PLAIN LANGUAGE

Untangling legalese:

FAMILIAR WORDS, VERTICAL LISTS, AND A FRIEND

BY IAN LEWENSTEIN

Plain language, its opponents argue, is imprecise and less accurate than the standard legalese that lawyers prefer, a myth that Joseph Kimble has debunked.[1] How ironic, then, that opponents are quick to cite plain language's purported imprecision in the face of a legalese-caused flood of litigation. While, admittedly, the inherent difficulties of untangling legalese *can* result in imprecision, it's more accurate to say that legalese itself causes this potential imprecision because it obfuscates and obscures. One simple solution: don't use legalese in the first place.

Despite this simple solution, you are still likely to encounter heavy doses of legalese. But you can start to untangle the thicket by beginning with these three crucial steps. First, identify the legalese and then substitute words that normal people utilize (use). Second, use vertical lists and marked paragraphs (with headings) to sort out muddled passages. And third, find a knowledgeable legal-drafting friend or a subject-matter expert and have them check your work. Here are some examples from a Minnesota statute and three administrative rules on labor disputes.

TRY TO USE FAMILIAR WORDS

You are a labor representative, and your union claims that workers from another labor union should be represented by your union. What to do? First, you would look to the relevant statute:

> Whenever two or more labor organizations adversely claim for themselves or their members jurisdiction over certain classifications of work to be done for any employer or in any industry, or over the persons engaged in or performing **such** work and **such** jurisdictional interference or dispute is made the ground for picketing an employer or declaring a strike or boycott against the employer, the commissioner may appoint a labor referee to hear and determine the jurisdictional controversy. If the labor organizations involved in the controversy have an agreement between themselves defining their respective jurisdictions, or if they are affiliated with the same labor federation or organization which has by the charters granted to the contending organizations limited their jurisdiction, the labor referee **shall** determine the controversy in accordance with the proper construction of the agreement or of the provisions of the charters of the contending organizations. If there is no agreement or charter which governs the controversy, the labor referee **shall** make **such** decision as, in consideration of past history of the organization, harmonious operation of the industry, and most effective representation for collective bargaining, will best promote industrial peace. If the labor organizations involved in the controversy so desire, they may submit the controversy to a tribunal of the federation or labor organization which has granted their charters or to arbitration before a tribunal selected by themselves, **provided** the controversy is so submitted **prior to** the appointment by the governor of a labor referee to act in the controversy. After the appointment of the labor referee by the governor, or the submission of the controversy to another tribunal **as herein provided**, it **shall be** unlawful for any person or labor organization to call or conduct a strike or boycott against the employer or industry or to picket any place of business of the employer or in the industry on account of **such** jurisdictional controversy.[2]

"Plain Language," edited by Joseph Kimble, has been a regular feature of the Michigan Bar Journal for 37 years. To contribute an article, contact Prof. Kimble at WMU–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.

This statute (legalese in boldface) is not helpful to you — or to anyone, really. As any English teacher will tell you, use paragraphs to organize your writing. This simple advice applies to legal drafting as well. Be kind to your readers and respect their time by using paragraphs, headings, and vertical lists.

Let's assume that you listened to your teacher, yet you are still left with a statute brimming with legalese. Though the enormous text block itself screams, "Don't read me," the legalese in the text block says, "If you do happen to read me, I dare you to understand me."

First, *such* is used four times; it can usually be replaced (as in the first, third, and last instances here) with *the* or *a*. *Such* is not more precise than the humble article and provides enough of a bump to pause the reader. Pausing the reader can lead to confusion, frustration, and, ultimately, noncompliance.

Second, *herein provided* is used in a text block with no paragraphs or headings, so the reader must tediously search the text. The relevant reference could be anywhere, and what if there are several possible references? The solution is to use normal words and active voice to eliminate clutter:

> After ~~the appointment of~~ the governor appoints a labor referee ~~by the governor,~~ or ~~the submission of~~ the parties submit the controversy to ~~another~~ a tribunal ~~as herein provided~~ under [insert cross-reference], it ~~shall be~~ is. ...

Third, *shall* is used incorrectly. *Shall*'s only meaning is to establish a mandatory duty. For example, look to the first *shall*: "the labor referee **shall** determine the controversy. ..." The labor referee has a duty to determine the controversy. In contrast, look to the last *shall*: "it **shall be** unlawful for any person or labor organization to call or conduct a strike or boycott. ..." Unlike with the first example, no duty is being established. Instead, a legal fact is being stated: "it **is** unlawful for any person or labor organization. ..." And this could be rewritten to state that "a person or labor organization **may not** call or conduct a strike or boycott. ..." That is, the person or labor organization does not have permission. And some might argue that *must* should be used as a stronger prohibition.[3]

The upshot: as with legalese generally, *shall* should not appear — in codified law, anyway — because it is so often misused (with its various potential meanings) and is sometimes ambiguous; use a normal word — *must* — when establishing a duty.

USE VERTICAL LISTS

You represented your labor union before the labor referee, and now you want the record. But you can't easily tell what is included in the record as described in the administrative rule:

> The record in the proceedings **shall** consist of the order appointing the commission, the notice of hearing, proof of service of **such** notice upon the parties to the proceedings, the objections of any person to the proceedings, the rulings **thereon**, all motions, stipulations between the parties, exhibits, documentary evidence, depositions, the stenographic notes or record if kept, and the report of the commission.[4]

As in the first example, the same problems appear: legalese, an absent vertical list, and a misused *shall*. Additionally, the legalese here causes trouble: legalese such as *thereon*, when combined with other legalese and long horizontal lists, can create ambiguity. At first, I substituted *on the proceedings* for *thereon* because *proceedings* was the closest noun to *thereon*. But I misinterpreted because (1) there was no vertical list, and (2) *thereon* is vague legalese that can easily be misinterpreted. With a vertical list — and some other changes — it becomes clearer what *thereon* refers to.

> The record consists of:
>
> A. the order appointing the commission;
> B. the hearing notice;
> C. proof of service of notice on the parties;
> D. any objection of any person to the proceedings;
> E. any ruling **on an objection**;
> F. all motions, stipulations, exhibits, documentary evidence, and depositions;
> G. the transcript, if kept; and
> H. the commission's report.

Untangling legalese usually results in questions. In this example under item D, for instance, one wonders whether a *person* is different from a *party* and whether *to the proceedings* applies to *any objection* or to *any person*.

CHECK YOUR WORK; USE A FRIEND

Untangling legalese requires diligence: check your work, and then check it again. And don't neglect having subject-matter experts review your work to ensure that you don't inadvertently change meaning. As for me, I have a friend — my wife, a longtime Minnesota

legal drafter — check my work and point out my errors. Here's an example from another administrative rule with a tricky *thereof*:

> After such hearing the labor referee shall make an order granting or denying the request. If the request is granted, the labor referee shall proceed to reconsider or clarify the determination and shall fix a time and place for hearing thereon, of which notice shall be given as for the first hearing. … Thereupon, further proceedings shall be had as upon the original notice or jurisdictional controversy. At the conclusion **thereof**, the labor referee shall affirm the determination or shall make and file an amended determination which shall supersede the original determination.[5]

What does *thereof* refer to? I thought it referred to *hearing* because previous sentences established hearing requirements. After checking my work, I untangled the legalese to determine that *thereof* referred to the *proceedings*.

Why not make it challenging and have multiple *thereof*s? Here's an example from a different rule:

> The person making the challenge **shall** state fully the grounds **thereof** and a record **thereof shall be** made by the agent conducting the election. The agent **shall** then examine the challenged employee as to the employee's qualifications for voting and **shall** make a record **thereof**.[6]

I got my first two *thereof* translations correct (*the challenge*) but not the last one, when I first presumed *employee's qualifications*; it should be *the examination* — though either could be correct. (Note, though, that the noun *examination* doesn't appear; the reader must extrapolate meaning from the verb *examine*.) But potential errors should not dissuade you from translating legalese into something clearer and more accurate.

In addition to errantly untangling the legalese, I also wasted time and effort to rectify something that should have never been drafted in the first place, something that most likely confused labor unions, labor referees, and other members of the public.

Follow the simple solution: eschew legalese.

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ENDNOTES

1. Kimble, *Writing for Dollars, Writing to Please* (Durham: Carolina Academic Press, 2012), pp 37–43.
2. Minn Stat 179.083.
3. Garner, *Garner's Guidelines for Drafting and Editing Contracts* (St. Paul: West Academic Publishing, 2019), p 172.
4. Minn R 5500.1100, subp. 9.
5. Minn R 5500.2100.
6. Minn R 5505.1100.