

## Summary of Laws, Rules, and Lawsuit Papers (1992-1993) (Part Two)

By the Plain English Committee

Last month we discussed items 1-5 in Figure 1 (page 1068). This month we discuss items 6-9.

### 6. Jury Instructions

For criminal jury instructions we gave a Clarity Award to the state and federal committees who rewrote the instructions. We didn't have time to analyze civil jury instructions the first time around, but we have now. We reviewed all the civil jury instructions published in the *Michigan Bar Journal* in 1992—specifically, in the January, September, and December issues.

Our review is again a mixed review. We believe that the instructions are mostly well-written at the sentence level. The sentences are reasonably short, they tend to favor strong verbs in the active voice, and they avoid intrusive phrases between the subject, verb, and object.

On the other hand, the diction, or choice of words, is not as plain as it should be, so we cannot give a Clarity Award. We will review the instructions again next year, hoping to see a change. The final step should not be that hard to take.

In the sentences, we counted an average of about 23 words (excluding optional language and sentences with lists). This is not bad. In addition, most sentences seem to use the active voice:

*Plaintiff claims that . . .*

*When I say that plaintiff must prove that defendant intentionally interfered with the contract, I mean that . . .*

The sentences are generally well-constructed, and some are even crisp:

*The admission of evidence in court is governed by rules of law.*

*You must not concern yourselves with the reasons for these rulings, and you must not consider any testimony which was ordered stricken [better: that I ordered to be struck]*

A few of the sentences do have multiple subordinate clauses:

*If defendant's conduct was lawful, it is still improper if it was done without justification for the purpose of interfering with plaintiff's contractual rights.*

*The duty of ordinary care includes the obligation to warn invitees of an unreasonable risk of danger that is known to the possessor, or which should be known in the exercise of ordinary care, and which the possessor has reason to believe is not obvious to the invitee.*

But on the whole, we have no quarrel with the sentences.

The words are another matter. The Committee's boilerplate notice includes the useless, archaic "hereby":

*The Committee hereby gives notice . . .*

Some of the instructions use words to convey their less common meanings:

*The possessor must exercise [use] ordinary care . . .*

*The possessor is also charged with knowledge of [responsible for] unreasonable risks of harm . . .*

*The possessor of premises is not an insurer of the safety of an invitee [the possessor does not guarantee that the premises are safe].*

Similarly, the instructions do not always prefer the shorter, more familiar word:

*If you determine [decide] that plaintiff has suffered damages which will continue [last] for the remainder [rest] of his/her life . . .*

*These mortality figures are conclusive [final] . . .*

*risks which should have been discovered and remedied [fixed] . . .*

*defendant's primary [main], but not necessarily sole, purpose . . .*

The best guidelines for writing jury instructions are those published by the Federal Judicial Center, in the appendix to its *Pattern Criminal Jury Instructions* (West, 1988). The Judicial Center's first guide-

line: "Avoid using words that are uncommon in everyday speech and writing." Good writers have always known that plain words make the straightest line between two minds.

All in all, we think that the jury instructions sound a little too much like opinions. It would be better if opinions could be written in plain language as well. But at least they should be translated for a lay audience.

### 7. Complaints, Answers, Motions, Orders, and Affidavits

For reference sources we gave the 1992 Clarity Award to the State Court Administrative Office for its approved court forms, and a 1993 Clarity Award to Lawyers Cooperative Publishing for its revised volume 2 of *Michigan Civil Practice Forms*. We found that legalese still exists in ICLE's *Gilmore*, MTLA's *Manual of Complaints*, and West's *Michigan Court Rules*. Here is what the authors of these books say:

*David Parker, a co-author of the 1991 edition of MTLA's Current Manual of Complaints in Michigan, is a former instructor of Legal Writing and Research at Detroit College of Law. Parker fully supports the concept of plain English in pleadings. He indicates that there are no current plans for a further update of the MTLA Manual, which was only recently revised. The problem he sees in trying to eliminate archaic terms such as "Now Comes" from this Manual is that the authors simply solicit sample pleadings and make no effort to revise these forms. The manual is a voluntary effort by*

"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 Hathaway, chair of the Committee. The Committee seeks to "improve the clarity of legal writing and the public opinion of lawyers by eliminating legalese." Want to contribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901.

the authors. Because it is already time-consuming to evaluate and compile pleadings submitted by attorneys for the Manual, the authors do not have the time to commit to redrafting the pleadings into plain English.

Robert Dean is the author of the latest revision of West's Michigan Court Rules of Practice—Forms. Dean supports the concept of plain English in principle, but feels that other considerations, such as time and expediency, may justify using established forms. He also points out that trying to redraft all old pleadings in form books is a major task that publishers will not undertake unless there is a strong demand or other economic incentive to justify the time and expense. He suggests it might make an interesting project for the Plain English Committee to offer to assist in such rewrites. He indicated that volume 5 is due for a rewrite this year, and suggested that he would welcome the Committee's input if it wanted to review a draft and offer changes to any of the forms.

Plain English Committee's response: The court forms approved by the Michigan Supreme Court's State Court Administrative Office are in plain English because the SCAO wanted to write them in plain Eng-

lish. So are the newest forms published by Lawyers Cooperative. Therefore, our Committee recommends that Michigan lawyers use the SCAO and Lawyers Co-op forms.

In our sample surveys of lawsuit papers, we found that "Now Comes," "Wherefore," "hereby," and "SS" still exist in many papers. We asked the Presidents of the Michigan Judges Association, Michigan District Judges Association, Michigan Trial Lawyers Association, Michigan Defense Trial Counsel, and Association of Defense Trial Counsel for their comments and help in eliminating these words. We will discuss this more in future articles.

## 8. Briefs and Memorandums

The reference sources for briefs and memorandums have always been law-school legal-writing classes, which have always been excellent. We are not yet prepared to sample the many briefs that are actually filed in Michigan courts. But we will consider giving Clarity Awards to clearly written briefs that are submitted to the *Michigan Bar Journal* in care of our Committee.

## 9. Judicial Opinions

We gave a 1993 Clarity Award to the reference source for judicial opinions, the Michigan Judicial Institute's opinion-writing seminar for trial courts. Again, we are not prepared to sample the many trial-court and appellate-court opinions that are written in Michigan courts. But we will consider giving Clarity Awards to clearly written opinions that are submitted to the *Michigan Bar Journal* in care of our Committee.

## Conclusion

This concludes phase two of our review of laws, rules, and lawsuit papers in Michigan. One of our respondents referred to the old adage that lawyers are "100 percent in favor of progress, and 1000 percent opposed to change." We believe the most effective way to change legal writing is to continue to a) group legal documents into four basic groups, b) list the specific types of legal documents in each basic group, and c) give Clarity Awards to specific legal documents that are clearly written. We welcome your comments. ►



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Figure 1. Summary of Laws, Rules, and Lawsuit Papers

Categories	Specific Documents	Quality of Specific Documents			
1. Statutes	Michigan statutes, published annually in Legislative Service Bureau's Public and Local Acts of Michigan	A	1993 Clarity Award given to the group that writes the statutes—Legal Division of Legislative Service Bureau (Director, Susan Andreini)		
2. Resolutions	Michigan honorary resolutions, published in House and Senate Journals	C-			
3. Rules	Michigan rules, published annually in Legislative Service Bureau's Michigan Administrative Code Supplement	B			
4. Executive Orders	Michigan Executive Orders, published monthly in Michigan Register	D			
5. Opinions of Attorney General	Opinions of Attorney General, published monthly in Michigan Register	B-			
6. Jury Instructions	Civil Jury Instructions, published in ICLE's Michigan Standard Jury Instructions—Civil, Second Edition	B			
	Criminal Jury Instructions, published in ICLE's Michigan Criminal Jury Instructions, Second Edition	A	1993 Clarity Award given to Committee on Standard Criminal Jury Instructions (Chair, Judge William J. Caprathe) and Institute of Continuing Legal Education (Director of Publications, Lynn Chard)		
	Sixth Circuit Criminal Jury Instructions, published by West	A	1993 Clarity Award given to Committee on Pattern Criminal Jury Instructions of Sixth Circuit District Judges Association (Chair, Judge Julian Abele Cook, Jr.)		
7. Complaints, Answers, Motions, Orders, and Affidavits	Reference Sources	Quality of Ref. Sources		Sample Survey	Quality of Sample Survey
	• MTLA's Manual of Complaints	C-		Complaints for "Now comes" and "Wherefore"; orders for "hereby"; and affidavits for "SS"	C-
	• ICLE's Gilmore on Michigan Civil Procedure Before Trial	A-			
	• SCAO's approved forms	A	1992 Clarity Award given to State Court Administrative Office (Director, Marilyn Hall)		
	• West's Michigan Court Rules Practice	B-			
• Lawyers Co-op's Michigan Civil Practice Forms	A	1993 Clarity Award given to Lisa Fox and Laurel Lester of Lawyers Co-op for 1992 revised volume 2 of Michigan Civil Practice Forms			
8. Briefs and Memorandums	Law school legal-writing classes	A			
9. Judicial Opinions	Michigan Judicial Institute	A	1993 Clarity Award given to Michigan Judicial Institute (Executive Director, Dennis Catlin) for judicial writing seminars		