

PLAIN LANGUAGE

The will to change

BY JOSEPH KIMBLE

Why do legal writers resist or dismiss plain language? I addressed that question in my book *Writing for Dollars, Writing to Please*: “You can point to an assortment of reasons . . . , but . . . they come down to . . . lack of will, lack of skill, and lack of time.”¹ I’ve explored each of these three reasons in more detail in the book.

This column will be a test—primarily of writers’ will to change. Why? Because I’ll offer four prime examples of needless, antiquated formalisms that would take no skill and no time to eradicate. You merely need the will to wipe them out.

Before getting to the examples, let me repeat what I said about lack of will:

[It] has its own fairly obvious causes. Probably the main one is the two-fisted grip of habit and pure inertia, admittedly powerful forces. It’s usually easier to do things the old way—to copy an old form, for instance, or to fall back on jargon. Another cause is a false notion of power and prestige, of being in control, of having the status conferred by a mysterious and seemingly magical language. Yet another is a belief in the very myths addressed in this part of the book, along with a profoundly misplaced confidence in traditional style—by writers who must not realize how ineffective, inefficient, unnecessary, and prone to uncertainty that style is.²

I need to emphasize that writing in plain language is a skill acquired through hard work; that it involves dozens of guidelines and techniques; and that it requires reading, practice, and critique.³ But anyone who cannot take the teeny-tiny steps of cutting the four formalisms in boldface below is forever stuck.

Now comes the plaintiff, blah, blah, blah. This column is in its 42nd year. Early on, in October 1987, we did one of the first surveys that tested reader preferences for plain language versus legalese. We asked participants to check off their preference for the A or B version of six different paragraphs from various legal documents. We did not identify the choices as either “legalese” or “plain English.” We received responses from 425 Michigan judges and lawyers. The same study was later repeated in three other states—Florida, Louisiana, and Texas. And in all four states, the participants preferred the plain-language version by margins running from 80% to 86%.⁴

One of the six choices was between two versions of how to begin a complaint:

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:

So here’s the question. How do you begin your complaints? If you follow something like the A model, why—when other readers, including judges, overwhelmingly prefer the B model? And if you have never seen these results until now, will you change?

Know all men by these presents. Another otiose opener. A while ago, I hired a property-law expert to prepare some documents for me. When he sent me the draft of one of them, it began with this silly phrase. (Bryan Garner calls it a “flotsam phrase—as sexist as it is inscrutable to most readers—that needlessly begins many legal documents.”⁵) At the end of a phone call discussing some of the

¹“Plain Language,” edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 42 years. To contribute an article, contact Prof. Kimble at Cooley Law School, 300 S. Capitol Ave., Lansing, MI 48933, or at kimblej@cooley.edu. For an index of past columns, visit www.michbar.org/plainlanguage.

substantive matters in the documents, I gently kidded the lawyer for using it. When he sent me the final draft, it was gone. Easy as can be.

Further affiant sayeth naught. Now we turn to formalistic endings. This one, of course, still appears at the end of many affidavits—a further testament to habit and inertia. The commentators call it a “gratuitous traditional tagline of legalese”⁶ and “useless verbiage.”⁷ It “[a]dds nothing to sense.”⁸ You should “use [it] not.”⁹

In Witness Whereof, blah, blah, blah. I was recently presented with a publishing contract that ended like this: “IN WITNESS WHEREOF we have hereunto affixed our hands and seals this _____ day of _____, two thousand twenty five.” You will see different versions of this concluding paragraph (before the signature block), but they are all “overblown,”¹⁰ “extravagantly verbose,”¹¹ “flourishes of a style long dead.”¹² Thomas Haggard calls *In Witness Whereof* “an antique phrase” and proclaims that “nothing has contributed more to the bad reputation of legal writing than these archaic phrases.”¹³

Is this clause needed at all? Garner doesn’t use it in a sample contract, but settles for a signature block with names and titles (the effective date having been stated earlier).¹⁴ Kenneth Adams gives arguments for and against having a concluding clause, but offers this example if drafters decide to include one: “Each party is signing this agreement on the date specified for that party’s signature.”¹⁵ Notice: no *In Witness Whereof*.

So there you have it: four hopelessly antiquated expressions. The second and third should be liquidated entirely. The first and fourth (if needed at all) can easily be replaced with plain language, if lawyers have the will to do it. Maybe then they could start moving on to all the harder parts of plain writing.

A shorter version of this column appeared in the ABA Journal’s *Your Voice online column*.



Joseph Kimble taught legal writing for 30 years at Cooley Law School. His fourth and latest book is *Essentials for Drafting Clear Legal Rules* (with Bryan Garner). He is a senior editor of *The Scribes Journal of Legal Writing*, editor of the Redlines column in *Judicature*, and a drafting consultant on all federal court rules. He led the work of redrafting the Federal Rules of Civil Procedure, Federal Rules of Evidence, and Michigan Rules of Evidence. In 2023, he won a Roberts P. Hudson Award from the State Bar of Michigan. In 2024, he won the Golden Pen Award from the Legal Writing Institute.

ENDNOTES

1. Kimble, *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* (Durham: Carolina Academic Press, 2d ed, 2023), p 24.
2. *Id.* at 24–25.
3. For an outline of guidelines for writing in plain language, see *id.* at 5–10.
4. For a breakdown of the six paragraphs and the results, see Kimble & Prokop, *Strike Three for Legalese*, 69 Mich B J 418 (May 1990), https://www.michbar.org/file/generalinfo/plainenglish/pdfs/90_may.pdf.
5. Garner, *Garner’s Dictionary of Legal Usage* (New York: Oxford University Press, 3d ed, 2011), p 512; see also Butt, *The Lawyer’s Style Guide* (Oxford: Hart Publishing, 2021), p 459 (calling the phrase “unforgivably archaic and sexist”).
6. Child, *Drafting Legal Documents: Principles and Practices* (St. Paul: West Publishing Company, 2d ed, 1992), p 79.
7. Garner, *The Redbook: A Manual on Legal Style* (Eagan, Minnesota: West Academic Publishing, 5th ed, 2023), p 256.
8. Mellinkoff, *Legal Writing: Sense and Nonsense* (New York: Charles Scribner’s Sons, 1982), p 134.
9. Garner, *Garner’s Dictionary of Legal Usage*, p 383.
10. Burnham, *The Contract Drafting Guidebook* (Charlottesville: The Michie Company, 2d ed, 1992), p 475.
11. Butt, *The Lawyer’s Style Guide*, p 423.
12. Mellinkoff, *Mellinkoff’s Dictionary of American Legal Usage* (St. Paul: West Publishing Company, 1992), p 254.
13. Haggard, *Legal Drafting: Process, Techniques, Exercises* (St. Paul: The West Group, 2003), pp 318, 320.
14. Garner, *The Redbook*, pp 582, 591.
15. Adams, *A Manual of Style for Contract Drafting* (Chicago: ABA Publishing, 5th ed, 2023), pp 169–170.

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