

# Revisiting the Writing Contests (on Boilerplate)

By Joseph Kimble

We continue with our retrospective of some of the exciting and instructive contests that have appeared with various columns over the years. The following are from September–October 2006, November–December 2006, and January–February 2007. I again tried to update the winners' position or firm as best I could.

## September 2006 Contest

What do you think of this specimen?

Under the power of sale contained in said mortgage and the statute in such case made and provided, notice is hereby given that said mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, at public vendue, at the 1st floor of the Ingham County Circuit Courthouse in Mason at 10:00AM on August 10, 2006.

I'll send a copy of *Lifting the Fog of Legalese: Essays on Plain Language* to the first person who writes an "A" version of that sentence in plain language. Email your version to kimblej@cooley.edu. I can't respond to each email but will print the winner with next month's column.

## The Results

Last month, I offered a free copy of *Lifting the Fog of Legalese: Essays on Plain Language* to the first person who emailed me an "A" version of this gem:

Under the power of sale contained in said mortgage and the statute in such case made and provided, notice is hereby given that said mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, at public vendue, at the 1st floor of the Ingham County Circuit Courthouse in Mason at 10:00AM on August 10, 2006.

The winner is Ricardo J. Lara, now the general counsel for Impellam North America. His version:

The mortgage will be foreclosed by public sale of the premises on August 10, 2006, at 10:00 a.m. at the 30th Circuit Court, Mason Courthouse, 1st floor.

All the entries dispensed with the legalese—making you wonder why most foreclosure notices continue to read the way they do.

Watch for a new contest next month. And thanks to everyone who participated.

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"Plain Language," edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 33 years. To contribute an article, contact Prof. Kimble at WMU-Cooley Law School, 300 S. Capitol Ave., Lansing, MI 48933, or at kimblej@cooley.edu. For an index of past columns, Google "Plain Language column index."

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## November 2006 Contest

By popular demand, another contest.

What about this beauty?

Now comes Richard Penniman, hereinafter referred to as "Penniman," Third-Party Defendant in the above-styled and numbered action, and files this Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and in support thereof will respectfully show unto this Court as follows.

I'll send a copy of *Lifting the Fog of Legalese: Essays on Plain Language* to the first person who sends me an unadorned "A" version of that sentence. Email your version to kimblej@cooley.edu. I'll print the winner in next month's column.

## The Results

Last month, I offered a free copy of *Lifting the Fog of Legalese: Essays on Plain Language* to the first person who emailed me an unadorned "A" version of this opener:

Now comes Richard Penniman, hereinafter referred to as "Penniman," Third-Party Defendant in the above-styled and numbered action, and files this Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and in support thereof will respectfully show unto this Court as follows.

The winner is Michael J. Gildner, of Simen, Figura & Parker, for this version:

For his motion to dismiss, brought under Fed. R. Civ. P. 12(b)(6), Richard Penniman says.

Assuming that the case is in federal court, you could probably even omit "Fed. R. Civ. P.": Thus:

For his motion to dismiss under Rule 12(b)(6), Richard Penniman says.

Almost 20 years ago, in the October 1987 column, we reported on a Michigan survey in which 84% of judges and 71% of lawyers preferred a plain introduction like those last two. So why continue to use the formulaic legalese? Pure habit?

The reasons for changing it—in fact, for avoiding it altogether—go even deeper than style. For one thing, the formalism typically does little more than repeat the document's title. What's more, you waste a valuable opportunity to provide an effective summary in your first paragraph or two. For a good discussion, see the November 2003 column, called "On Beginning a Court Paper." And for more examples, see Bryan A. Garner, *The Winning Brief* 484–485 (3d ed 2014).

So the traditional opening is stuffy, unappealing to most readers, repetitious, and a lost opportunity. In the words of the legendary Richard Penniman (Little Richard), we should rip it up.

## January 2007 Contest

Here's a little nugget:

This Agreement shall be governed by, and construed and enforced in accordance with, the Laws of the State of Michigan, regardless of the place of execution or the laws that might otherwise govern under applicable principles of conflicts of law thereof.

I'll send a copy of *Lifting the Fog of Legalese: Essays on Plain Language* to the first person who sends me an unembroidered "A" version of that sentence. Email your version to kimblej@cooley.edu.

Programming note: the contest will return next year, after we finish this retrospective.



*Joseph Kimble taught legal writing for 30 years at WMU–Cooley Law School. His third and latest book is Seeing Through Legalese: More Essays on Plain Language. He is senior editor of The Scribes Journal of Legal Writing, editor of the "Redlines" column in Judicature, a past president of the international organization Clarity, and a drafting consultant on all federal court rules. He led the work of redrafting the Federal Rules of Civil Procedure and Federal Rules of Evidence. Follow him on Twitter @ProfJoeKimble.*

## The Results

Last month, I offered a free copy of *Lifting the Fog of Legalese: Essays on Plain Language* to the first person who emailed me an "A" version of this sentence:

This Agreement shall be governed by, and construed and enforced in accordance with, the Laws of the State of Michigan, regardless of the place of execution or the laws that might otherwise govern under applicable principles of conflicts of law thereof.

The winner is Sandra Hanshaw Burink, now at Hanshaw Burink, PLC, for this version:

Michigan law governs this agreement.

Some might disagree with this stripped-down language. You might argue for excluding Michigan's choice-of-law principles. But in states that follow the Restatement (Second) of Conflict of Laws § 187, the "law" of the chosen state includes choice-of-law principles only if the parties specify that it does. Still, I'm happy to name a second winner, Peter L. Wanger (now deceased), for this version:

Michigan law (excluding its conflict-of-law provisions) governs this agreement.

Some might still object. Should you say "Michigan law governs the interpretation and enforcement of this agreement"—on the theory that, if the question ever arises, a court might read "govern" in some constricted way?

These are perhaps the hardest calls in drafting—what degree of detail to include, whether to draft for improbable contingencies and interpretations, and where to draw the line if you do.

In any event, most drafting experts prefer a plain choice-of-law provision. See, e.g., Kenneth A. Adams, *Legal Usage in Drafting Corporate Agreements* 101, 188, 197 (2001); Scott J. Burnham, *Drafting and Analyzing Contracts* 334 (3d ed 2003); Bryan A. Garner, *The Redbook: A Manual on Legal Style* 527, 536 (3d ed 2013); Peter Siviglia, *Exercises in Commercial Transactions* 86–87 (1995). One expert would include tort claims within the provision. See Tina L. Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* 226–227 (2d ed 2014).

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