

Plain English in Lawsuit Papers

By George Hathaway

In the January Plain Language Column we stated the goal of the Plain English Committee (to eliminate legalese in all legal documents in Michigan by the year 2000) and the agenda to meet that goal. As part of the divide-and-eliminate method in the agenda, we divided legal writing into eight substantive areas of the law. This is the review of the first area—lawsuit papers.

Types, Examples, and Reference Sources

There are two types of lawsuit papers—relatively fixed-form and relatively free-form. See Figure 1. The main examples of relatively fixed-form lawsuit papers are pleadings (complaints and answers), motions, orders (including summonses, subpoenas, and judgments), and affidavits, all of which are patterned after the specimens in form



Figure 1—Types of Lawsuit Papers

Types of Papers	Main Examples	Reference Sources
Relatively Fixed-Form	Complaints, Answers, Motions, Orders, Affidavits	MTLA's Manual of Complaints ICLE's Gilmore on Mich. Civil Pro. Before Trial SCAO Approved Forms West's Michigan Court Rules Practice Callahan's Michigan Civil Practice Forms
Relatively Free-Form	Memorandums and Briefs	Law-School Legal-Writing Classes
	Opinions	Michigan Judicial Institute

books or after previous pleadings that each law office has filed. The main examples of relatively free-form lawsuit papers are memorandums, briefs, and opinions, all of which are written from a fresh start on a blank sheet of paper. The reference sources for these papers are law-school legal-writing classes, which concentrate on memorandum and brief writing, and the Michigan Judicial Institute, which teaches opinion writing.

Survey of Fixed-Form Reference Sources

Listed below are the most well-known forms and form books in Michigan for relatively fixed-form lawsuit papers. In general all of these publications are well done in both substance and style. However, many of the form books still contain the following examples of legalese:

A. MTLA's Current Manual of Complaints in Michigan (The Orange Book, 1991). The complaints start with the obsolete formalism "Now Comes"; contain the redundant phrase "by and through"; and end with the archaic "Wherefore." The jury demands contain the archaic "hereby."

B. ICLE's Gilmore on Michigan Civil Procedure Before Trial (3rd ed., 1987). The forms in this book are generally well-written, but the complaints and motions still end with the archaic "Wherefore."

C. SCAO's Approved Court Forms. These separately published forms are well-written, and the more recent ones, especially, contain no legalese.

D. West's Michigan Court Rules Practice—Forms (5 volumes, 1992 pocket parts by Dean). Most of the sample complaints begin with "Now Comes" and end with "Wherefore." The orders contain the archaic "hereby," and the affidavits contain the obsolete formalism "being first duly sworn deposes and says."

"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.

E. Callahan's Michigan Civil Practice Forms (10 volumes, 1992). The 1992 pocket parts of nine of the ten volumes contain sample complaints and motions that begin with "Now Comes" and end with "Wherefore." However, the 1992 Revised Volume 2 by Lisa Fox and Laurel Lester of the Publisher's Editorial Staff contains sample complaints and motions that begin with "Plaintiff states" and end with "Wherefore." This is the first published form book for lawsuit papers in Michigan that completely follows what plain language proponents have been advocating ever since UCLA law professor David Mellinkoff wrote his 1963 landmark book, *The Language of the Law*.

Survey of Free-Form Reference Sources

We did not survey law-school legal-writing classes because we know that

these classes have always taught plain English. We know this not only because we have published many of their materials in the Plain Language Column, but also because three of our Committee members teach legal writing.

We did review material from the Michigan Judicial Institute (MJI). The MJI, under Executive Director Dennis Catlin, conducted judicial writing programs for judges in 1980, 1982, 1984, 1985, and 1987. The Institute's seminar materials, in particular the 1987 Trial Court Opinion Writing Seminar, in a three-ring binder, emphasize the benefits of planning and editing, the need for clear organization, the use of succinct statements, consistent use of reference words, and the avoidance of boilerplate and jargon. Budget limitations have prevented offering the seminar in recent years, but the positive effect the program has had on

clear writing is still evident in recent opinions.

Survey of Fixed-Form Lawsuit Papers Actually Filed in Michigan

Most of the complaints, answers, motions, orders, and affidavits that are filed in Michigan are filed in Michigan District Courts (98 districts with jurisdiction over damage claims under \$10,000), Michigan Circuit Courts (56 circuits with jurisdiction over damage claims for more than \$10,000 and equity claims), and Federal District Courts (seven locations with jurisdiction over federal questions and cases involving diversity of citizenship). Rather than survey all these courts, we selected one Michigan District Court, one Michigan Circuit Court, and one Federal District Court. We then asked the Clerk of the Court to randomly sample 10 complaints, 10 orders, and

EXPERT MEDICAL TESTIMONY

- Addiction Medicine
- Aero Medicine
- Allergy
- Anesthesiology
- Blood Banking
- Cardiology
- Cardiovascular Surgery
- Clinical Nutrition
- Colorectal Surgery
- Critical Care
- Dentistry
- Dermatology
- Dermatological Surgery
- Dermatopathology
- Dysmorphology
- Electrophysiology
- Emergency Medicine
- Endocrinology
- Epidemiology
- Family Practice
- Forensic Odontology
- Gastroenterology
- General Surgery
- Genetics
- Geriatric Medicine
- Gynecologic Oncology
- Gynecology
- Hand Surgery
- Hematology
- Immunology
- Infectious Diseases
- Internal Medicine
- Mammography
- Maternal-Fetal Medicine
- Maxillofacial Surgery
- Neonatology
- Nephrology
- Neurology
- Neuropathology
- Neuropsychology
- Neuroradiology
- Neurosurgery
- Nursing
- Obstetrics
- Occupational Medicine
- Oncology
- Ophthalmic Pathology
- Ophthalmology
- Orthodontics
- Orthopedic Surgery
- Otorhinolaryngology
- Pain Management
- Pathology
- Pediatric Allergy
- Pediatric Anesthesiology
- Pediatric Cardiology
- Pediatric Cardiovascular Surgery
- Pediatric Critical Care
- Pediatric Dermatology
- Pediatric Emergency Medicine
- Pediatric Endocrinology
- Pediatric Gastroenterology
- Pediatric Hematology
- Pediatric Infectious Diseases
- Pediatric Intensive Care
- Pediatric Nephrology
- Pediatric Neurology
- Pediatric Oncology
- Pediatric Otolaryngology
- Pediatrics
- Pediatric Surgery
- Periodontics
- Pharmacy
- Pharmacology
- Physical Medicine
- Plastic Surgery
- Podiatric Surgery
- Psychiatry
- Psychopharmacology
- Public Health
- Pulmonary Medicine
- Quality Assurance
- Radiation Therapy
- Radiology
- Reconstructive Surgery
- Renal Transplantation Surgery
- Rheumatology
- Thoracic Surgery
- Toxicology
- Urological Oncology
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- Vascular Surgery
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10 affidavits that had been filed in their court for use of "Now Comes" in complaints, "Wherefore" in complaints, "hereby" in orders, and "SS" in affidavits.¹ The results are shown in Figure 2.

Survey of Free-Form Lawsuit Papers Filed or Published in Michigan

Because of time limitations, we did not do an in-depth survey of memorandums, briefs, or opinions for this article. We will do this in the future. However, many attorneys are aware of an increasing number of well-organized, plainly written, and succinct trial court and Court of Appeals opinions.

Clarity Awards

The SCAO forms are well-written and contain no legalese. We recognized this in 1992 by giving the first Clarity Award to SCAO.

We now give two more Clarity Awards, again for lawsuit papers. The first 1993 Clarity Award goes to Lisa Fox and Laurel Lester for their plain English forms for lawsuit papers in Revised Volume Two of Callahan's Michigan Civil Practice Forms. The second 1993 Clarity Award goes to the Michigan Judicial Institute, to recognize its efforts in teaching and encouraging Michigan judges to write their opinions in a clear style and to honor the judges who have done so.

Back to the Drawing Boards

Plain language proponents have urged lawyers for many years to eliminate obsolete formalisms such as "Now Comes" and "SS," and archaic words such as "Wherefore" and "Hereby." Every legal-writing instructor, textbook, class, and seminar has asked lawyers to eliminate these words. The Plain English Committee has published eighty-nine Plain Language articles about these words and other words of legalese. We have published many Plain Language articles about the Michigan Supreme Court's SCAO-

Figure 2—Results of Sample Survey of Filed Lawsuit Papers

	36th District Court (for City of Detroit)	Wayne County Circuit Court (includes Detroit, and is the largest trial court in Michigan)	Federal District Court ED Mich. (at Detroit)
Complaints with "Now Comes"	9 of 10	8 of 10	7 of 10
Complaints with "Wherefore"	9 of 10	10 of 10	10 of 10
Orders with "Hereby"	8 of 10	8 of 10	3 of 10*
Affidavits with "SS"	7 of 10	9 of 10	9 of 10

*However, Federal civil subpoena forms and grand jury subpoena forms still contain the phrase "You are hereby commanded."

approved court forms, which do not contain the words "Now Comes," "SS," "Wherefore," and "hereby."

In addition, for the last ten years, I've experimented with different methods to try to find the magic button to push to eliminate legalese. I've initiated campaigns of "Never Say Now Comes," "Say No To Hereby," and "Avoid Any and All." In 1986 I wrote a tongue-in-cheek Plain Language article, under the pen name T. Selden Edgerton, entitled "After Seven Centuries, the True Meaning of SS"; included a picture of myself with a paper bag over my head; and suggested that SS was actually an old Norse abbreviation for the modern-day phrase known as KMA. People still remember the bag (Hey, were you the guy with the paper bag over your head?) but they don't remember, or aren't persuaded, to stop writing "SS." In March 1991, as a member of the Representative Assembly of the State Bar of Michigan, I proposed a resolution that the Assembly recommend "Real Lawyers Never Say Now Comes," which the Assembly defeated in a voice vote by a margin of about two to one. Finally, to see if any progress was made, I developed and took the objective sample survey of fixed-form lawsuit papers actually filed in Michigan (instead of subjectively saying that "we've made a lot of progress.") The results? Continued heavy use of "Now Comes," "Wherefore," "SS," and "hereby." It's back to the drawing boards.

Legalese List

Lawyers have ignored the proponents, instructors, textbooks, articles, and campaigns. Consequently, many Michigan form books, lawyers, and legal secretaries still use specific words of legalese. Therefore, the first four entries on the Plain English Committee's Legalese List are "Now Comes," "Wherefore," "hereby," and "SS." These four entries epitomize hard-core legalese, which many lawyers and legal secretaries simply refuse to give up to the detriment of their writing and the legal profession. See Figure 3.

No Hereby

If a lawyer said, "The men in our law office don't discriminate against the girls in the office," someone could rightfully object to the use of the word "girls." They could also rightfully object to any other sexual, ethnic, racial, or religious epithet that may be used in place of the word "girls." They would object even if the lawyer who made the statement had never made any discriminatory statements against anyone in his life. After all the millions of words against discrimination, they could say that the lawyer still hasn't got it. The

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reason for the objection is that the one little epithet represents much more than just one word.

"Hereby" is not an epithet, but it is an unnecessary word. "Hereby" represents much more than just one word; "hereby" represents legalese. And after many years of plain language laws, books, articles, classes, seminars, and speeches, the legal profession (old and new members) still hasn't got it that they should not write "hereby." The "No Hereby" symbol (circle around the word "hereby" with a diagonal line superimposed over the word) at the beginning of this article is meant to be a reminder to eliminate legalese. If Michigan lawyers and legal secretaries will eliminate the archaic "hereby," they will eventually eliminate legalese. If they won't, they won't. If they ridicule attempts to eliminate "hereby," they simply make it easier for the general public to ridicule and attack the legal profession.²

Conclusion

"No organization of lawyers can long survive which has not for its primary object the protection of the public." So said former State Bar President Roberts P. Hudson. However, the public has long objected to legalese and has voiced its objection through lawyer jokes that ridicule the legal profession. Lawyers know and cite the latest case decisions in their briefs. Yet when they are asked to eliminate "Now Comes," "Wherefore," "Hereby," and "SS," many rationalize that it takes a long time to change their forms. This is not true. Lawyers and legal secretaries can easily eliminate these words and other examples of legalese from their lawsuit papers if they want to.³ The sooner they do, the sooner the public opinion of lawyers will begin to improve.

The magic button to eliminate legalese is really three buttons, all labeled "improved public perception of lawyers." Some Michigan judges have pushed the first button by writing their opinions in plain English and encouraging lawyers to write their lawsuit

papers in plain English. Legal forms publishers have pushed the second button by publishing many plain English court forms. Now it's up to Michigan lawyers, legal assistants, and legal secretaries to push the third button by actually writing their lawsuit papers in plain English. They should start by eliminating "Now Comes," "Wherefore," "SS," and especially "hereby."⁴ ■

Footnotes

1. We thank the following people for participating in this survey: Gloria Lyons, Deputy Court Administrator of the Civil Division of the 36th District Court; Ron Maurer, Chief Deputy Circuit Court Clerk of Wayne County Circuit Court; and Judith Christie, Administrative Manager of the U.S. District Court for the Eastern District of Michigan.
2. For an illustration of the current situation see State Bar President George Googasian's "A Response to *The Detroit News*" in the January 1993 *Michigan Bar Journal*, p 10, in which Mr. Googasian replies to the *News's* comments about the "plummeting reputation of lawyers and the judicial system."
3. As those lawyer jokes tell, the public doesn't believe lawyers want to eliminate legalese.

Figure 3—Legalese List

Obsolete Formalisms	Archaic Words
1. Now Comes (in Complaints, Answers, Motions)	1. Wherefore (in Complaints, Answers, Motions)
2. SS (in Affidavits)	2. Hereby (in Orders)

In fact, the public fears that lawyers use legalese, as Don McLean put it in Bronco Bill's Lament, "To put you where they choose with the language that they use."

4. To add more interest to eliminating "hereby," I've contacted plain language proponents in other states and in Canada and suggested a contest to see which state or province can be the first to completely eliminate "hereby" from all legal writing in the state or province. We'll develop rules and select appropriate prizes later. We will also continue to recruit contestants. The first ones to join are the Honorable Richard Klein of the Philadelphia Court of Common Pleas in Pennsylvania; the Honorable James A. Knecht, Justice of the Appellate Court of Illinois, who lectures on effective brief writing in continuing legal education seminars (and who has already suggested selling T-shirts with the "No Hereby" symbol); the Honorable Joseph Stevens, Chief Judge of the U.S. District Court for the Western District of Missouri and Chair of the Special Committee on Plain English and the Law of the Missouri Bar; and Robert C. Dick of Rogers, Smith, Dick, Thomson & McMillan in Toronto, Ontario, author of the well-known legal writing textbook *Legal Drafting*. Your Honors and Counselors, start your erasers.

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