

## In Defense of Legalese®

(An Answer to T. Seldon Edgerton)

By Edmund Z. Righter

**F**or the past year I have been reading and have been growing increasingly irritated by the utter nonsense that the *Michigan Bar Journal* has seen fit to print in this so called "Plain Language" column, if it can be called a column at all.

The articles by Mr. T. Seldon Edgerton are pure garbage, not even suitable to cover the bottom of a bird cage. They are about as exciting, funny and interesting as four hours of live broom to broom coverage of a semi-final curling match on Canadian TV.

I'm told that Mr. Edgerton hopes to someday publish a book of his collected articles on Plain English. He even has the audacity to think that the book may outsell the Bible. I beg to inform Mr. Edgerton that a collection of his articles would not even outsell a book — which I abstain from dignifying by mentioning its name — that identifies and describes 59 different ways in which people pass gas.

Does this gentleman, and I use the term very loosely, realize what he is doing? In this writer's opinion, Mr. Edgerton is performing a gigantic disservice to the profession to which he purportedly belongs. I pity him if he thinks his pathetic rumbblings can have any effect at all on trying to rally the insignificant handful of misguided attorneys who wrongly think that the traditional language of the law needs to be changed.

I am appalled to think that not one single person has made any reply to these monstrous and outrageous attacks on our honorable legal language. I think it is high time that Mr. Edgerton got a taste of his own medicine. I am therefore forced to take pen in hand and rise to the defense of the noble writing style that has stood the test of time and has served generations of lawyers and Americans.

Mr. Edgerton tries to prove that he is "right" by listing some groups that supposedly support what he calls

"Plain English." Logicians call this proof by association. By using Mr. Edgerton's same method of proof, and by relating a story told to me by a very high-ranking member of the Michigan Irish Judiciary, I will hereby prove that Jesus Christ was Irish. This is obvious because (1) He never married, (2) He lived at home until he was 33, (3) His mother thought he was God, (4) He had 12 drinking buddies, and (5) His last words were "I thirst."

So much for Mr. Edgerton's logic. I would now like to address myself to what Mr. Edgerton calls "specifics" rather than "generalities."

### Specific #1 — Legal-Size Paper

There is a very good reason why attorneys have traditionally used legal-size paper — you simply can get more on it than you can get on letter-size paper. A brief written on five legal-size pages would require six letter-size pages. Many of my briefs run fifty pages or more. For each fifty pages of legal-size paper I have saved ten pages that would have been required had I used common letter-size paper. Oh, I know that Mr. Edgerton will then point out that many of the fifty legal-size pages, such as the cover sheet, title page, table of contents, table of citations, statements of issue, affidavits, proofs of service, etc., are not covered from top to bottom with lines of print and would have fit on letter-size paper. For this I will grant him five pages. The uncontested result, however, is that I can write a brief on fifty legal-size pages that would take Mr. Edgerton fifty-five letter-size pages. Over the years this results in a not inconsiderable savings of paper and filling space. As to the other arguments that documents with various size paper, for instance, combinations of 8½ by 11, 8½ by 13 and 8½ by 14, are difficult to handle and copy and cause extra time for legal secretaries, paralegals and other document handlers,

we need go no further than to say that compared to my billing rate their time is really very insignificant, almost miniscule. Besides, a legal document, even a proof of service, gives oneself a feeling of accomplishment and fulfillment. When drafted on legal-size paper it becomes an object of elegance and beauty, an attestation to the honor and worth of the profession. When printed on common letter-size paper it simply becomes another banal exercise. In short, it's the paper we use that makes us attorneys, and we shouldn't let anyone forget that.

### Specific #2 — Obsolete Formalisms

From time immemorial the traditional phrase "Now Comes the Plaintiff" has graced the beginning of virtually each and every complaint and motion that any attorney worth his salt has ever written. Judges, regardless of whether they ever read the complaint or motion or not, have come to expect this language. Granted the obsolete formalisms "Now Comes," "Know all Men By These Presents" and "SS" are words that might be considered unnecessary to Plain English advocates and high school teachers. However, these words serve an important function. They serve an historical purpose of linking the past with the present. They give a feeling of confidence, continuity and certainty to anyone, be it lawyer, layman or judge, who reads them. Let's take a standard mortgage form introduction of "Know All Men By These Presents." This wording serves several important functions. First, the important psychological factor — when you read it it gives you an immediate sense that, "yes this IS a real estate document, a solidly drafted instrument." Secondly, since this phrase has been used since time immemorial, no need to worry about any new plain English words conflicting with case precedents, interfering with the legal effects of the instrument and

causing the documents to be null and void. Third, even though the words "Know All Men By These Presents" have never had any legal significance and have served only as meaningless introductory words, some introductory words obviously have to be used. Therefore, why not continue to use the words that everyone is used to seeing? Keeping six little meaningless words is hardly going to obfuscate an entire legal instrument.

### Specific #3 — Old English Words

Old English words such as "hereby" also serve an important function. In a document the words "I hereby certify" indicate that the person is certifying something by THIS specific act, not by some other specific act. What is really being said is "I, right now by this document, certify etc." The word hereby is really a shorthand version of "right now by this document." Of course, as Mr. Edgerton is fond of pointing out it's always obvious that the certification is being done "right now by this instrument." Nevertheless, it never hurts to emphasize this fact to the writer and the reader. Furthermore, phrases such as "I hereby certify" have been used for so long and are now so common that the phrase "I certify" sounds funny and incomplete, as though something has been left out.

In addition, words such as "herein" and "therein" are shorthand for words such "in this document" and "in that document." It is commonly established custom to use a "herein" here and there. It not only specifies with precision what you are talking about but also is language that serves to demand the respect of the reader.

### Specific #4 — Redundant Phrases

What Mr. Edgerton refers to as redundant phrases have been in each and every lawyer's arsenal of legal language for so long that to change

them now would be foolhardy. The phrases have become terms of art. To change them now would be opening up "Pandora's Box." Take a phrase such as "due and payable," a standard phrase in all mortgages. What if a plain English advocate drafted a mortgage that simply said "due?" If this mortgage was ever subject to litigation an opposing lawyer would most certainly note the discrepancy that most mortgages say "due and payable" and this mortgage says only "due." There aren't any precedent real estate cases that discuss the difference, if any, between "due and payable" and "due." This is because real estate cases are usually too expensive to wait the long years required before a case is finally tried and the appeal heard. Therefore, most real estate cases are settled between the opposing lawyers in the judge's chambers. Thus there is very little published case precedent real estate law. Most of it is unpublished courtroom law. This law is heavily dependent on what the individual judge thinks the law is. And what attorney wants to take the chance that some judge in his chambers will know that there is no difference between the phrase "due and payable" and the word "due." It is because of this uncertain chameleon-like court room law that we must keep all the phrases that Mr. Edgerton has ridiculously termed the "Horrible Hundred Redundant Phrases of the Traditional Language of the Law." Stop using entire phrases such as "due and payable" and "terms and conditions" and you will open floodgates of litigation.

### Definition of Legalese

At this point I must say that Mr. Edgerton has me (and probably all nine or ten other members of the State Bar of Michigan who read his column) completely confused. One month Mr. Edgerton defines "legalese" as four items, namely, legal-size paper, ob-

solete formalisms, old English words and redundant phrases. And the next month he goes ahead and enlarges his definition of legalese to include ten items. If consistency is an attribute of plain English, and I assume it is, then Mr. Edgerton's articles are anything but plain English.

### Conclusion

I could go on and on but I will stop here. Suffice it to say that this allegedly well-meaning but clearly misguided plain English nonsense must be brought to an end. Present day attorneys simply have too much to do. To bother them with this ridiculous and amateurish tampering with a legal language that has been shaped and molded over the centuries into a precision lexicon would be nothing less than a monumental tragedy. ■

© 1986 by Edmund Z. Righter

Mr. Righter is a retired member of the Bar. He resides in Blue Heron Harbor, Michigan.

"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by George H. Hathaway, Chairperson of the State Bar Plain English Committee. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a Plain English article? Contact Mr. Hathaway at The Detroit Edison Co., Room 688 WCB, 2000 Second Ave., Detroit, MI 48226.