A Legal-Writing Carol

By Mark Cooney

We end our reprints from the column's 30-year archive with a seasonal classic. This one you'll probably see again.
—JK

Ebenezer Scribe stoked the dying embers, folded himself inside a wool afghan, and settled into his wingback chair. He'd had another productive day, adding a good ten billable hours to Scribe & Morley's ledger. Now, in the faint firelight, he was enjoying his hard-earned repose. As he picked up his bowl of stew, he felt a whisper of a draft against the back of his neck and then, inexplicably, heard the gentle ring of the old servant bell, a vestige of his Victorian home's century-old design.

"Humbug," scowled Scribe, who was in no mood for mysterious disturbances. But he would not quell things so easily this night.

Clank, clank, thump.

Scribe snapped to attention at the sound. A few seconds passed. Then quiet again. "Confounded old pipes. Humbug!" He dipped his spoon into his stew. Then the servant bell rang again, this time with vigor.

Clank, clank, thump.

"Blasted, confounded old—"

But before another word dripped from Scribe's acid tongue, every bell and chime in the house clamored. Scribe's stew bowl fell to the floor, dumping its contents onto the hearth rug. And then, before Scribe's brain could register what was happening, a glowing figure passed through the closed door as easily as sunlight through plate glass. The limp fire roared to life as if greeting an old friend, and Scribe was face to face with a terrifying specter.

"Wha…what…" stammered Scribe, lifting a hand up to shield his eyes.

"Ebenezer."

"Who…what are you? Why do you disturb my supper this way?"

"Do you not recognize me, Ebenezer? Look. Whom do you see?"

Scribe peered more carefully into the ghostly glow and made out a familiar face, the face of his long-dead law partner, Jacob Morley. The ghost's eyes were vacant, its expression blank. Yet its torment was evident. The ghost was wrapped in chains—an elaborate network of links that bound it in eternal struggle. As Scribe looked closer still, he saw that the chains were made of words: *save as hereinbefore otherwise stipulated…as duly executed and attested by the party of the first part…and by these presents does unconditionally grant, bargain, and sell unto the party of the second part, to have and to hold, the said chattels, goods, and objects hereof…*

Scribe mustered his voice again. "My dear Morley. My good partner and colleague. But it can't be. Bah, humbug! My eyes are tricking my brain, and I won't have it. You're nothing more than a figment, the untoward product of a bad morsel of beef."

"Your eyes do not lie, Ebenezer."

"But, but what do you want of me? And why are you so tortured? You were a good, able attorney, and your billables were always high and lucrative for our firm. Why do you come to me in chains?"

"I wear the chains I forged in life—chains made from the boilerplate, archaic language that built a wall of intimidation and confusion between me and my readers. The impenetrable words that forced my clients to beg for an explanation time and again. I'm chained by the countless surplus words, the inflated words, the rote doublets and triplets. I wear the excess, born of laziness and vanity, that tried my readers' patience. The words that prevented clarity rather than ensuring it. I wear the chains of *legalese*, now, as I did in life."

"But those words served you well enough, Morley. Why should you regret them now? And why should I abandon what worked for my predecessors—what worked for you? It was good business, wasn't it?"

"Business? Good business? *Clarity* was my business, Ebenezer. Communicating with readers. Those words didn't serve me well. I made money in spite of them. I chose the perceived safety of the stale status quo rather than striving for better."

"But clarity would dumb it down, Morley," replied Scribe.

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"I wear the chains I forged in life….I wear the chains of *legalese*…."

"Ebenezer Scribe!" roared the ghost, shaking the chains that bound it.

Scribe cowered in his chair.

"Clarity is not dumbing it down. Clarity is smartening it up! Why is it, Ebenezer, that you now use a computer to write, use e-mails and text messages to correspond, and file briefs electronically—modern advances barely dreamt of while I was alive—yet you continue to write in a style that was already antiquated before World War II? Does that make sense, Ebenezer?"

Scribe gave no answer.

"Tonight, you will be visited by three more spirits, one each hour, starting at the stroke of midnight. Heed their words, Ebenezer—their plain words. See the folly of writing in ways that inhibit communication."

And with that, Morley's ghost retreated from the room as quickly as it had appeared. Scribe sat in stunned disbelief, his plans for a relaxed dinner now a distant memory.

"Humbug," Scribe murmured, though without his usual conviction. "I must have dozed off for a moment there. Bad beef. Nothing a good night's sleep won't put behind me."

Scribe's sleep passed uneventfully until his bedroom clock started chiming. He stirred and woke. Then he began counting. On the twelfth chime, Morley's prophecy took life. Scribe's room glowed bright, and from the glow came a spirit that flitted and danced like a candle flame. It shifted its shape and face in quick bursts while Scribe looked on, aghast. Grabbing Scribe's trembling hand, it announced, "I'm the Ghost of Writing Past, Scribe. Your past. Come with me."

"But I, I don't want to—"

Yet the ghost whisked Scribe out of the house before he could finish his protest, and within seconds Scribe was a world away, standing beside a young law student who was enjoying a lively study-group session. Scribe was looking at himself nearly 40 years earlier.

"Spirit, that's me, and this is my law-school apartment! Why, that's my buddy Richard Wilkins and good ol' Jack Robinson. Richard, Jack, how are you, my old friends?"

"They can't hear you, Scribe. But you can hear them. Listen."

"Boy, Professor Fezziwig was really going on and on about that new Roe v Wade *case today. In a few years, nobody will even remember it," quipped Richard. "Hey, did you read that form contract in our Contracts text, Ebenezer?"*

"You don't read it, Richard. You endure it, like a bad movie. Listen to this: 'It is hereby covenanted and agreed that any claims, disputes, or controversies arising subsequent to the signing of this Agreement and which arise out of or concern the aforestated terms, provisions, or conditions of this Agreement shall be subject to all applicable laws prevailing in the State of Michigan as applied by a court of competent jurisdiction.' What was that lawyer on, anyway?"

"Must've been a Woodstock casualty!" joked Jack, and laughter filled the room.

"How about simply, 'Michigan law governs this contract'?" said the young Ebenezer.

"Well done, Ebenezer!" said Richard, bursting into mock applause.

"Let me tell you, gentlemen, when I get out into practice, I'm going to throw all those stuffy old forms into the garbage can and write new contracts that people can read without getting a headache—that people can actually understand."

"Letting clients understand their own contracts, Ebenezer? Why, then you can't bill them for the extra time it takes to explain what their contracts mean!" More laughter filled the room.

"Those were good days, Spirit. We were going to change the world," said Scribe.

The ghost took Scribe's hand again and led him through the wall. Once beyond it, Scribe found himself back in his bedroom. In a moment, he was in bed and fast to his pillow, asleep. But in a blink, the clock's single chime woke him once more.

Scribe sat up quickly, readying himself. Yet he saw nothing at first. Then Scribe noticed light spilling in under his bedroom door, coming from the parlor. He walked to the door apprehensively and opened it. What he saw was indeed his parlor, but it was transformed—the ceiling double its regular height and the room aglow, as if light in its purest form were shining down from the heavens. Scribe squinted and looked up at an enormous figure. It wore a lush velvet robe with regal trimmings, and a grin lit its whiskered face. When its eyes met Scribe's, it let out a booming laugh that nearly shook Scribe out of his slippers.

"You must be the next spirit come to haunt me," Scribe said.

"Oooh," mocked the spirit, "you *are* a clever one, Scribe! No wonder your practice is so profitable. I am the Ghost of Writing Present."

"If you have some wisdom to share with me, Spirit, be on with it. Yet I must say that all I learned from my first visitor was that I was once, like many, a bright young man with lots of big ideas. I still struggle to see why I should abandon the lofty prose that critics love to call *legalese*, as if naming some exotic, fatal disease. If everyone wrote with so-called plain English, we'd have no art—why, we'd have no Shakespeare."

"Are you comparing a zoning ordinance or a contract for the sale of 2,000 ball bearings to *Hamlet*? To poetry? Those who advocate plain-English legal writing aren't advocating plain Shakespeare, are they, Scribe? Shouldn't parties who make a contract be able to understand the writing that embodies their business relationship—that spells out their rights and duties? Or should their own rights and duties be kept secret from them? And shouldn't citizens—common, everyday people—have a fighting chance of understanding the statutes and ordinances they're legally bound to follow?"

"But judges and clients expect and demand the lofty language—the legalese. I was just a naïve boy to think otherwise," replied Scribe.

"Is that right, Scribe?" And with that, the ghost took Scribe's hand and ushered him out of the house and into the cold night sky. They flew over mountains and lakes until arriving at a large hotel conference facility bustling with activity.

"Where are we, Spirit? I don't know this place."

"No, I wouldn't expect you to, Scribe. This is the Legal Writing Institute's biennial conference, a gathering of legal-writing professors from across the country."

"But what have I to learn from law-school professors?" Scribe wondered aloud to the spirit. "I've been practicing for 36 years."

"Maybe if you'd stop talking you might see," replied the ghost, gesturing to a man who was speaking at a podium in front of a large audience.

My research builds on the existing data. For decades, we've known that judges prefer

plain language over legalese. For example, Benson and Kessler's 1987 research showed that appellate judges are likely to consider legalese-filled briefs unpersuasive and substantively weak.[1] *Similar surveys between 1987 and 1990—by Child, Harrington, Kimble, and Prokop—showed that over 80% of responding judges in Michigan, Florida, Louisiana, and Texas preferred plain English.*[2] *And Flammer's 2010 survey reaffirmed judges' preference for plain language, showing that the majority of responding state and federal judges preferred plain English over legalese.*[3]

But my research looked beyond judges to the general public's views on writing style. I surveyed people from all walks of life who've hired and communicated with attorneys. The results confirm what we've suspected for years: the respondents overwhelmingly preferred plain language—choosing the plain-English samples more than 80% of the time. Oh, I see a hand up. Yes?

You've talked about data confirming our suspicions, Professor Trudeau, but did any of the data surprise you?

As a matter of fact, yes, and it concerned well-educated clients. Some lawyers think that their so-called "sophisticated" clients want inflated language. But the data debunked that notion. In fact, as respondents' educational levels increased, so did their preference for plain language. Respondents with less than a bachelor's degree selected the plain-language version 76% of the time; those with a bachelor's degree selected it 79% of the time; those with a master's or doctoral degree selected the plain-language version 82% of the time; and those with a law degree selected it 86% of the time. This means, for example, that respondents with a master's or doctoral degree were 6% more likely to prefer plain language than those without a bachelor's degree.[4]

"But I thought legalese impressed clients, Spirit," said Scribe. "I thought it gave them confidence in my intellect."

"Do intelligent people purposely communicate in ways that hinder communication, Scribe? Do intelligent writers ignore the wishes and needs of their most important readers?"

"But—"

"Whom do you think you're impressing, Scribe? Do you honestly believe that a judge who has read thousands of briefs will coo in admiration if you write *subsequent to the company's cancellation of said contract* instead of *after the company canceled the contract*? Why would you take on the style of some sort of fourth-rate Dickens while writing briefs about commercial disputes or while drafting contracts or corporate bylaws? Are you writing to please your reader or yourself?"

The spirit began to chuckle, and then its chuckle gained momentum into a laugh, and then its laughter became deafening. Scribe locked his eyes shut and covered his ears, but the sound only grew louder, as if coming from within his own mind. And then Scribe was again jolted by the clock's chimes—two this time, and then silence.

Scribe opened his eyes. His bedroom was dark and still. But he could just make out a tall robed figure, shrouded in gloom. It spoke not a word. A hood obscured its face. Scribe could see nothing but the robe itself and a gavel extending from one sleeve.

"You are no doubt the final spirit that Morley told me to expect, the Ghost of Writing Yet to Come. I confess, Spirit, that I fear you most of all. Tell me, What are your plans for me?"

But the phantom said nothing, instead raising its right arm deliberately and pointing its gavel toward the window. And with that, they were thrust outside and into the city's hustle and bustle. Soon Scribe found himself inside an impressive downtown building, standing in a large room with rich mahogany paneling. He knew this place from his litigation work, although he was surprised to see his favorite judge memorialized in a painting on the wall rather than sitting behind the bench. Then an unfamiliar judge began to speak.

Thank you for your arguments, counsel. I'm ready to rule. To summarize, in an earlier case, the State sued Reliable Construction Company because Reliable damaged State property. When the parties settled, the State signed a "Release and Indemnity" agreement in Reliable's favor. Now Reliable claims that this agreement requires the State to indemnify Reliable for a third party's personal-injury suit arising from the same accident. The State counters that the indemnity agreement is unclear and ambiguous, which allows me to consider parol evidence showing that the parties didn't intend for the agreement to stretch this far.

"I drafted that agreement, Spirit, using an old form. It's ironclad. The State hasn't a leg to stand on," said Scribe with confident glee.

This court agrees with the State and dismisses Reliable's indemnity claim.

Scribe clutched his heart and tottered like a glanced bowling pin. "But—"

In so ruling, I rely, in part, on the Louisiana case Sanders v Ashland Oil, Inc,[5] *where a contractor likewise sought indemnity from a state agency under an indemnity clause that said this*:

> *We do hereby further agree to indemnify and hold harmless said parties, together with all employees, agents, officers, or assigns thereof of and from any and all further claims and/or punitive damage claims that may be made or asserted by the aforesaid or by anyone because of the aforesaid injuries, damages, loss or expenses suffered as a result of the aforesaid explosion/fire, whether such claim is made by way of indemnity, contribution, subrogation or otherwise.*[6]

The Sanders *court concluded that this was too unclear, stating, and I quote, "After carefully reviewing the agreement, we conclude that it is neither explicit nor unambiguous. Initially, we note that the agreement is poorly drafted and that the use of legalese,*

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such as 'aforesaid,' makes the meaning of the contract terms unclear."[7]

Reliable's indemnity clause is a carbon copy of the confusing, legalese-laden clause in Sanders, *and I agree with the court's reasoning in* Sanders. *I have considered some of the other evidence, and I see that the parties never intended for the State to indemnify Reliable under the present circumstances. Reliable's case is dismissed.*

"Reliable is one of my good clients, Spirit. It's not a big company, but it's been with me for years." But the spirit offered no solace or reply—not even a nod. Instead, it raised its gavel again and pointed, and they were soon in another courthouse.

Thank you, counsel. I'm prepared to rule. This is the bank's motion to dismiss its former customer's suit to rescind a loan transaction. The bank relies on a signed "Acknowledgment of Waiver of Right to Rescind" form, which says this:

> *Whereas more than three (3) business days have elapsed since the undersigned received my/our Notice of Right to Rescind and the Truth-in-Lending Disclosure Statement concerning the transaction identified above; in order to induce aforesaid to proceed with full performance under the agreement in question, the undersigned do herewith warrant, covenant and certify that I/we, jointly and separately, have not exercised my/our Right to Rescind; that I/we do hereby ratify and confirm the same in all respects. I/we further represent that the undersigned is/are the only person(s) entitled to rescind, in that I/we am/are all of the persons who have an ownership interest in the real property or I/we am/are all of the person(s) who will be subject to the security interest in the real property.*

I decline to enforce this document because the Truth in Lending Act requires lenders to clearly disclose the terms of a loan, including the right to rescind, and this document is not clear. I rely on cases like Tenney v Deutsche Bank Trust Corp,[8] *in which the United States District Court refused to enforce a bank's "Certificate of Confirmation of Notice of Right to Rescind," which was virtually identical to the bank's form in the present case. The* Tenney *court noted that this was "legalese that [was] unnecessarily convoluted and difficult for the average consumer to read."*[9] *Given the legalese and other misleading circumstances, the court there held that the certificate violated the Truth in Lending Act because it "would confuse and mislead the average consumer."*[10] *I see no difference here. The bank here didn't overreach as much as the bank in* Tenney *did. Nevertheless, the bank's form is dense, impenetrable boilerplate—classic legalese in the worst sense. Therefore, I deny the bank's motion.*

"But, Spirit, I drafted that form, too, just as I always have. I don't…I don't understand…" Scribe's voice trailed off.

"Please tell me, Spirit. Are these the images of court decisions that *will* be, or court decisions that *might* be? Oh, Spirit, do I still have time? Do I have time to change my ways—to change my attitudes and practices? Is there time for me to redraft these documents and others like them? Can I develop the confidence to shed the inflated language that is chaining me as surely as it chained my partner, Morley? To shed the style that shuts out readers rather than inviting them in? Please tell me, Spirit. Tell me. I beg of you," Scribe pleaded, tugging at the bottom of the phantom jurist's robe.

But when Scribe opened his eyes, the mahogany-paneled walls, bench, and pews were gone, as was the terrifying specter. Scribe found himself on his knees on his bedroom's hardwood floor, tugging at the bottom of his bedskirt. A sudden wave of relief hit him. He drew a deep breath and exhaled. The morning sun's friendly rays shone in, and Scribe had the newfound buoyancy of a schoolboy released for summer. He ran to his window and flung it open.

"Young lad," he called to a boy on the sidewalk below. "My good lad, do you know the bookstore around the corner?"

"Of course, sir. It's the last bookstore in town."

"Indeed it is, dear boy. Such a smart lad. And have you seen the books in the window: *Legal Writing in Plain English*, by Bryan Garner; *Lifting the Fog of Legalese*, by Joseph Kimble; and *Plain English for Lawyers*, by Richard Wydick?"

"Yes, sir."

"Well, I want you to go buy the whole lot of them for me, and I'll pay you $20 to do it. And if you bring them back to me within 10 minutes, I'll throw in an extra $30!"

"$50, sir? I'll do it, sir! Right away, sir!"

"Excellent! Then be off with you!" Scribe barked good-naturedly. "What a wonderful boy. *Delightful* boy."

And when the boy returned with the books, Scribe made good on his promise to the boy—and to the spirits. From that day on, Scribe's letters, contracts, and court briefs were pictures of clarity. Clients praised his knack for making the complex seem simple. In Scribe, they'd found a lawyer whose writing empowered them rather than disenfranchising them. And Scribe's court briefs, with their direct and nimble prose, built a pillar of credibility that grew taller with every page. Yes, every day, Ebenezer Scribe was doing the hard work necessary to make his writing easier for readers to understand, and his stock rose with every word. ■

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ENDNOTES

1. See Benson & Kessler, *Legalese v. Plain English: An empirical study of persuasion and credibility in appellate brief writing*, 20 Loy LA L R 301, 319 (1987).
2. Kimble, *Lifting the Fog of Legalese* (Carolina Academic Press, 2006), p 13.
3. Flammer, *Persuading judges: An empirical analysis of writing style, persuasion, and the use of Plain English*, 16 Leg Writing 183, 201 (2010) (summarized in the September 2011 Plain Language column, 90 Mich B J 50).
4. Trudeau, *The public speaks: An empirical study of legal communication*, Scribes J Legal Writing 121, 142–143 (2011–2012).
5. *Sanders v Ashland Oil, Inc* (La App 1 Cir 6/20/97); 696 So 2d 1031, 1037.
6. *Id.* at 1038.
7. *Id.*
8. *Tenney v Deutsche Bank Trust Corp*, unpublished opinion of the United States District Court for the District of Massachusetts, issued January 26, 2009 (Docket No. 08-40041-FDS).
9. *Id.* at *4.
10. *Id.* at *5.