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# Plain Language

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## The Plain English Movement in the Law — Past, Present and Future

by George H. Hathaway



### The Past — Tilting at a Windmill

About 400 years ago the Chief Justice of England, Lord Coke, urged his fellow lawyers "to speak effectively, plainly and shortly, it becometh the gravity of this profession." Ironically, Lord Coke attained his high estate by speaking and writing more law latin, law french and law legalese than anyone else in England. It thus appears that Lord Coke was one of the early masters of the lawyers' unwritten creed: Do as I say, not as I do.

This unwritten creed is one of the reasons for the two most famous references about lawyers in English and American literature:

"Plain Language" is a regular monthly column of the *Michigan Bar Journal*. It is edited by the Chairperson of the Plain English Committee of the State Bar, George H. Hathaway, The Detroit Edison Company, Room 688 WCB, 2000 Second Avenue, Detroit, MI 48226. Through this column the Plain English Committee hopes to publicize and promote the use of plain English in the law. Groups, committees and individuals are invited to contribute articles. For a copy of the publication guidelines and to discuss topics, contact Mr. Hathaway at the above address.

"The first thing we do, let's kill all the lawyers"

William Shakespeare, *Henry VI, Pt. 2*, Act 4, Sc. 2, L 86 (1600)

"Why does a hearse horse snicker Hauling a lawyer away?"

Carl Sandburg, "The Lawyers Know Too Much," from *Smoke and Steel* (1920)

Lawyers practice the creed every day when they ask a client to relate the plain, simple facts concerning a proposed lawsuit, and then open the complaint with, "Now comes the plaintiff," etc. Judges practice it when they ask lawyers to identify the plain, basic issues in a case, and then begin the Order: "It is hereby adjudged, ordered and decreed," etc.

But "Do as I say, not as I do" was never the practice of all lawyers. Ever since the 1600s, when English law was first written in English, a small minority of lawyers have used (and have urged other lawyers to use) Plain English in the law. The best-known are Thomas Jefferson, John Adams, Jeremy Bentham and Fred Rodell.

Their work exhortations were ignored by most of their fellow-lawyers. Lawyers who actually tried to reform legal language were wasting their time, with no chance of success. They were, like Cervantes' hero Don Quixote, tilting at windmills.

### The Present — The Windmill Begins to Crumble

Nothing is as powerful as an idea whose time has arrived. Aided by the Consumer Movement, the Plain English Movement's time arrived in the mid-1970s. The legalese windmill began to crumble. For a quick summary of national events in the Plain English movement, see "An Overview of the Plain English Movement" in the November, 1983 *Michigan Bar Journal*. For events in the Plain English movement in Michigan, see Table 1.

#### TABLE 1 Events in the Plain English Movement in Michigan

- 1975 — District Court forms developed by District Court Forms Committee
- 1979 — Plain English forms developed by Probate Court Forms Committee, Adoption Forms Committee, Juvenile Court Forms Committee, Friend of the Court Forms Committee and Circuit Court Forms Committee.
- 1979 — Plain English bills first introduced into Michigan Legislature
- 1979 — Plain English Deed form developed by Real Property Law Committee

- 1981 — Plain English Committee formed by State Bar of Michigan
- 1983 — Plain English theme issue published by *MBJ*
- 1984 — Monthly "Plain Language" series begun in *MBJ*
- 1985 — Irwin Alterman's book *Plain and Accurate Style in Law-suit Papers* sent to all lawyers in the state by the State Bar of Michigan
- 1985 — Michigan Supreme Court and State Court Administrative Office formalize their commitment to plain English by adopting MCR 8.103 (8) — "approve and publish forms...as the administrator deems advisable."

Now the legalese windmill is about to disintegrate. Everything is in place. First, the literature that describes legalese and discusses how to write in Plain English has been written and is available. See "Bibliography of Plain English for Lawyers" in the November, 1983 *Michigan Bar Journal*. Second, the leadership of the legal establishment endorses Plain English. In 1965, the American Bar Foundation published Reed Dickerson's *Fundamentals of Legal Drafting*. Since 1981, the State Bar of Michigan has endorsed the Plain English bills in the Michigan Legislature. Since 1984, a majority of the substantive law committees of the State Bar of Michigan have contributed articles for the "Plain Language" series in the *Michigan Bar Journal*. And the 1985-1986 president of the State Bar of Michigan, George Roumell, Jr., has made the advancement of Plain English one of the major goals in his term of office.

The challenge now is to take what the Plain English authors have written, to take what the legal establishment has endorsed, to take Plain English out of the back pages of the *Michigan Bar Journal*, and get lawyers to actually practice Plain English.

Some lawyers are using Plain English — but not enough of them. Too many lawyers simply ignore the Plain English movement, or give it lip service and continue to write legalese. After 10 years of discussion of Plain English in the United States, after five years of discussion over a Plain

English bill in Michigan, almost all complaints, answers and motions filed in Michigan courts still begin, "Now comes the plaintiff. . ."

For the last 400 years the language of the law (legalese) has differed from plain, ordinary English. There were many technical reasons for this. But the technical reasons, if ever they were valid, are no longer valid today. If all lawyers wanted to write Plain English and eliminate a majority of legalese, they could do so today as easily as motorists could buckle up their seat belts and reduce auto accident injuries.

#### The Four Horsemen of Legalese

In the Bible, the Four Horsemen of the Apocalypse are Conquest, War, Famine and Death. In the traditional language of the law, the Four Horsemen of Legalese are ignorance, apathy, stubbornness and misrepresentation.

- "Ignorance" because many lawyers blindly use hereby and herein out of habit; they don't know whether the words are really required or not.

- "Apathy" because even though some lawyers know these words are not required, they don't care enough to eliminate them. They feel that making a living is the doughnut and that Plain English is the hole in the doughnut.

- "Stubbornness" because even though lawyers have the opportunity to eliminate legalese, they won't.

They have gotten used to legalese. Using legalese subconsciously makes them feel worthwhile. They didn't go to the most prestigious law school in the entire solar system to come out writing like everyone else. They didn't take the bar examination three times just so they could write like everyone else. To eliminate legalese would deprive them of their lawyerinity.

- "Misrepresentation" because many lawyers offer the rationale that the "herebys" and "hereins" are required because of case precedent, even though they never have nor do they ever intend to actually see if there are any case precedents that require the use of specific words.

"Case precedent" is the classical reason for not writing Plain English, like a headache is the classical reason

for not making love. Case precedent is the real reason for not writing Plain English about as often as a headache is the real reason for not making love. ("Sorry counselor, no plain English tonight, I have a slight case precedent.")

#### Forms — The Best Route to Plain English

Nevertheless, a lawyer faces reality. To paraphrase a well-known saying about alligators and draining the swamp, "when you're up to your neck in meeting court deadlines, getting new clients, satisfying old clients, making partner, coping with your opponent's abuse of discovery and trying to make enough money to feed your kids, it's hard to remember that one of your original objectives was to write Plain English."

The practical reality is time. No lawyer has the time to take all the legalese he or she is faced with each day and rewrite it into Plain English. The critical area where major improvements can be made are court forms and form books.

A significant portion of each lawyers' day is spent either in filling out or using documents that originated from some type of published standard form. In litigation, almost all pleadings, motions and other papers have their origin in standard court forms, such as the District Court forms, Probate Court forms, Friend of the Court forms or in volumes such as *Benders* federal forms or Michigan pleading forms. Some of these forms are already available in Plain English, but major breakthroughs can be made in the use of Plain English by publishing all forms of every kind in Plain English. Using a Plain English form is as easy as using a traditionally worded form.

Hence, the best way to overcome the Four Horsemen of Legalese, and to get lawyers to use Plain English, is through legal forms. The key is to develop Plain English forms for all types of substantive areas of the law — lawsuit forms, divorce forms, real property forms, wills and trust clauses, etc. Their use must then be encouraged through seminars, publications and media publicity. These are the four areas — forms, seminars, ►

publications and publicity — that the Plain English Committee will be concentrating on in 1985-1986.

Forms can be (a) the printed type distributed by publishing companies, in which lawyers simply fill in the blanks, or (b) example forms which lawyers and legal secretaries are encouraged to follow and program into their word processors. Seminars can be (a) ICLE seminars for practicing lawyers, (b) semi-annual Federal Bar Association seminars for new lawyers, (c) seminars for legal assistants, (d) seminars for legal secretaries or (e) in-house seminars in individual law firms.

Publications include the *MBJ*, *Inter Alia* and local bar association magazines and newsletters.

Finally, media publicity: News reporters have always practiced the "subject-verb-object" (who, what, why, when and where) of stories. These reporters, especially those assigned to cover legal news, are usually especially interested when lawyers start advocating and using plain language style.

### The Future — Eliminating the Windmill

Is all of this simply a lot of hopeful talk — more windmill-tilting? Will legalese flourish for another 400 years? Will success of these efforts be measured simply by saying we did it, and trying to convince people that we have done it, with no objective results? Table II is a sample list of goals, tests for eliminating the windmill, to objectively measure the effectiveness of the Plain English movement in Michigan.

**TABLE II**  
**Sample List of**  
**Plain English Goals**

1. Since January 1, 1982, all lawsuit papers filed in federal court have been required to be on 8½ by 11-inch size paper, rather than "legal" size paper (8½ by 13 or 8½ by 14). At present, any size paper is accepted in most Michigan district and circuit courts. A rule similar to the federal rule, mandating 8½ by 11 inch paper for all lawsuit papers, is needed in Michigan.
2. Old English words (the leading examples are "hereby," "herein" and "hereof,") are not used in ordinary English and are not re-
3. Obsolete formalisms, the leading examples are "Now comes" and "Wherefore," are now used to begin and end almost all complaints, answers and motions in Michigan courts. Plain English won't be achieved until these terms are eliminated from all lawsuit papers in Michigan. See Mellinkoff, *Legal Writing: Sense and Nonsense*, Appendix A, for a list of these words.
4. The standard legal documents containing the most legalese are the proof of service, affidavit, notary jurat and acknowledgment. Plain English won't be achieved until these documents are written in the simplest possible plain language.
5. Lawsuit papers — pleadings, motions and discovery papers — are filled with legalese. Either printed Plain English forms or sample forms illustrating plain language are needed.
6. Divorce papers contain much unneeded legalese. A Plain English "divorce package" of printed lawsuit papers is needed.
7. Real property papers contain much unneeded legalese. Plain English printed real property forms are needed. In cases where one form cannot be agreed upon, a compilation of Plain English clauses for real property forms is needed.
8. Wills and trust clauses contain much unneeded legalese. A publication containing Plain English wills and trusts clauses is needed.
9. Consumer contracts are presently the subject of a proposed Plain English bill in the Michigan Legislature. But, at the very least, old English words and obsolete formalisms should be voluntarily eliminated from all consumer contracts in Michigan.
10. Insurance policies can be divided into two categories — Life/Health and Property/Liability. The two most common types of in the Life/

quired in legal documents. Plain English will not be achieved until these words are banished from everything, from court orders to Detroit Tiger baseball tickets. See Mellinkoff, *Legal Writing: Sense and Nonsense*, Appendix A, for a list of these words.

Health category are life insurance and health insurance. The two most common types in the Property/Liability category are car insurance and home insurance. The insurance industry is leading the way in writing policies in Plain English. Many life, health, car and home insurance policies are already written in Plain English. However, a good test for the success of Plain English is for individuals to pick up their life, health, car and home insurance policies and find that all the policies are written in Plain English.

### Conclusion

Plain English is simply good English. But because of this, there are many different definitions and levels of Plain English. The beginning level of Plain English — we'll call it Plain English 101 as in a beginning level college course — is: Plain English = the Traditional Language of the Law - Old English words ("hereby") - Obsolete Formalisms ("Now comes"). Unfortunately 99% of the lawyers in the country refuse to pass Plain English 101.

In a step-by-step approach, P.E. 101 must be passed before higher level concepts, such as unnecessary duplication ("force and effect") and unnecessarily long sentences, are studied. The goals in Table II must be analyzed first in terms of Plain English 101 and then in terms of higher levels of plain English.

Some of these goals can be achieved in the next year. Some will take longer. Many can be reached by 1990. But even though a majority of lawyers will probably be reading and writing plain English 15 years from now, in the year 2000, there will undoubtedly still be a few remaining lawyers who resist being pulled kicking and screaming into the 21st century. Nevertheless, the Plain English movement will have achieved complete success if judges treat legalese in the year 2000 as Winslow, Arizona Justice of the Peace Waltron treated the following opening statement of lawyer Henry Ashurst in 1908:

Mr. Ashurst: Your Honor, as I approached the trial of this case today, my heart was burdened with crushing and gloomy forebodings. The immense responsibility of my client's welfare bowed

me down with apprehensions. A cold fear gripped my heart as I dwelt upon the possibility that through some oversight or shortcoming of mine there might ensue dreadful consequences to my client, and I shrank within myself as the ordeal became more imminent. Yet the nearer my uncertain steps brought me to this tribunal of justice, distinguished as it has been for years as the one court of the rugged West where fame attended the wisdom of justice of the decisions of Your Honor, a serene confidence came to my troubled emotions, and the raging waters of tumultuous floods that had surged hotly but a moment before were stilled. Your Honor, I was no longer appalled. I no longer feared the issue in this case. Aye, I reflected that throughout the long years of your administration as judge, there had grown up here a halo as it were of honor and glory illuminating Your Honor's record, eloquent of a fame as deserved as that the chastity of Caesar's wife, a fame that will augment with the flight of years and with increasing luster light the pathway of humanity down the ages so long as the heaving billows of the stormy Mediterranean shall beat vainly upon the steep cliffs of Gibraltar.

Justice Waltron: Sit down, Mr. Ashurst. You can't blow any smoke up this Court's \*\*\* ■



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