will not be made* and *fails to provide*). It also turns the verbs into nouns (*payment* and *notification*), and the active voice into the passive (*will not be made*).

Paragraph 6

6A uses the familiar and readable *if... [then]...* construction. It keeps the subjects and verbs together, and it puts the important details at the end. It also uses the simple word *send* instead of *submit*, and the simple *on* instead of *regarding*.

6B has two intrusive phrases: one inside the verb (*may submit*) and one between the verb (*submit*) and its object (*comments*).

As you have gathered, the plain-English answers are 1B, 2A, 3B, 4B, 5A, and 6A. The alternative versions contain many of the familiar enemies of plain English: obsolete formalisms (*Now comes...*); archaic words (*hereby*, *hereof*); longer and less common words (*subsequent*, *submit*) instead of simple, everyday words (*later*, *send*); wordy phrases (*above named*, *prior to*); doublets (*by and through*, *foreseen or anticipated*); abstract nouns (*execution*, *payment*, *notification*) created from strong verbs; passive voice (*payment will not be made*); long sentences; intrusive phrases; and negative form.

The Responses

The original survey, in Michigan, was sent to a random sample of 300 Michigan judges and 500 lawyers. Responses came from 425 (53%). The judges preferred plain English in 85% of their responses, and the lawyers in 80%.

The Florida survey was done by Barbara Child, the former director of legal drafting at the University of Florida College of Law. She reported her results in the *Florida Bar Journal*.² She surveyed 558 Florida judges and 558 lawyers, and received responses from 628 (56%). The judges preferred plain English in 86% of their responses, the lawyers in 80%—almost identical to the Michigan results.

In her article, Child reviews the trend toward plain English and credits the practicing bar in Michigan with having “taken on plain English reform wholesale.”³ At the same time, she acknowledges the overriding need “for practice to catch up with preference.”⁴

The Louisiana survey was done by Joseph Prokop while he was a student at Thomas Cooley Law School. He sent the survey to judges only, 247 judges of the Supreme Court, Court of Appeals, and trial courts. In 123 responses, those judges preferred the plain-English versions 82% of the time.

No doubt about it. Submitted to the judgment of 1,176 law professionals in three states, legalese has struck out.

There is one other study worth mentioning. It focused more narrowly on the persuasive form of legal writing.⁵ In California, ten appellate judges and their research attorneys, reading passages from appellate briefs, rated the passages written in legalese as “substantially weaker and less persuasive than the plain English versions.”⁶

The Message

When the discussion of legal writing turns to concrete examples, we naturally prefer the greater clarity and readability of plain English. As *readers* we prefer it; that is the message—and the moral imperative—for writers. If we expect the other person’s writing to be straightforward, we had better demand it of our own. Remember the Golden Rule.

Legal-Language Survey

Below are paragraphs taken from legal documents. Please mark your preference for paragraph A or B in the place provided.

1. _____

A [] Now comes the above named John Smith, plaintiff herein, by and through Darrow & Holmes, his attorneys of record, and shows unto this Honorable Court as follows:

B [] For his complaint, the plaintiff says:

2. _____

A [] I received a completed copy of this note and disclosure statement before I signed the note.

_____ Date _____

B [] Maker(s) hereby acknowledge receipt of a completely filled in copy of his note and disclosure statement prior to execution hereof of this ____ day of _____, 19____.

3. _____

A [] Petitioner’s argument that exclusion of the press from the trial and subsequent suppression of the trial transcripts is, in effect, a prior restraint is contrary to the facts.

B [] Petitioner argued that it is a prior restraint to exclude the press from the trial and later suppress the trial transcripts. This argument is contrary to the facts.

4. _____

A [] One test that is helpful in determining whether or not a person was negligent is to ask and answer whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he would have foreseen or anticipated that someone might have been injured by or as a result of his action or inaction. If such a result from certain conduct would be foreseeable by a person of ordinary prudence

with like knowledge and in like situation, and if the conduct reasonably could be avoidable, then not to avoid it would be negligence.

B [] To decide whether the defendant was negligent, there is a test you can use. Consider how a reasonably careful person would have acted in the same situation. To find the defendant negligent, you would have to answer “yes” to the following two questions:

1) Would a reasonably careful person have realized in advance that someone might be injured by the defendant’s conduct?

2) Could a reasonably careful person have avoided behaving as defendant did?

If your answer to both of these questions is “yes,” then the defendant was negligent. You can use the same test in deciding whether the plaintiff was negligent.

5. _____

A [] The company will pay benefits only if the insured notifies the company of the loss.

B [] Payment of benefits will not be made by the company if the insured fails to provide notification of the loss.

6. _____

A [] If attorneys want to comment on the proposed change in court procedures, they may send comments in writing to the Clerk, 233 Main St., Gotham City, before Feb. 21, 1987.

B [] Interested attorneys may, on or before Feb. 20, 1987, submit to the Clerk, 233 Main St., Gotham City, written comments regarding the proposed change in court procedures.

Louisiana Judges

Question	1	2	3
plain English	91 (74%)	92 (75%)	113 (92%)
legalese	32 (26%)	31 (25%)	10 (8%)
no response	0 (0%)	0 (0%)	0 (0%)
Question	4	5	6
plain English	109 (89%)	101 (82%)	101 (82%)
legalese	11 (9%)	21 (17%)	22 (18%)
no response	3 (2%)	1 (1%)	0 (0%)
Total number of plain-English responses	607		
Total number of legalese responses	127		
Total number of no responses	4		
Percent of plain-English responses	82%		
Percent of legalese responses	17%		
Percent of no responses	1%		

Preference for Plain English

State	Judges	Lawyers
Michigan	85%	80%
Florida	86%	80%
Louisiana	82%	—

Unfortunately, the myths about plain English persist, and so does legalese. The myths number at least four.

Myth One: Plain-English advocates want first-grade prose, or want to reduce writing to the lowest common denominator. Not true. We advocate writing that is as simple, direct, and economical as the circumstances allow. We have encouraged lawyers to at least get started by doing away with obsolete formalisms, archaic terms, doublets and triplets, and other common affronts to plain style.⁷

In the 1980s and '90s, the Plain English Committee of the State Bar translated hundreds of passages into plain English and helped revise dozens of forms. And this column has offered examples almost every month since 1984. Rarely have we heard that the plain-English versions changed the meaning, or were simpliminded, or were inferior to the originals.

Far from advocating first-grade prose, we have said many times that plain English only *looks* easy. As Barbara Child points out, "it requires sophistication to produce documents that are consistently coherent, clear, and readable. By contrast, the 'specialized tongue' of lawyers, 'legalese,' may even be easier to write because it relies on convention instead of thought."⁸

Myth Two: Plain English does not allow for literary effect or recognize the ceremonial value of legal language. Not true. Plain English has nothing against an attractive

writing style; or against a rhetorical flourish or strategy in the right context, such as a persuasive brief; or against *the truth, the whole truth, and nothing but the truth* to convey a sense of gravity in the courtroom. These things are matters of context, judgment, effectiveness, and degree.

The trouble is that the successful and legitimate uses of expressive style have been overwhelmed by legalese. Ask the judges or clerks who read briefs for a living how much literature they see. Ask them whether they would settle for writing that is clear and concise. Or test the literary hypothesis against a random volume from a case reporter.

At any rate, there is little room for literary effect in the neutral style of contracts, wills, consumer forms, and so on. Yet this seems to be where legalese is thickest.

We have no answer for those who find beauty in *Now comes the plaintiff*. But those who enjoy a fresh metaphor or a rhythmic and well-turned sentence can rest assured: in most contexts, these are quite compatible with the goals of plain English. And in every context, simplicity has a beauty of its own.

Myth Three: Plain English is impossible because legal writing includes so many terms of art. This one dies hard. Of course legal writing and analysis may involve terms of art, such as *bearsay* and *res judicata*. Legitimate terms of art convey in a word or two a fairly specific, settled meaning. They are useful when lawyers write for each other, but when we write for a lay audience, terms

of art impose a barrier. If we cannot avoid them, we should at least try to explain them.

Terms of art are limited in another, more important way: they are but a small part of any legal paper. One study of a real-estate sales agreement found that only 3% of the words had significant legal meaning based on precedent.⁹ The rest of a legal paper can be written in plain English, without *hereby* or *in consideration of the premises set forth herein* or *further affiant sayeth naught* or *ordered, adjudged, and decreed* or *due to the fact that* or *in the event of default on the part of the buyer*.

The task for legal writers is to separate real terms of art from all the rubble. The one indispensable guide is *Garner's Dictionary of Legal Usage* (3d ed. 2011).

Myth Four: Plain English is impossible because the law deals with complicated ideas that require great precision. This notion, like the previous one, contains a kernel of truth, but only a kernel.

First, much of what plain English opposes has nothing to do with precision. The word *hereby* rarely adds an iota of precision. *Said plaintiff* is no more precise than *the plaintiff*. *In the event of default on the part of the buyer* is no more precise than *if the buyer defaults*.

Second, it's no criticism of plain English that many important legal ideas cannot be made precise. The terms *reasonable doubt* and *good cause* and *gross negligence*, for instance, are *inherently* vague. The best we can do with terms like these is to make them as clear and precise as possible.

Third, plain-English principles can usually make even complicated ideas more clear. This column has yet to find a sentence too complex for plain English.¹⁰ Another columnist points out that "[i]f anything, complex ideas cry out for clear, simple, transparent prose. The substance is challenging enough; don't compound the challenge with a difficult prose style."¹¹ He suggests that we

think of plain English as a means to clear writing, a goal we can all agree on.

Let's abandon these myths. Legalese persists for the same reasons as always—habit, inertia, formbooks, fear of change, and notions of prestige. These reasons are more emotional than intellectual. We may think that clients expect and pay for legalese, but it has prompted endless criticism and ridicule. And besides, since legalese has nothing of substance to recommend it, its dubious prestige value depends on ignorance. We cannot fool people forever. Our main goal should be to communicate, not to impress.

Legalese persists for another, less obvious reason—one that goes more to training and skill. Law schools have neglected legal drafting. Most first-year writing courses concentrate on research, analysis, and advocacy; students write office memorandums and appellate briefs. Law schools have been much slower to offer courses in drafting contracts, wills, legislation, and the like. The result: "Many lawyers now in practice have had no formal training in the fundamental principles of drafting such documents, much less techniques to make them readable."¹²

Contracts, real-estate documents, wills and trusts, powers of attorney, consumer forms, administrative rules, legislation—this is the realm of drafting, where legalese is thickest and the need for reform is greatest. ■

Joseph Kimble has taught legal writing for 30 years at Thomas Cooley Law School. He is the author of Lifting the Fog of Legalese: Essays on Plain Language and Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law. He is also senior editor of The Scribes Journal of Legal Writing, the past president of the international organization Clarity, and the drafting consultant on all federal court rules. He led the work of redrafting the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

After leaving Cooley Law School, Joseph A. Prokop Jr. earned an LL.M. degree in estate planning and administration from the University of Miami Law School and an LL.M. degree in elder law from Stetson University Law School. He is board-certified by the Louisiana State Bar Association as an estate-planning and administration specialist.

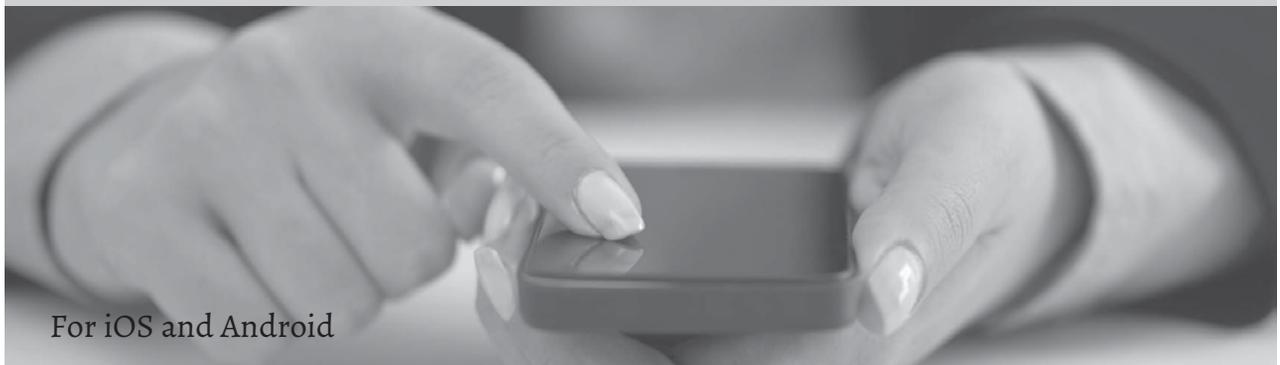
He is the founder of Joseph A. Prokop Jr. & Associates, an elder-law firm in Baton Rouge. Mr. Prokop is the author of Louisiana Successions (3d ed. LexisNexis 2013) and is a frequent continuing-education lecturer.

ENDNOTES

1. Harrington and Kimble, *Survey: Plain English Wins Every Which Way*, 66 Mich B J 1024 (October 1987).
2. Child, *Language Preferences of Judges and Lawyers: A Florida Survey*, 64 Fla B J 32 (February 1990).
3. *Id.* at 34.
4. *Id.* at 36.
5. Benson and Kessler, *Legalese v Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 Loy LA L Rev 301 (1987).
6. *Id.* at 301.
7. Edgerton (Hathaway), *The Ten Commandments of How to Not Write in Plain English*, 65 Mich B J 1168 (November 1986); Kimble, *Protecting Your Writing from Law Practice*, 66 Mich B J 912 (September 1987).
8. Child, *supra* n 2, at 32.
9. Barr, Hathaway, Omichinski, and Pratt, *Legalese and the Myth of Case Precedent*, 64 Mich B J 1136, 1137 (October 1985).
10. Hathaway, *Results of the "Too Complex for Plain English" Search*, 68 Mich B J 1194 (December 1989).
11. Mathewson, *Verbatim*, 18 Student Lawyer 12, 13 (October 1989).
12. Child, *supra* n 2, at 36.

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