Strike Three for Legalese

By *Joseph Kimble and Joseph A. Prokop, Jr.*

In the October 1987 column, we reported on a survey of Michigan judges and lawyers in which they showed a strong preference for plain English over legalese.[1] The same survey has now been done in Florida and Louisiana—with strikingly similar results in favor of plain English. So geography makes no difference: Plain English wins everywhere.

The Survey

The survey form is shown in the box on the opposite page. The form invites readers to choose between the A or B version of six paragraphs—one version in plain English and the other in traditional legal style. Neither the survey form nor the cover letter referred to "plain English" or "legalese." Rather, the cover letter introduced the survey as part of an effort to "test language trends in the legal profession."

Each of the six paragraphs in the survey was designed to test for specific aspects of plain English.

Paragraph 1

1A uses a wordy, obsolete formalism.

1B is simple and direct.

"Plain Language" is a regular feature of the ***Michigan Bar Journal,*** *edited by Joseph Kimble for the State Bar Plain English Committee. Assistant editor is George H. Hathaway. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a plain English article? Contact Prof. Kimble at Cooley Law School, P.O. Box 13038, Lansing, MI 48901.*

Paragraph 2

2A uses the first person ("I") and strong, simple verbs ("received" and "signed").

2B uses archaic and inflated words ("hereby," "hereof," and "prior to"), and it uses abstract nouns ("receipt" and "execution") instead of the strong verbs.

Paragraph 3

3A is hard to read because of the long, intrusive clause between the subject ("petitioner's argument") and the predicate ("is contrary to the facts"). And 3A again turns strong verbs into abstract nouns ("argument," "exclusion," and "suppression").

3B removes the intrusive clause and puts the conclusion in a separate short sentence. 3B also uses stronger verb forms ("argued," "to exclude," and "[to] suppress") instead of the abstract nouns.

Paragraph 4

4A uses long sentences again and a series of redundant pairs. It also defines "negligence" negatively ("not to avoid [the conduct]").

4B uses shorter sentences. It addresses jurors in the second person ("you") and walks them through the instruction step-by-step. 4B also defines "negligence" positively. 4B is no shorter than 4A, but plain writing does not always mean the fewest possible words.

Paragraph 5

5A uses positive form and strong verbs ("will pay" and "notifies") in the active voice.

5B uses two negatives ("will not be made" and "fails to provide"). It also turns the verbs into nouns ("payment" and "notification"), and the active voice into the passive ("will not be made").

Paragraph 6

6A uses the familiar and readable "if...[then]..." construction. It keeps the subjects and verbs together, and it puts the important details at the end. It also uses the simple word "send" instead of "submit," and the simple "on" instead of "regarding."

6B has two intrusive phrases: one inside the verb ("may submit") and one between the verb ("submit") and its object ("comments").

As you have gathered, the plain English answers are 1B, 2A, 3B, 4B, 5A, and 6A. The alternative versions contain most of the enemies of plain English: obsolete formalisms ("now comes..."); archaic words ("hereby," "hereof"); longer and less common words ("subsequent," "submit") instead of simple, everyday words ("later," "send"); wordy phrases ("above named," "prior to"); doublets ("by and through," "foreseen or anticipated"); abstract nouns ("execution," "payment," "notification") created from strong verbs; passive voice ("payment will not be made"); long sentences; intrusive phrases; and negative form.

The Responses

The original Michigan survey was sent to a random sample of 300 Michigan judges and 500 lawyers. Responses came from 425 (53%). The judges preferred plain English in 85% of their responses, and the lawyers in 80%.

The Florida survey was done by Barbara Child, director of legal drafting

at the University of Florida College of Law. She recently reported her results in the *Florida Bar Journal.*[2] She surveyed 558 Florida judges and 558 lawyers, and received responses from 628 (56%). The judges preferred plain English in 86% of their responses, the lawyers in 80%—almost identical to the Michigan results.

In her article, Child reviews the trend toward plain English and credits the practicing bar in Michigan with having "taken on plain English reform wholesale."[3] At the same time, she acknowledges the overriding need "for practice to catch up with preference."[4]

The Louisiana survey was done by one of the authors of this article, Joseph Prokop. He sent the survey to judges only, 247 judges of the Supreme Court, Court of Appeal, and trial courts. In 123 responses, those judges preferred the plain English versions 82% of the time.

No doubt about it. Submitted to the judgment of 1,176 law professionals in three states, legalese has struck out.

There is one other study worth mentioning. It focused more narrowly on the persuasive form of legal writing.[5] In California, ten appellate judges and their research attorneys, reading passages from appellate briefs, rated the passages written in legalese as "substantially weaker and less persuasive than the plain English versions."[6]

The Message

When the discussion of legal writing turns to concrete examples, we naturally prefer the greater clarity and readability of plain English. As *readers* we prefer it; that is the message—and the moral imperative—for writers. If we expect the other person's writing to be straightforward, we had better demand it of our own. Remember the Golden Rule.

Unfortunately, the myths about plain English persist, and so does legalese. The myths number four.

Myth One: Plain English advocates want first-grade prose, or want to reduce writing to the lowest common

Legal Language Survey

Below are paragraphs taken from legal documents. Please mark your preference for paragraphs A or B in the space provided.

1. _____

A[ ] Now comes the above named John Smith, plaintiff herein, by and through Darrow & Holmes, his attorneys of record, and shows unto this Honorable Court as follows:

B[ ] For his complaint, the plaintiff says:

2. _____

A[ ] I received a completed copy of this note and disclosure statement before I signed the note. _____ Date_____

B[ ] Maker(s) hereby acknowledge receipt of a completely filled in copy of his note and disclosure statement prior to execution hereof this _____ day of _____, 19_____.

3. _____

A[ ] Petitioner's argument that exclusion of the press from the trial and subsequent suppression of the trial transcripts is, in effect, a prior restraint is contrary to the facts.

B[ ] Petitioner argued that it is a prior restraint to exclude the press from the trial and later suppress the trial transcripts. This argument is contrary to the facts.

4. _____

A[ ] One test that is helpful in determining whether or not a person was negligent is to ask and answer whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he would have foreseen or anticipated that someone might have been injured by or as a result of his action or inaction. If such a result from certain conduct would be foreseeable by a person of ordinary prudence with like knowledge and in like situation, and if the conduct reasonably could be avoidable, then not to avoid it would be negligence.

B[ ] To decide whether the defendant was negligent, there is a test you can use. Consider how a reasonably careful person would have acted in the same situation. To find the defendant negligent, you would have to answer "yes" to the following two questions:

1) Would a reasonably careful person have realized in advance that someone might be injured by the defendant's conduct?

2) Could a reasonably careful person have avoided behaving as defendant did?

If your answer to both of these questions is "yes," then the defendant was negligent. You can use the same test in deciding whether the plaintiff was negligent.

5. _____

A[ ] The company will pay benefits only if the insured notifies the company of the loss.

B[ ] Payment of benefits will not be made by the company if the insured fails to provide notification of the loss.

6. _____

A[ ] If attorneys want to comment on the proposed change in court procedures, they may send comments in writing to the Clerk, 233 Main St., Gotham City, before Feb. 21, 1987.

B[ ] Interested attorneys may, on or before Feb. 20, 1987, submit to the Clerk, 233 Main St., Gotham City, written comments regarding the proposed change in court procedures.

denominator. Not true. We advocate writing that is as simple, direct, and economical as the circumstances allow. As modest starting points, we have encouraged lawyers to do away with obsolete formalisms, archaic terms, doublets and triplets, and other common enemies of plain writing.[7]

In the past six years the Plain English Committee has translated hundreds of passages into plain English and has helped revise dozens of forms. Not once has the Committee heard that its plain English versions changed the meaning, or were simple-minded, or were inferior to the originals.

Far from advocating first-grade prose, we have said many times that plain English only *looks* easy. As Barbara Child points out, "it requires sophistication to produce documents that are consistently coherent, clear, and readable. By contrast, the 'specialized tongue' of lawyers, 'legalese,' may even be easier to write because it relies on convention instead of thought."[8]

Myth Two: Plain English does not allow for literary effect or recognize the ceremonial value of legal language. Not true. Plain English has nothing against an attractive writing style; or against a rhetorical flourish or strategy in the right context, such as a persuasive brief; or against "the truth, the whole truth, and nothing but the truth" to convey a sense of gravity in the courtroom. These things are matters of context, judgment, effectiveness, and degree.

The trouble is that the successful and legitimate uses of style have been overwhelmed by legalese. Legal writing has been an object of complaint and ridicule for four centuries. Ask the judges or clerks who read briefs for a living how much literature they see. Ask them whether they would settle for writing that is clear and concise. Or test the literary hypothesis against a random volume from a court reporter.

At any rate, there is little room for literary effect in the neutral style of contracts, wills, consumer forms, and so on. Yet this seems to be where legalese is thickest.

We have no answer for those who find beauty in "Now comes the plaintiff." But those who enjoy a fresh metaphor or a rhythmic and well-turned sentence can rest assured. In most contexts, these are quite compatible with the modest goals of plain English. And in every context, simplicity has a beauty of its own.

LOUISIANA JUDGES

Question	1	2	3
plain English	91 (74%)	92 (75%)	113 (92%)
legalese	32 (26%)	31 (25%)	10 (8%)
no response	0 (0%)	0 (0%)	0 (0%)
Question	**4**	**5**	**6**
plain English	109 (89%)	101 (82%)	101 (82%)
legalese	11 (9%)	21 (17%)	22 (18%)
no response	3 (2%)	1 (1%)	0 (0%)

Total number of plain English responses	607
Total number of legalese responses	127
Total number of no responses	4
Percent of plain English responses	82%
Percent of legalese responses	17%
Percent of no responses	1%

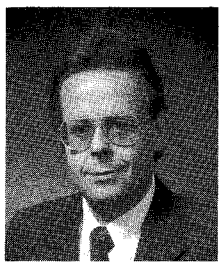
PREFERENCE FOR PLAIN ENGLISH

State	Judges	Lawyers
Michigan	85%	80%
Florida	86%	80%
Louisiana	82%	—

Myth Three: Plain English is impossible because legal writing includes so many terms of art. This one dies hard. Of course legal writing and analysis may involve terms of art, such as "hearsay" and "res judicata." Legitimate terms of art convey in a word or two a settled, circumscribed meaning. Their value was thoughtfully discussed in a recent issue of *Inter Alia* (published by the Michigan Young Lawyers Section).[9]

Terms of art are useful when lawyers write for each other. When we write for a lay audience, however, terms of art impose a barrier. If we cannot avoid them, we should at least try to explain them.

Terms of art are limited in another, more important way. They are but a small part of any legal paper. One study of a real estate sales agreement



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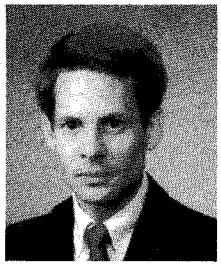

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found that only 3% of the words had significant legal meaning based on precedent.[10] The rest of a legal paper can be written in plain English, without "hereby" or "party of the first part" or "further affiant sayeth not" or "ordered, adjudged, and decreed" or "due to the fact that" or "in the event of default on the part of the buyer."

The task for legal writers is to separate real terms of art from all the rubble. The one indispensable guide is Bryan Garner's *Dictionary of Modern Legal Usage.*

Myth Four: Plain English is impossible because the law deals with complicated ideas that require great precision. This notion, like the previous one, contains a kernel of truth, but only a kernel.

First, much of what plain English opposes has nothing to do with precision. The word "hereby" does not add an iota of precision. "Said plaintiff" is no more precise than "the plaintiff." "In the event of default on the part of the buyer" is no more precise than "if the buyer defaults."

Second, it is no criticism of plain English that some important legal ideas cannot be made precise. The term "reasonable doubt," for instance, is *inherently* vague. We can hardly make it more precise. The best we can do with such terms is to make them as clear and precise as possible.

Third, plain English principles can usually make even complicated ideas more clear. This column has yet to find a sentence too complex for plain English.[11] Another columnist points out that "[i]f anything, complex ideas cry out for clear, simple, transparent prose. The substance is challenging enough; don't compound the challenge with a difficult prose style."[12] He suggests that we think of plain English as a means to clear writing, a goal we can all agree on.

Let's abandon these myths. Legalese persists for the same reasons as always—habit, inertia, form books, fear of change, and notions of prestige. These reasons are more emotional than intellectual. We may think that clients expect and pay for legalese, but really, legalese has long been a source of ridicule. And besides, since legalese has nothing of substance to recommend it, its prestige value depends on ignorance. We cannot fool people forever. Our main goal should be to communicate, not to impress.

Legalese persists for another, less obvious reason, one that goes more to training and skill. Law schools have neglected legal drafting. Most first-year writing courses concentrate on research, analysis, and advocacy; students write office memorandums and appellate briefs. Law schools have been much slower to offer courses in drafting pleadings, other lawsuit papers, contracts, wills, and legislation. The result: "Many lawyers now in practice have had no formal training in the fundamental principles of drafting such documents, much less techniques to make them readable."[13]

Pleadings, contracts, real estate documents, wills and trusts, consumer forms, administrative rules, legislation—this is the realm of drafting, where legalese is thickest and the need for reform is greatest. ■

Footnotes

1. Harrington and Kimble, *Survey: Plain English Wins Every Which Way,* 66 Mich BJ 1024 (1987). This article was reprinted in 3 Second Draft No 2 (November 1987) (the newsletter of The Legal Writing Institute). It was summarized in Simply Stated No 77 (March 1988) (the newsletter of the Document Design Center of the American Institutes for Research, Washington, DC).
2. Child, *Language Preferences of Judges and Lawyers: A Florida Survey,* 64 Fla BJ 32 (1990).
3. *Id.* at 34.
4. *Id.* at 36.
5. Benson and Kessler, *Legalese v Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing,* 20 Loy LA L Rev 301 (1987).
6. *Id.* at 301.
7. Edgerton (Hathaway), *The Ten Commandments of How to Not Write in Plain English,* 65 Mich BJ 1168 (1986); Kimble, *Protecting Your Writing From Law Practice,* 66 Mich BJ 912 (1987).
8. Child, *supra* note 2, at 32.
9. Miller, *The Limits of Plain English,* 27 Inter Alia 15 (Fall 1989).
10. Barr, Hathaway, Omichinski, and Pratt, *Legalese and the Myth of Case Precedent,* 64 Mich BJ 1136 (1985).
11. Hathaway, *Results of the "Too Complex for Plain English" Search,* 68 Mich BJ 1194 (1989).
12. Mathewson, *Verbatim,* 18 Student Lawyer 12, 13 (October 1989).
13. Child, *supra* note 2, at 36.