

The Eighth Annual (1999) Clarity Awards

By George H. Hathaway

Why do journalists write negative articles about legal writing? They think it's good for business, because bad news sells better than good news. Dan Seligman's article in the September 7, 1998 issue of *Forbes Magazine* is the latest example. Here are excerpts from the article [with our comments in brackets]:

Why do lawyers write so lousily? They think it's good for business. Among nonlawyers there is broad agreement that legal writing is god-awful. From outpourings of the American Bar Association to Supreme Court decisions, obvious klutziness abounds. . . . A lot of lawyers are themselves quite agitated about their profession's murky prose. . . . Many big-league law firms now have writing coaches. . . . [M]ost of them are partisans of the plain language movement. . . . It has. . . a newsletter (*Rapport*) . . . and. . . a Web site (www.plainlanguage.com) . . . It is supported by some state bar associations. . . . In 1995, the Michigan Bar embraced a goal of abolishing legalese by 2000, but progress on this front has apparently been, shall we say, de minimus. . . . [Hold it, Dan. Among the many things that are probably *de minimus* is your knowledge of the facts. You're wrong about Michigan almost as many times as Lee Corso is. But go on. . .]

So who's against plain language? Gazillions of lawyers. Many in the profession want to be obscure. Despite what they've been told in law school writing programs, a lot of young lawyers thrill to the idea that they are now

"Plain Language" is a regular feature of the **Michigan Bar Journal**, edited by Joseph Kimble for the State Bar's Plain English Committee. The 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. For information about the Plain English Committee, see our web site—www.michbar.org/committees/penglish/pengcom.html

members of an exclusive club whose members communicate in a language incomprehensible to the uninitiated.

More important, they come to believe that this language has genuine cash value. More important still, this belief is not entirely crazy. Worth quoting at length in this connection is one response to the ProfNet query. It comes from Michael Bowen, a Milwaukee attorney (Foley & Lardner), novelist (eight so far) and traitor to his class.

Says Bowen: "Lawyers write obscure and impenetrable prose for the same reason the medieval Church didn't want the Bible printed in the vernacular. They want to control and limit access to vital information. They don't want a sales manager to look at a statute and decide for himself that his rebate program is legal; or a plant operations manager to read an EPA regulation and figure out how to get his effluent discharges within the legal limit. The legal profession wants them to call lawyers to do these things for them." [Not quite, Mike. The reasons are not so deliberate as that. Your explanation of legal writing to Dan reminds us of the blind leading the blind. Instead of being wrong about the motives for legalese, why don't you accept some responsibility for legal writing and form a Plain English Committee of the State Bar of Wisconsin, as we did in Michigan? Anyone can criticize legalese; it takes blood, guts, sweat, tears, and long, lonely, thankless years of persistence to persuade your fellow lawyers to actually eliminate legalese. Now go on, Dan.]

All of which tells us that there is a certain inescapable tension between two of the professions's priorities: (1) responding to all the reasonable complaints about legaldegoon and (2) maintaining the billings at reasonable levels. Guess which usually wins out.

Responsibility

There are two types of people in this world: those who complain about problems and those who try to solve them. Unfortunately, for every one hundred people who complain, there is usually only one person who tries to solve. The differential ingredient is a sense of responsibility.

David Mellinkoff has it.¹ He took time off from his law practice in the early 1960s to write *The Language of the Law*, the book that started the plain-language movement in the law. His preface says it all. "With communication the object, the principle of simplicity would dictate that the language used by lawyers agree with the common speech, unless there are reasons for a difference. . . . If there is no reason for departure from the language of common understanding, the special usage is suspect. . . . This is no crusade for the propagation of a new language. . . . It is an endeavor to make an existing language better perform its function. . . . This is a beginning. The goal is nothing more modest than the rationalization of the language of the law."

Bryan Garner also has it.² He gives seminars to practicing lawyers around the U.S. on clear writing in legal documents. Many of our previous award winners attended his seminars.

And we select lawyers and judges who have it for our Plain English Committee. For the last 15 years, we have tried to persuade Michigan lawyers to write in plain language. We have also asked lawyers who are already involved in the plain-language movement in other states to form plain-language committees in their states. Texas did it in 1989, Missouri in 1993, and Pennsylvania in 1998.

www.michbar.org/committees/penglish/pengcom.html is the URL of our web site. Here we explain who we are, how we started, and what we do. We list all our 15 years of monthly "Plain Language" articles. You can directly download the last four years of these columns. We also list all our Clarity Award winners and include plain-English examples from 20 types of legal documents. Somehow you missed our website, Dan. Instead, you stumbled onto the web site of Cheryl Stephens of The Precedents Group in Vancouver, Canada. Everything about this group is first-class. We have contributed to many issues of their newsletter, *Rapport*. They are writing experts who are trying to persuade Canadian

Figure 1—Winners of Eighth Annual (1999) Clarity Awards



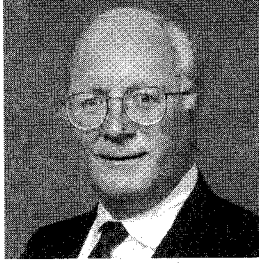

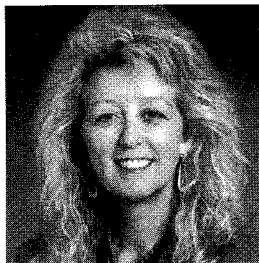


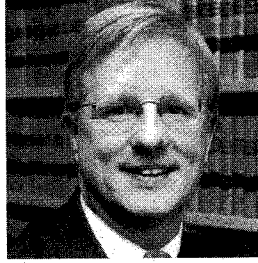
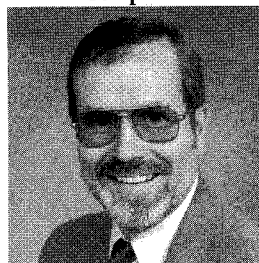
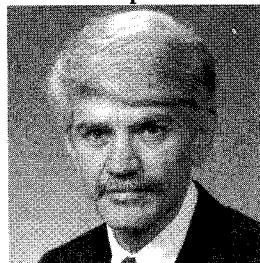
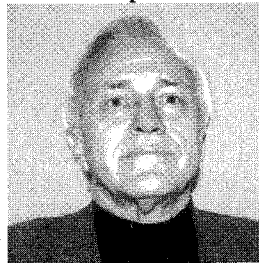
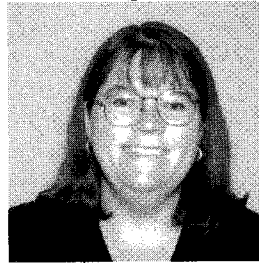

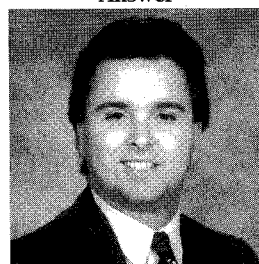


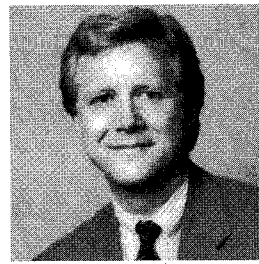
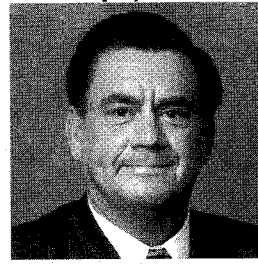
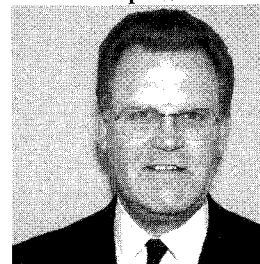
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<p>Equity-Line</p>  <p>Palmer</p>	<p>Prospectus</p>  <p>Andersen</p>			

Figure 2—Clarity Award Categories (for 20 Specific Types of Legal Documents)

Laws	Lawsuits	Contracts	Real Estate	Estate Planning
<ul style="list-style-type: none"> • Resolutions • Statutes • Rules 	<ul style="list-style-type: none"> • Complaints, Answers, Motions, and Orders • Sworn Statements and Proofs of Service • Opinions, Judgments and Settlement Agreements 	<ul style="list-style-type: none"> • Consumer Finance Contracts • Construction Contracts • Sales-of-Goods Contracts • Sales-of-Services Contracts • Employment Contracts • Investment Contracts • Insurance Contracts 	<ul style="list-style-type: none"> • Sales Contracts and Land Contracts • Deeds and Easements • Leases • Notes and Mortgages 	<ul style="list-style-type: none"> • Durable Powers of Attorney • Wills • Trusts

lawyers to write clearly. They are doing this from outside the practicing bar. We are practicing lawyers and judges within the State Bar of Michigan. We write legal documents and are promoting plain English from within the State Bar. And you either missed or ignored the progress we have made, Dan.

Goals

The State Bar of Michigan has the following goals and priorities:

- **Goal VII—Public Understanding of and Respect for the Justice System and Profession.**
- **Goal VIII—Openness of the Profession.**
- **Key Priority of Long-Range Plan—Image of the Profession.**

Our Plain English Committee supports these goals and priorities through its goal of promoting the use of clear writing by legal professionals. In 1992, we added a specific goal of eliminating legalese from all legal documents in Michigan by the year 2000. If we promote legal documents that are written in plain English without legalese, we directly promote the rationalization of the language of the law, and indirectly promote the public understanding of and respect for the profession.

Clarity Awards

We promote our goal by doing three things. First, we divide all legal writing into five general categories and 20 specific types, and focus on only one specific type at a time. Second, we identify the specific lawyers or group of lawyers who write each type of document. We thus concentrate on only one relatively small group of lawyers at a time. And third, we find clearly written examples of each specific type of document, give them Clarity Awards, and promote them as good examples to follow. We search for good examples throughout the

year and then give Clarity Awards on Law Day, May 1, of each year. See Figure 1 for photos of this year's winners.

We search for Clarity Awards in the categories shown in Figure 2.

Our search for the Eighth Annual (1999) Clarity Awards is discussed below.

The Search for Plain-English Laws

Resolutions

State resolutions (www.michiganlegislature.org, under Journals) are written by the 110 representatives (only 11 of whom are lawyers) and 38 senators (only five of whom are lawyers) in the Michigan Legislature, and by the clerks of the House and Senate. Our subcommittee on resolutions (former Representative Nick Ciaramitaro and Karen Willard; Clerk of the House Mary Kay Scullion; Bill Steude, of the Michigan Municipal League; and Pat McAvoy, Director of Legislative Affairs of the Michigan Township Association) has been trying to persuade the Legislature to remove the legalese such as *Whereas* and *Now, therefore* from state resolutions. The only state resolutions that have been written in plain English are Representative Ciaramitaro's 1988 HR 691 and Representative Willard's 1995 HR 302.

We also promote plain English in the resolutions of the 210 cities in the Michigan Municipal League and of the 1,242 townships in the Michigan Township Association. This year we give Clarity Awards for the following resolutions:

- *Grand Rapids City Commission Resolution No. 64015*, by City Manager Kurt Kimball;
- *City of Ferndale Resolution of October 26, 1998, on Tobacco and Alcohol Laws*, by the Ferndale City Council and Mayor Chuck Goedert;
- *City of Sterling Heights Resolution of December 15, 1998*, by City Attorney Paul O'Reilly and Assistant City Attorney Neil Lehto; and

- *City of Flint Resolution Approving the Fair Housing Study and Action Plan*, by Chief Legal Officer Karen McDonald Lopez.

Statutes

Michigan statutes (www.michiganlegislature.org, under Public Acts 1998 Table) are written by the Legal Division of the Legislative Service Bureau. We have given Clarity Awards to Michigan statutes for many years. Our subcommittee on statutes (Carol Cousineau, Director of the Legal Division of the LSB; and Joe Kimble, a legal-writing teacher at Thomas Cooley Law School) believes that most of the statutes in Michigan are written in reasonably clear plain English. And even if a statute is not written as clearly as it could be, it is most likely because of all the competing political interests that influence the passage of a bill, not because the drafter wrote it badly on purpose.

We also promote plain English in city and township ordinances. This year we give a Clarity Award for the following city ordinance:

- *City of Dearborn Ordinance No. 98, on Alarm Systems*, by City Attorney Debra Walling, Deputy Corporation Counsel Laurie Sabon, and Corporal Susan Gomolak of the Dearborn Police Department.

Rules

Michigan administrative rules (www.migov.state.mi.us/rules/org) are written by the 19 departments of state government, reviewed by the Governor's Office of Regulatory Reform, and edited by the Legal Editing Division of the Legislative Service Bureau. Our subcommittee on administrative rules (Mike Zimmer, Director of the Governor's Office of Regulatory Reform; Roger Peters, Director of the Legal Editing Division of the LSB; and Diana Pratt, Director of the Legal-Writing Program at Wayne State Law School) believes that most of the administrative rules in Michigan are written in reasonably clear plain

English. Each year, we select one clearly written rule for a Clarity Award. This year we give a Clarity Award to the following administrative rule:

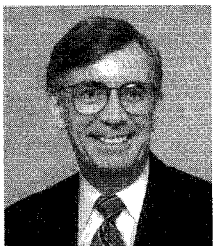
• *Rule 432.1831, Destruction of Counterfeit Chips and Tokens*, by Nelson Western and Eric Eggan.

To summarize our 15 years of analyzing the writing style of statutes and rules, we believe that lawyers do not write unclear statutes and rules on purpose, and that most Michigan statutes and rules are written with reasonable clarity—far better than they were written even a generation ago.

The Search for Plain-English Lawsuit Papers

Lawsuit papers are written by members of the Michigan Trial Lawyers Association, Michigan Defense Trial Counsel, Litigation Section of the State Bar, and Michigan Association of Legal Support Professionals. Here there is more reason for your comments, Dan—because there is a strong refusal by litigators to eliminate legalese such as *Now Comes* and *Wherefore* from their lawsuit papers. But this refusal is not going to be overcome by occasional magazine articles criticizing the legal profession or by awards for the worst-written lawsuit papers.

Our subcommittee on lawsuit papers (Hon. George Steeh, Jr., of the U.S. District Court for the Eastern District of Michigan; John Mayer, Court Administrator of the U.S. District Court for the Eastern District of Michigan; Hon. Chad Schmucker, Chief Judge of Jackson County Circuit Court; Keith Beasley, Court Administrator of Macomb County Circuit Court; Matt Rick, an Assistant Attorney General; and Greg Ulrich, a former Commissioner of the State Bar) have assumed the responsibility for helping to promote clear writing in lawsuit papers. They believe that the following Clarity Awards will help promote this goal:



George Hathaway is a senior real estate attorney at the Detroit Edison Company and chair of the Plain English Committee of the State Bar of Michigan.

Figure 3—Examples of Plain English

1. Grand Rapids Resolution

RESOLVED, that a 23rd Year Community Development Block Grant Agreement in a form to be approved by the City Attorney between the City and Family Talk, Inc. for a youth counseling program for the period of November 1, 1997 through September 30, 1998, in an amount not to exceed Twelve Thousand Dollars (\$12,000) [just the numbers] is approved and the Mayor is authorized to execute the Agreement for the City. [Better yet: "The Commission approves . . . The Mayor may sign . . ."]

2. Ferndale Resolution

The Ferndale City Council realizes the importance of early intervention programs that are designed to stop underage drinking and smoking.

3. Sterling Heights Resolution

Under federal law, the application for transfer of control of the cable television franchise is automatically approved if it is not acted upon unfavorably ["not denied?"] within 120 days.

4. Flint Resolution

IT IS RESOLVED that the City of Flint and the Flint City Council approve the fair housing study and action plan entitled "Analysis of Impediments to Fair Housing in Genesee County, including the City of Flint."

5. Dearborn Ordinance 98 to amend Section 14-10 of the City Code:

(a)(3) Any person affected by the assessment of a false alarm fee may request and shall be granted a hearing on the matter before the security systems board. Such ["The"] person shall file a request for hearing in the office of the chief of police within ten days of the assessment of the false alarm fee. The burden of proving an alarm was not a false alarm shall be ["is"] on the alarm user.

6. Administrative Rule 432.1831

(1) This rule applies to a casino licensee and a casino license applicant.

(2) All of the following provisions apply to the notice of counterfeit chips and tokens:

(a) A casino licensee shall notify the board and the executive director, in writing, immediately upon the discovery of a counterfeit chip or chips or token or tokens that results in a loss of more than \$1,000 to the licensee.

7. Complaint for Divorce of Legal Aid Bureau of SW Michigan

Therefore, I am requesting that the court grant me a divorce consistent with the relief requested in this Complaint.

8. Complaint for Divorce of Central Aid of Central Michigan

Plaintiff and Defendant were married on the following date: _____, in the following place: _____.

9. Answer to Complaint

The Defendants, Shelby Township and the Shelby Township Water Department, for their Answer to the complaint to remove wetland easement, state as follows: . . .

Therefore, Defendants Shelby Township and the Shelby Township Water Department respectfully request that this Court grant such relief as is equitable and just under all the circumstances presented to the court during the course of this proceeding. [Omit everything after "just?"]

10. Motion and Order for Admission to Practice Law

Petitioner requests that this Court enter an order admitting the candidate to the practice of law in the State of Michigan.

11. Stipulation and Order to Dismiss

IT IS ORDERED that Joseph Schumaker and G. John Schumaker are dismissed without prejudice.

12. Release and Covenant Not to Sue

Employee agrees that she will keep the terms of the Release confidential and will not disclose its terms to anyone.

13. Ford Credit Vehicle Retail Installment Contract

You must insure yourself and the Creditor against loss or damage to the vehicle. The type and amount of insurance must be approved by the Creditor. If the Creditor obtains a refund on insurance or service contracts, the Creditor will subtract the refund from what you owe. **Whether or not the vehicle is insured, you must pay for it if it is lost, damaged, or destroyed.**

14. Standard Federal Equity Line Agreement

You may use the proceeds of a Loan for any legal purpose, except (a) the purchase of ["buying"] stocks or bonds, or (b) the making of ["making"] any payments required under this Agreement.

15. General Motors Prospectus

THE HUGHES TRANSACTIONS We are proposing three related transactions to enhance the value of the businesses operated by our Hughes Electronics subsidiary. We need your consent in order to accomplish these "Hughes Transactions." (1) Hughes Defense. We propose to spin off the defense electronics business of Hughes Electronics to our common stockholders. We call this business "Hughes Defense." Immediately after the spin-off, Hughes Defense will merge with Raytheon Company. Based on the Recent Raytheon Stock Price, these transactions have an indicated value of approximately ["about"] \$9.5 billion.

Complaints:

- *Complaint for Divorce*, the Legal Aid Bureau of Southwest Michigan, by Executive Director Ward McDonough and Managing Attorney Richard Kupferschmidt.

- *Complaint for Divorce*, Legal Aid of Central Michigan, by Don Reisig, Director of Litigation (and former President of the State Bar of Michigan) and Yvette Willson.

Answers:

- *Answer to Complaint in Cirenese v Willauer*, by David Viar and Donald DeNault, Jr.

Motions:

- *Motion and Order for Admission to Practice Law*, by Macomb County Bar Association, Lori Finazzo, President.

Orders:

- *Stipulation and Order for Dismissal in Liberty Home Builders v City of Monroe*, by Karen Mendelson.

Settlement Agreements:

- *Release and Covenant Not to Sue*, by Daniel Bretz.

The Search for Plain-English Contracts

We have written many previous articles about contracts.³ Most of these articles can be directly downloaded from our web site. The following Clarity Awards not only prove that contracts can be written in plain English, but will help promote clear writing in future contracts:

Consumer-Finance Contracts:

- *Michigan Simple-Interest Vehicle Retail Installment Contract* of Ford Credit, by the Ford Credit In-House Counsel Group.

- *Equity-Line Agreement and Disclosure Statement* of Standard Federal Bank, by David Trahan, Ron Palmer, and Greg Clark.

Investment Contracts:

- *Solicitation Statement/Prospectus* of Hughes Transactions, by Warren Andersen, Attorney of General Motors Corporation.

The Search for Plain-English Real-Estate and Estate-Planning Documents

Most real-estate and estate-planning documents are written by the 3,000 mem-

bers of the Real Property Law Section and the 3,000 members of the Estate Planning Law Section of the State Bar of Michigan. These are the lawyers who can do the most to improve the clarity of real-estate and estate-planning documents. In previous years, we have given Clarity Awards to a clearly written real-estate sales contract, a durable power of attorney for property transfer, a durable power of attorney for health care, a will for property transfer, and a living will for health care. Clear examples prove that real-estate and estate-planning documents can be written in plain English. The implication is: If these documents can be written in clear language, then why can't you write your documents in clear language?

Examples from Clarity-Award Documents

We have never claimed that our Clarity Award winners are perfectly written legal documents—if there is such a thing. In fact, even in the short excerpts below, we have offered some gentle editorial suggestions [in brackets]. What we do claim, though, is that the award winners are plainer than traditional documents of their kind—and less pitted with legalese. We are trying to recognize and promote change and progress. To anyone who thinks they can do better, we say go for it. Instead of criticizing a document, send us a document for a future Clarity Award. We have been asking this for years.

Public Journalism

In 1995, Davis Merritt, editor of the *Wichita Eagle*, wrote *Public Journalism & Public Life*. He said that for decades the pervasive model of American journalism had been distance. Now, however, he advocates becoming more actively involved in the news. Public journalism moves beyond the limited mission of “telling the news” to a broader mission of helping public life go well. It moves from detachment to being a fair-minded participant. It moves beyond just describing what is “going wrong” to also imaging what “going right” would be like.

Newspaper reporters and magazine columnists could help the plain-English movement by practicing public journalism

and writing balanced articles about legal writing.

Conclusion

We are now in our fifteenth year and our Eighth Annual Clarity Awards. The clear writing that David Mellinkoff recommends in *The Language of the Law* and that Bryan Garner teaches in his seminars can be used in current legal documents if enough lawyers assume the responsibility to promote it. This year we have identified many lawyers who are assuming that responsibility. They include private practitioners, city attorneys, in-house counsel for General Motors, Ford Credit, and Standard Federal Bank, and a past president of the State Bar of Michigan who is now the Director of Litigation for a legal-aid clinic.

Progress may be hard, but it's not *de minimus*. ■

Footnotes

1. *The Language of the Law* (1963; 11th printing, 1990); *The Conscience of a Lawyer* (1973); *Lawyers and the System of Justice* (1976); *Legal Writing: Sense and Nonsense* (1982); Mellinkoff's *Dictionary of American Legal Usage* (1992); *How to Make Contracts Illegible*, 5 Stanford L Rev 418 (1953); *The Language of the Uniform Commercial Code*, 77 Yale L J 185 (1967); *The Myth of Precision and the Law Dictionary*, 31 UCLA L Rev 423 (1983); *Plain English in the Law*, 73 Mich B J 22 (January 1994).
2. *A Dictionary of Modern Legal Usage* (2d ed 1995); *The Elements of Legal Style* (1991); *Black's Law Dictionary* (1996); *Guidelines for Drafting and Editing Court Rules* (1996); *Finding the Right Words*, 67 Mich B J 762 (August 1988); *Excerpts from a Dictionary of Modern Legal Usage*, 69 Mich B J 1066 (October 1990); *An Excerpt from the Elements of Legal Style: Rooting Out Sexism*, 70 Mich B J 942 (September 1991); *Judges on Effective Writing: The Importance of Plain Language*, 73 Mich B J 326 (March 1994); *Excerpt from the Indispensable Book: Garner's Dictionary of Modern Legal Usage*, 74 Mich B J 1062 (October 1995).
3. *Motor Vehicle Leases* (December 1995); *The Word from the Securities and Exchange Commission: Put It in Plain English* (December 1996); *Don't Stop Now: An Open Letter to the SEC* (August 1997); *Plain English Subcommittee on Contracts* (October 1997); *Plain English in Car Loans* (August 1998); *Plain English in Home-Equity Agreements* (October 1998); *Plain English in Contract Recitals and Boilerplate* (November 1998).