

Plain Language

To speak effectively, plainly, and shortly, it becometh the gravity of the profession.

—Sir Edward Coke, 1600

Plain English in Real Property Law

By Sally S. Harwood

While the consumer is generally the focus of the movement toward plain English in legal documentation, clear and readable documents should be the lawyer's goal in all drafting. To the extent that technical or uncommon language is mandated by statute or case law, or is simply necessary for accuracy, it must be retained. If legalese is included only out of habit, desire to impress or love of tradition, change is in order. This article gives practical suggestions for drafting changes to aid readability in real estate transaction documentation.

For various reasons, most lawyers use standard printed forms for typical consumer real estate transactions. This minimizes their control over the language used. Nevertheless, the suggestions in this article may help in selecting well-written forms, perhaps providing a beneficial hint to the title companies and real estate boards which usually provide

the forms. In fairness, we should note that the readability of printed forms most often used for consumers has improved

This is the seventh in a series of articles coordinated by the Plain English Committee of the State Bar of Michigan. The articles are written by sections, committees, groups and individuals interested in promoting plain language in the law.

over the years. Compare the portions of two forms in Figures 1 and 2, both from the same title company.

Even in consumer-used forms, however, and certainly in most lawyer-drafted real estate documents I've seen, more simplification can be achieved without sacrificing accuracy.

Format

The structure and archaic formalities of many real estate documents could be intimidating enough to make a non-lawyer give up before even attempting to understand the substance, which might be very simple. Although also used in other areas of the law, "know all men by these presents" (in large scroll type) seems to be particularly popular as an introduction to real estate documents to be recorded. A notice-type document can speak to a world of third parties without that phrase, which evokes images of the Middle Ages for lawyers, but fear of gobbledy-gook for everyone else.

"This indenture" (also in curlycue capitals), "witnesseth" and "to wit" are other initial phrases which can safely be eliminated, along with dating documents "In the year of our Lord one thousand nine hundred and eighty-five."

Beyond such introductory stumbling blocks, another structural obstacle to clarity is confusing identification of parties, the worst being "party of the first part/party of the second part," closely followed by "vendor/vendee," "lessor/

Figure 1

Assignment of Mortgage (used primarily by creditors):

KNOW ALL MEN BY THESE PRESENTS, that _____ part _____ of the first part, for and in consideration of the sum of _____ dollars, lawful money of the United States of America, to _____ in hand paid by _____ of the second part, the receipt whereof is hereby acknowledged, have _____ sold, assigned and transferred, and hereby do sell, assign and transfer to the said part _____ of the second part, all _____ right, title and interest in and to a certain real estate mortgage, dated the _____ day of _____ in the year one thousand nine hundred and _____ made by . . .

Figure 2

Land Contract (commonly used):

THIS CONTRACT, made the _____ day of _____, A.D., 19____, between _____ herein called the "Seller," and _____ herein called the "Buyer," witnesseth: 1. The Seller agrees to sell to the Buyer land in _____ City/Township, _____ County, Michigan, described as: . . .

lessee," "mortgagor/mortgagee," etc. Instead, use the parties' names throughout, if convenient, or use relevant and easily understood labels such as "seller/buyer," "landlord/tenant" and "lender/borrower." Other terms to be used often in the document should be defined in a separate first section, or if in a short instrument (such as a deed or release), as early as possible in the text.

Closings in documents can be as elaborate and abstruse as traditional introductions. The purpose served by "in witness whereof, the parties hereto have hereunto set their hands and seals on the day and year first above written," can more understandably be fulfilled with "by signing this [] the parties agree to all of the above."

Lengthy acknowledgment forms also serve only to overwhelm understanding by weight of words. While recording requirements do include acknowledgment of parties' signatures (MCLA 565.201), forms like that in Figure 3, from a document recently reviewed, are not necessary.

Rather, the Uniform Recognition of Acknowledgments Act (MCLA 565.261 et seq.) provides the form in Figure 4 for a corporate acknowledgment.

The statute, in defining the means of the terms used, includes in less ornate style all the factors stated in the longer form. The statutory individual acknowledgment form is even simpler.

Traditional	Better
covenants	promises; agreements (agrees)
demise; lease and let; hire	lease
demised	leased; rented
executed; set his hand to	signed
full consideration of	total purchase price; the sum of
in arrears	late; overdue; back
indenture	deed; mortgage; agreement
lessee	tenant; resident
lessor	landlord; owner
mortgagee	lender
mortgagor	borrower; debtor
situate in	located; in; at
seized of	own(s)
vendee	buyer
vendor	seller
witnesseth	background facts; recitals

Real Estate Legalese Lexicon

Several writers in this series have suggested alternatives for standard legalese terms habitually used by lawyers. The chart on this page lists those applicable to real estate documentation.

Specific Provisions

Lengthy legal descriptions of real property are often unavoidable, as with unplatted land requiring a metes and bounds description. Though attorneys are wisely unwilling to tinker with the legal description itself, once the title company and surveyor are in agreement, the type of language in Figure 5 can be avoided.

The language in Figure 6 conveys at least as much information, but can be understood by all.

Several printed forms, especially deed forms, now have simple language surrounding the legal description, but I believe the addition of the street address is helpful. A listing including property rights is especially important in mortgages and land contracts, where a partial encumbrance may otherwise have been intended.

The words needed to convey or encumber the real property described are established by statute. According to MCLA 565.154, the words "mortgages and warrants" are enough to create a valid mortgage lien, with the statute defining the nature and extent of the warranty. "Convey and warrant" or "quit claim" are adequate for a conveyance

Figure 3

I, _____, a Notary Public in and for the said County in the State aforesaid, do hereby certify, that _____ and _____, personally known to me to be the same persons whose names are subscribed to the foregoing instrument and personally known to me to be the _____ and _____, respectively, of _____, a _____ corporation, appeared before me this day in person, and acknowledged that they signed, sealed with the corporate seal of _____, and delivered the said instrument as their free and voluntary act as such _____ and _____, respectively, and as the free and voluntary act of said _____, for the uses and purposes therein set forth.

GIVEN, under my hand and notarial seal this _____ day of _____, 19_____.

Figure 4

The foregoing instrument was acknowledged before me this _____ by _____ of _____, a _____ corporation, on behalf of the corporation.

Figure 5

All that certain piece or parcel of land, situate, lying and being in the _____ of _____, County of _____, State of Michigan, known and described as follows, to wit:

[Legal Description]

Together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, etc., etc.

Figure 6

The property is located at [street address and city], which is in _____ County in the State of Michigan. It has the following legal description:

[Legal Description]

The property includes the following:

[generic list of improvements, mineral rights, etc., in separate numbered paragraphs]

by deed (MCLA 565.151, .152). Perhaps because the operative words are so critical, however, lawyers can get carried away. Eliminate "grant, bargain, sell, remise, convey, alien and confirm," or similar overkill, in favor of the statutory prescription.

Language creating a leasehold interest also can be modernized and simplified, from "the Lessor does hereby let and lease" and "the Lessee hereby hires," to "the Landlord leases and the Tenant rents." The related use and quiet enjoyment clause of leases should read:

The Landlord promises to allow the Tenant quiet enjoyment of the premises, without disturbing his right of possession under the lease in any way, so long as the Tenant pays his rent and fulfills the requirements of this Lease.

rather than:

The Landlord covenants that the Tenant, on payment of the rental at the time and in the manner aforesaid and performing of all the foregoing covenants, shall and may peacefully and quietly have, hold, and enjoy the demised premises for the term aforesaid . . .

This is a case in which a term of art, "quiet enjoyment," really should be retained despite possible misinterpretation, to assure application of years of case law, but one can also add a plain language indication of its meaning.

Although no statute dictates or defines the language of leasehold conveyance, note that several statutes impose language limitations and requirements. (MCLA 554.601 *et seq.*; MCLA 554.631 *et seq.*)

Miscellaneous Documents

Often the consent of a person not a party to the particular real estate transaction may reasonably be required by

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one of the parties. For example, a second mortgagee may insist on receiving a consent or at least an estoppel letter from the first mortgagee, or a sublessee from the landlord, a land contract assignee from the seller or purchaser, etc. The person from whom the consent is sought may well be a layperson unfamiliar and uncomfortable with real estate transactions and with legalese, and furthermore probably has no particular motivation other than good will to respond. Hence lawyers should be especially careful to make requests for such consents simple and nonintimidating. I can envisage a land contract seller throwing away the following communication before paying a lawyer to translate it:

The undersigned has assigned to _____ (hereinafter referred to as "Lender") all of its right, title and interest in and to the Land Contract between you and the undersigned dated _____ (hereinafter referred to as the "Land Contract"). Said assignment does not impair or diminish any of our obligations to you pursuant to the provisions of the Land Contract, nor are any said obligations imposed upon the Lender, its successors or assigns.

Pursuant to said assignment you are hereby notified of the Lender's interest and are requested as Vendor under the Land Contract to agree to notify the Lender in the event of default made by the Vendee in the performance of any of the covenants of the Land Contract, not less than forty-five (45) days before exercising your rights as Vendor as a result of said default, with the right (but not the obligation) in the Lender to cure such default or breach during such period. Kindly sign and return the enclosed copy of this letter, thereby acknowledging and agreeing to all of the above:

This communication could more appropriately read:

We have assigned our interest as purchaser under our land contract with you dated _____ to [Lender], as security for a loan from [Lender]. Our relationship with you will not change because of the assignment, and [Lender] will not become responsible to you.

[Lender] has requested that you notify it if we fail to perform under our land contract. Also, [Lender] wishes to have forty-five days after notice to perform in our place, if it chooses to do so.

Please sign and return the enclosed copy of this letter, to acknowledge that you are

aware of the assignment and to agree to give [Lender] the requested notice. Please call us at [phone] with any questions.

Conclusion

I hope that this article has provided useful hints for drafting relatively readable real estate documents, but I also hope that it will *not* be interpreted as support for legislation imposing "plain English" requirements. Regardless of how clearly a real estate document is drafted, the drafter cannot assure that every consumer will understand the underlying transaction or its ramifications.

Only consultation with a knowledgeable and informed professional, with an opportunity for questions and answers, can begin to achieve that goal. Legislation mandating a particular mode of expression is unlikely to produce greatly increased consumer understanding at the outset, but rather will provide ammunition to avoid responsibilities assumed in exchange for an initial benefit.



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