Results of the Search for Legalese "Required by Statute," and the Conclusion of the Three Searches

By George H. Hathaway

In the December 1990 Plain Language column, we asked readers if they thought some legalese is required by statute. If they did, we asked them to send in the words of legalese and the citation to the statute that requires the legalese. Here are the replies and our comments on the replies.

Michigan Security Deposit Statute

from Chris Campbell, Lansing, Michigan:

"I found one example. The statutes governing security deposits in residential leases demand specific notices, which 'shall include the following statement in 12-point boldface type':

> *You must notify your landlord in writing within 4 days after you move of a forwarding address where you can be reached and where you will receive mail; otherwise your landlord shall be relieved of sending you an itemized list of damages and the penalties adherent to that failure. [MCL 554.603; MSA 26.1138(3).]*

"Other statutes strongly encourage standard language, without compelling it. The Truth in Renting Act requires in leases 'in a prominent type, or in legible print with letters not smaller than 1/8 inch, a notice in substantially the following form....' MCL 554.634; MSA 26.1138(34). Now, what rational lawyer is going to mess with the Legislature's language, when it has gone so far as to delve into type sizes? I suspect that the provision for 'substantially the following form' in this instance was an allowance for misplaced punctuation, misspellings, and the like by lay people—not for creativity by lawyers."

Author's Comments

First, the words you refer to are not legalese. Legalese consists primarily of long sentences, passive-voice verbs, weak verbs, negative form, non-parallel form, obsolete formalisms, archaic words, redundant phrases, compound phrases, and needlessly long words. The semicolon in the security deposit statute is just as good as a period in reducing sentence length. And the words "adherent to," although not very plain, are not as bad as hard-core legalese such as "hereby." The search was not to find words that are required by statute, but to find *legalese* that is required by statute. (Think of it as the difference between statutes that require certain words and statutes that require George Carlin's seven dirty words.)

Second, we can't discuss what you can or cannot do under the guidelines of "substantially the following form" unless we have a specific example of statutorily required legalese. See the comment below on a state security-law rule.

Federal EPA Regulation

from R. Eric Vogt, White Plains, New York

"I regret that I can cite several instances of legalese required by statute, in that it is required by the EPA administrative regulations under the Resource Conservation and Recovery Act (RCRA). In order to maintain an RCRA Permit for a hazardous waste storage, treatment, or disposal facility, the owner or operator must demonstrate financial ability to comply with closure and post-closure requirements. See 40 CFR Part 264, Subpart H and Part 265, Subpart H. This is done by filing with EPA (or the equivalent state agency) one of several alternative legal documents. The prescribed forms for these instruments are set out in 40 CFR 264.151, and they are uniformly couched in fairly thick legalese. My experience has been that EPA is usually quite rigorous in enforcing the required wording down to the last comma. This example aside, I know of no other instance of statutorily required legalese, certainly none that would apply to a consumer transaction."

Author's Comments

First, the words you refer to are not required by a federal statute. The words are required by a federal administrative regulation that is written under authority of a federal statute. There is, of course, a big difference between the two. If a federal statute directly requires specific words of legalese, then you have to convince Congress to amend the statute to eliminate the legalese. If a federal regulation requires specific words of legalese, then you have to convince the federal administrative agency to amend the regulation to eliminate the legalese.

Second, I agree that the EPA regulation requires a nightmare of legalese. The EPA Trust Agreement requires

"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 Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901

"by and between," "whereas," "Now therefore," "witness whereof," "hereunto," and many other archaic terms. The Acknowledgment is awful. And the Performance Bond starts out with "Know All Persons By These Presents..." (non-sexist baloney is still baloney). A worthwhile project would be to convince the EPA to eliminate the legalese in 40 CFR 264.151.

State Securities Law Rule

from Iris K. Socolofsky, Lansing, Michigan:

"I practice in the area of securities law. One of my 'favorite' complaints over the years has been the fact that the legends required to be included at the beginning of prospectuses and private placement memoranda are written in such an obscure manner that I suspect they fail in their intention to provide special emphasized notices to prospective investors. I have worked very hard to write in plain and simple English in the text of my documents. However, the one time that I tried to modify the required legends to convey the same information in more understandable language, a (North Carolina) state regulator informed me that I could not do that.

"I am enclosing just a few samples for your review. The enclosed Rule 451.705.6 from the State of Michigan, appears to have wiggle room in using the term 'in substantially the following form':

> *This preliminary prospectus and the information contained therein are subject to completion or amendment. These securities shall not be sold nor shall offers to buy be accepted prior to the time the prospectus is delivered in final form. Under no circumstances shall this preliminary prospectus constitute an offer to sell or the solicitation of an offer to buy nor shall there be any sale of these securities in any state in which such offer, solicitation, or sale is unlawful prior to registration or qualification under the securities laws of any such state.*

"However, the remaining enclosed examples do not, on their face, provide any room for variance. The prospectus

instructions from the Michigan Department of Commerce include a number of legends, each of which are written in a manner that obscures the message they are supposed to convey.

> *This is a best efforts offering, and the issuer reserves the right to accept or reject any subscription and will promptly notify the subscriber of acceptance or rejection. There is no assurance that this offering will all be sold. There are no assurances as to what size the issuer may reach.*
>
> *The issuer has not yet engaged in business. The securities offered hereby involve a high degree of risk. The offering price has been arbitrarily selected by this issuer. No market exists for these securities, and unless a market is established, purchasers might not be able to sell them.*
>
> *There is no assurance that our operations will be profitable or that losses will not occur.*
>
> *It is not the policy of the issuer to redeem these securities.*
>
> *Any representations contrary to any of the foregoing should be reported forthwith to the Lansing office of the Bureau.*

"Finally, enclosed are the uniform disclosure guidelines for legends promulgated by the North American Securities Administrators Association. Most states follow these requirements as a matter of policy. This means that if one tries to use language that deviates, it will probably be rejected.

> *In making an investment decision investors must rely on their own examination of the issuer and the terms of the offering, including the merits and risks involved. These securities have not been recommended by any federal or state securities commission or regulatory authority. Furthermore, the foregoing authorities have not confirmed the accuracy or determined the adequacy of this document. Any representation to the contrary is a criminal offense."*

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Author's Comments

First, the words you refer to are not required by a Michigan statute. They are required by a Michigan administrative rule written under authority of a Michigan statute. Again, there is a big difference between the two.

Second, concerning Michigan Rule 451.705.6, I agree that the words "therein" and "prior to," and a 54-word sentence are legalese. However, under the guidelines of "substantially the following form," the passage could be improved by rephrasing as follows:

> *The information in this preliminary prospectus is subject to completion or amendment. These securities shall not be sold, nor shall offers to buy be accepted, before the preliminary prospectus is delivered in final form. Under no circumstances is this preliminary prospectus an offer to sell or the solicitation of an offer to buy. There shall not be any sale of these securities in a state in which an offer, solicitation, or sale is unlawful before registration or qualification under the securities laws of any such state.*

The Rule could also be improved by naming an agent ("applicant"? "distributor"?), and by putting the action in verbs ("registers," "qualifies"). Nevertheless, we agree that the acceptance of any rephrasing depends on the reasonableness of the administrative agency.

Third, concerning the prospectus instruction from the Michigan Department of Commerce, I agree that the words "hereby" and "forthwith" are legalese. The instructions could be more plain.

Finally, from the Uniform Disclosure Guidelines, I don't consider the words to be legalese. The words are certainly not in the category of the EPA regulations.

Other Replies

The other replies we received either did not cite specific statutes or did not refer to words I considered to be legalese.

Results of the Statute Search

The results of our search are: (1) no federal or Michigan state statute directly requires legalese, and (2) only one federal administrative regulation and two Michigan state administrative rules require legalese. These are in two very narrowly defined areas of law—a permit for a hazardous waste facility, and a new securities offering.

Conclusion of the Three Searches

This completes the three searches we started in June 1989. We asked for legalese required because a topic was too complex for plain English[1]... and did not get any.[2] We asked for legalese required by case precedent[3]... and did not get any. And finally we asked for legalese required by statute[4]... and did not get any. The conclusion we reach from the results of our three-year search is that legalese is not required by complexity, case precedent, or statute. Furthermore, legalese is not required by federal administrative regulation or Michigan administrative rule, except for federal regulation 40 CFR 264.151 (concerning a permit for a hazardous waste facility), and Michigan Rule 451.705.6 and Michigan Department of Commerce prospectus instructions (both concerning a new securities offering).

Why then do lawyers say that legalese is required by complexity, case precedent, and statute? The answer is—because they *want to* write legalese. Therefore, to eliminate legalese we must convince lawyers to stop *wanting to* write legalese. ■

Footnotes

1. Hathaway, *The Search for the Sentence "Too Complex for Plain English,"* 68 Mich B J 522 (1989).
2. Hathaway, *Results of the "Too Complex for Plain English" Search*, 68 Mich B J 1194 (1989).
3. Hathaway, *The Search for Legalese "Required by Case Precedent,"* 69 Mich B J 360 (1990).
4. Hathaway, *The Search for Legalese "Required by Statute,"* 69 Mich BJ 1286 (1990).