

Littering with Legalese, or Get a Load of This Release

By Joseph Kimble

Here's a short story. Last April, the Center for Ethics, Service, and Professionalism at Thomas Cooley Law School sent an e-mail to the faculty and staff inviting us to participate in a Lansing "Clean Sweep." Participating organizations would pick up litter from their assigned area, a few city blocks, on a certain day. And Lansing would, at least for a while, be a brighter and tidier place.

I later learned that the event was being sponsored by a local bank. I admire the bank for undertaking the event. The people involved deserve credit and thanks for their community spirit. And the invitation struck a nerve with me. Like you, probably, I'm disgusted that people throw their trash out the car window or on the street for someone else to pick up. I'm even compulsive enough to pick up paper, plastic bottles, cans, and whatnot as I'm running. So, sure, sign me up.

Cooley's organizer said I would have to sign a release. Fine. She would drop it off at my office. Fine. She dropped it off at my office. Not fine.

The release was typical—and typically revolting. Once again, the public channels

were polluted by legalese. Once again, readers—those who bothered to even try—were subjected to a form of writing that has been criticized and ridiculed for centuries. Once again, many of them must have been confused about what they were agreeing to. And once again, a few of them may have wondered whether legal documents have to be like this—and if not, why lawyers can't mend their ways.

Anyway, I e-mailed Cooley's organizer about who had written the release. She named the bank. "Is there a problem with legalese?" she asked. (The school's staff loves to hear from me on matters like this.) I said, "Yes, the legalese is silly and unnecessary." I suggested that she tell the bank's lawyers. Not that I thought it would do any good, but at least I'd have registered a protest.

She sent an e-mail and even followed up with a second one that said this: "Several weeks back I sent an e-mail at the suggestion of Professor Joe Kimble suggesting that you may want to have [the bank's] general counsel review the waiver you are using for the Clean Sweep project because he had some concerns about the legalese. I was just wondering if anyone had reviewed the wording and if any changes were made."

The response: "We would like to know about the concerns regarding legalese. We did solicit some outside help both from the city's legal staff and from a local firm."

The response invited Cooley's organizer to participate in the next planning meeting. And I have since volunteered to rewrite the release.

The response was encouraging because legal departments more often react with indifference toward legalese and disdain for plain language. Over the years, I've heard from many nonlawyers who were trying to improve a form or letter or rule of some kind. After translating it into plainer language, they had to send it to the legal department. And the legal department told them that it wasn't legal. Usually, they received little or no explanation. The legal department just didn't like it; it didn't feel right. When there was an explanation, it usually had something to do with accuracy and precision—that old false criticism of plain language.¹

Now I must ask you to wade through the Clean Sweep release on the next page.

I realize that old forms are convenient and that lawyers are pressed for time. But how long would it take to make this release better? In a moment, I'll invite you to try. Before you do, though, consider these questions:

- Does the first sentence have to be 160 words?
- Is the recital of consideration necessary? If consideration is lacking, will the recital save the release? And isn't it obvious

"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee. We seek 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, or at kimblej@cooley.edu. For more information about plain English, see our website—www.michbar.org/generalinfo/plainenglish/.

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that the consideration here, if any, comes from being “permitted” to volunteer?²

- Is there any pattern or logic to the all-caps text? Is the capitalized language any more important than the uncapitalized *I . . . release*, for instance? And all-caps are notoriously hard to read in the first place.
- Why is ASSUME ALL RISK stated twice?
- Is it necessary to assume the risks in addition to releasing any claim?³
- A release can give up a claim only for ordinary negligence, not for gross negligence or worse.⁴ Should the release reflect that limitation?

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- Is there a way to avoid repeating *the City of Lansing, the Undersigned’s Employer, or any Sponsoring Organization*?
- Do you need this entire string: *release, waive, discharge, covenant not to sue and indemnify*? Doesn’t *release* cover everything except indemnifying? A release completely extinguishes an underlying claim, there seems to be no point to adding a “mere” covenant not to sue.⁵ Finally, note that *agree to . . . covenant not to sue* is gibberish. So is *wave . . . the City of Lansing . . . from any claim*.
- Do you need this entire string: *officers, employees, sponsors, volunteers, representatives and agents*? *Sponsoring Organization* was covered just a few words ago. What does *sponsors* add? What does *representatives* add?
- If the signer is indemnifying for claims by third parties, is that clear? How does the one word *indemnify* relate to the

CAPITAL CITY CLEAN SWEEP EVENT

WAIVER AND RELEASE FORM

IN CONSIDERATION of being permitted to participate in the Capital City Clean Sweep event, I (collectively, the undersigned participant and his/her parent or legal guardian), INTENDING TO BE LEGALLY BOUND, do hereby, for myself, my heirs, executors, administrators and representatives, ASSUME ALL RISK INHERENT IN MY PARTICIPATION, and further agree to, and do hereby release, waive, discharge, covenant not to sue and indemnify the City of Lansing, the Undersigned’s Employer, or any Sponsoring Organization, or any of the officers, employees, sponsors, volunteers, representatives and agents of the City of Lansing, the Undersigned’s Employer, or any Sponsoring Organization, of and from any claim in law or equity for injury or damages of any type whatsoever which I or he or they may make or incur arising out of my participation in the aforementioned activity, including payment of legal fees or costs incurred by the City of Lansing, the Undersigned’s Employer, and any Sponsoring Organization, in defending against any such claim.

In addition, I authorize and grant permission to the City of Lansing staff to secure emergency medical and/or hospital treatment for myself as a participant in the Capital City Clean Sweep event.

I AM FULLY AWARE OF ALL THE INHERENT RISKS ASSOCIATED WITH MY PARTICIPATION AND DO HEREBY ASSUME AND ACCEPT ALL SUCH RISKS. I AM NOT AWARE OF ANY CONDITION, PHYSICAL OR OTHERWISE, WHICH COULD BE AGGRAVATED, WORSENERD OR OTHERWISE ADVERSELY AFFECTED BY MY PARTICIPATION IN THE CAPITAL CITY CLEAN SWEEP EVENT.

I am signing this Waiver and Release form of my own free will and volition and I acknowledge that I have read this Waiver and Release Form and fully understand it.

Printed Participant Name	Date of Birth		
Signature of Participant	Date		
Participant’s Address	City	Zip Code	
Name of Participant’s Parent or Legal Guardian			
Signature of Participant’s Parent or Legal Guardian			
Parent or Legal Guardian’s Address	City	Zip Code	Phone No.

last part of the long sentence—beginning with *including*—about paying for legal fees? The signer is paying for having to defend *against any such claim*. Claim by whom? The signer? A third party? Who’s suing whom?

- In that same part beginning with *including*, isn’t the syntax garbled? Does it work to say that the signer is releasing the city and others from any claim, including payment of their legal fees? How do you release from payment of legal fees? This is the kind of trouble that a 160-word sentence causes.
- After the needless intensifier *whatsoever*, who is *be*? And who are *they*?

- In *the aforementioned (ugh) activity*, why has the earlier word *event* been changed to *activity*?
- What’s with all the doublets and triplets: *I . . . do . . . and further agree to . . . and do hereby; of and from any claim; make or incur; authorize and grant permission; aggravated, worsened or otherwise adversely affected; my own free will and volition*?
- If *secure emergency medical and/or hospital treatment* were changed to *secure emergency medical or hospital treatment*, would anyone argue that you couldn’t secure both?⁶ (And I’d delete *or hospital*; it’s covered by *medical . . . treatment*.)

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Let's have another contest. I'll send a free copy of *Lifting the Fog of Legalese: Essays on Plain Language* to the first person who sends me an A revision of the release. Feel free to briefly annotate or footnote your draft if you'd like to explain a few points. E-mail it to kimblej@cooley.edu before February 25. I'll try to print the winning entry in next month's column.

Maybe we can broom away some legalese from Michigan releases. ■

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FOOTNOTES

1. See Kimble, *The Great Myth That Plain Language Is Not Precise*, in *Lifting the Fog of Legalese: Essays on Plain Language* (Carolina Academic Press, 2006), p 37.
2. See Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (Aspen Publishers, 2007), p 66 ("A drafter cannot turn into consideration something that cannot be consideration. . . . Similarly, although a recital of consideration may create a presumption of consideration, that presumption is rebuttable. Accordingly, unless the consideration's adequacy is uncertain, omit the recital of consideration from the words of agreement.") (citations omitted).
3. See *Skotak v Vic Tanny International, Inc.*, 203 Mich App 616, 618-619; 513 NW2d 428 (1994) (using language about "accept[ing] full responsibility" but not about assuming risks); *Dombrowski v City of Omer*, 199 Mich App 705, 707; 502 NW2d 707 (1993) (upholding a release that said nothing about assuming risks).
4. *Universal Gym Equipment v Vic Tanny Int'l, Inc.*, 207 Mich App 364, 367-368; 526 NW2d 5 (1994).
5. *J & J Farmer Leasing, Inc v Citizens Ins Co of America*, 472 Mich 353, 357-358; 696 NW2d 681 (2005) ("A release immediately discharges an existing claim or right. In contrast, a covenant not to sue is merely an agreement not to sue on an existing claim. It does not extinguish a claim or cause of action.").
6. See Kimble, *To the Trashcan with And/Or*, 86 Mich B.J. 44 (March 2007).