

Protecting Your Writing from Law Practice

By Joseph Kimble ©1986

Let's get right to the point — the way many lawyers write. Carl Felsenfeld says that lawyers have two common failings. First, they don't write well; second, they think they do. Really, what could be more critical than the way lawyers write, since law is nothing if not a verbal profession?

Next question: What can I say in a few pages to undo the damage done by law school, from your having to read all those habit-forming opinions? And how do I counter the influences of law practice, where too many judges and lawyers are still mired in the old style?

The battle is an old one, as you probably know. We're talking about centuries of bad habits: Redundancy, wordiness, inflated diction, indirectness, contorted sentence structure, unnecessary complexity, and abstract nouniness. Finally, though, in the last ten years or so, things have started to change. I don't have space to detail all of the signs. Anyway, the trouble again is that despite the signs, too many lawyers are still stuck on the old style. How can we get them unstuck and prime them for plain English?

Let me ask two questions. Why should lawyers write in plain English? And indeed, what is it?

Prepared from a talk given to the New Lawyers Seminar sponsored by the Federal Bar Association and the State Bar of Michigan Young Lawyers Section in November, 1986 and June, 1987 in Detroit. The article, a sequel to the June, 1986 article, "Protecting Your Writing From Law School," also appears in the July 1987 issue of *The Practical Lawyer*.

Why Write in Plain English?

Three reasons.

First reason: It's morally right. A righteous claim, I know, but we all like the other person's prose to be plain, simple and direct, and we ought to require the same of our own. Writing is a public act that presumes someone else's time. We simply have no right to waste it with turgid, contorted, obscure prose.

A Cooley law student recently completed a random survey of Michigan judges and lawyers. They were asked to choose between six pairs of examples, some of which were more subtle than others. The plain English choices were landslide winners.

This survey will be reported in next month's *Plain Language* article. Among the conclusions we can draw is that it's pointless to debate plain English in the abstract. When the discussion turns to concrete examples, the old style forever loses in the tests of clarity and ease. As readers we prefer plain English; as writers we should put ourselves sympathetically in the reader's place.

Second reason: It's good business, believe it or not.

Increasingly, the literature contains stories of agencies and businesses that have put their forms or statements in plain English to reduce confusion and error. See "Simply Stated," Nos. 63, 64 (February, March 1986). The gains can be remarkable.

- The FCC rewrote its regulations for CB radios and was able to reassign five employees who had done nothing but answer questions.

- Southern California Gas Company simplified its billing statement and is saving \$252,000 a year from reduced customer inquiries.

- In England, the Department of Health and Social Security is saving

\$2,069,000 a year in staff time after redesigning three forms.

- The Department of Customs and Excise cut a 55 percent error rate to 3 percent by revising some forms used by airline passengers.

- In Australia, the Department of Health and Social Security found that the necessary follow-up on a badly written form with a distribution of over 4,000,000 was costing more than \$1,500,000 a year.

Think how much of the work of business and government and law is done through forms and form letters. Multiply hundreds of thousands of forms by millions of people, and you get an idea of the confusion and frustration produced by bad design and bad writing. An incredible waste of life.

Framed in my office is a full-page Washington Post ad taken out by the National Bank of Washington and titled "In Praise of Plain English." The bank revised its consumer loan form. Here's the before and after:

Makers acknowledge receipt of a completely filled in copy of this note and disclosure statement prior to the execution hereof this ___ day of _____, 19_____.

(I received a completely filled in copy of this note.)

The public loved it.

I think the public has grown sick and tired of the old style, and they're not going to take it anymore. A column in the *Detroit Free Press* on June 30, 1986 by Nickie McWhirter even declared, "May Lawyers Stand Mute Until They Speak English."

I know the concern some lawyers have: "You're going to take all the mystique out of it." The answer: Obedience based on ignorance may work for a while, but usually leads to contempt and disrespect.

Third reason for plain English: It works.

Apologists argue that we need the old style to deal with complicated ideas that require great precision and can't be expressed in plain English. I think that's just twaddle, the last part of it anyway. I've seen legal documents of all kinds revised and made clear. The answer to this argument is, first review the literature, then try harder.

This makes an important point. We don't have to charge any less for the shorter document. It's as hard, or harder, to write three clear and concise pages as five that ramble. The public has to understand that we are not paid by the word.

One of my favorite lines is by Jacques Barzun: "Simple English is no one's mother tongue. It has to be worked for."

Another myth is the argument of settled precedent or terms of art. Plain English has nothing against true terms of art like "hearsay" or "res judicata." But how many true terms of art are there? The Plain English Committee studied this in a real estate form, an agreement of sale. See the October, 1985 *Plain Language* article. About 1,800 likely words were checked by computer. Three percent had been litigated. So terms of art are a small part of any legal paper.

Finally, anybody who thinks the old style works, is more precise or intelligible, should read David Mellinkoff's *Language of the Law*. He explodes that notion and shows how self-defeating the old style really is.

Remember what Barzun says, that ideas slip into the mind most easily when the verbal noise is least. Every extra word, every extra syllable, is a barrier to effective communication.

"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by George H. Hathaway, Chairperson of the State Bar Plain English Committee. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a Plain English article? Contact Mr. Hathaway at The Detroit Edison Co., Room 688 WCB, 2000 Second Ave., Detroit, MI 48226.

What is Plain English?

It's not street talk, it's not Dick-and-Jane, it's not trying to reduce writing to the lowest common denominator. It doesn't truncate or change the meaning. It tries to deliver the meaning more clearly and efficiently, without entangled language and needless distractions.

Plain English, then, is a collection of principles in the service of simple, direct, economical writing and drafting. It requires an attitude, one that reflects the straightforward, unadorned person we all want to be. And it requires practice, as we try to learn skills that until recently law school didn't begin to teach.

Now, I can't resist trying to teach just a few of the principles.

Use the short, simple, everyday word, the word you would use in speaking. Let me give you one man's dirty dozen, my list of the most common offenders:

prior to (**before**)
and/or (**A or B or both**)
said (**for "the"**)
for the reason that (**because**)
for the purpose of (**to**)
in the event that (**if**)
Now comes the plaintiff. . .

(**The plaintiff says:**)
approximately (**about**)
frequently (**often**)
indicate (**for "say"**)
pursuant to (**under**)
utilize (**use**)

Is there one good reason to use "prior to" instead of "before," or "subsequent to" instead of "after"? You would never say, "Prior to dinner we'll rest, and subsequent to dinner we'll go out." So why put on a different face when sitting down to write?

Make a start. Resolve today that you will never again use the words on this list.

We could of course expand the list; it would be depressingly long. ►

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I do a little exercise with my classes. I give them the inflated word and ask for the short, simple word.

- concept (**idea**)
- observe (**see**)
- objective (**goal**)
- numerous (**many**)
- remainder (**rest**)
- inform (**tell**)
- initial (**first**)
- commence (**start, begin**)
- terminate (**end, finish**)
- sufficient (**enough**)
- ascertain (**find out, determine**)
- substantiate (**prove, confirm**)
- attempt (**try**)

Students have no trouble with this. We all know the simple word.

Let me say once more that it's partly a matter of attitude, of making ourselves acutely aware of inflated diction and having the self-confidence to deflate it. Lists are fine as far as they go, but legal writing is so littered with this stuff that we must ultimately depend on the critical faculty. Turn at random to almost any opinion and you find the likes of these:

- if the child is of sufficient years of age
(**if the child is old enough**)
- comports with the dictates of equity
(**comports with equity**)
(**satisfies equity**)
(**is fair**)

You have to *feel* how pompous these phrases are. An occasional "comports with the dictates of equity" may be all right, but if you fancy that style, if you regularly use the big word because you think it more impressive, then you consort with the shades of pomposity.



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Don't use lawyerisms. You know them. They're the strange words you never used before going to law school, the ones most often ridiculed by critics of legal writing.

- | | |
|---|----------------------------|
| above | same (it or them) |
| aforsaid | thereto |
| henceforth | therewith |
| herein | to wit |
| hereto | unto |
| premises | whatsoever |
| (in the sense of matters already referred to) | wherein |
| | whereof |
| said (the, that, or those) | within |
| | witnesseth |

Of course, that's not all. We could add "arguendo" and "sub judice" and "in lieu of" and "inter alia" and others. "Inter alia" in English is "among other things." Banish lawyerisms.

Don't use redundant doublets or triplets. You know these, too: "null and void," "stipulate and agree," "ordered, adjudged and decreed," "give, devise and bequeath." Usually we think of them in connection with the boilerplate in legal drafting. At this level, they are just silly. What can "devise and bequeath" possibly add to "give"?

At another level, the doublets are not only silly but dangerous. In opinions, which are also thick with them, they can be confusing. Take the recent Michigan Supreme Court decision on special assessments, *Dixon Road Group v City of Novi*, 426 Mich 390, 403; 395 NW2d 211, 217 (1986). The Court talked about whether the amount assessed was "substantially or unreasonably" disproportionate to the increase in the market value of the property. Now, is that a redundant doublet? Does it describe the same thing two ways? Or does it describe two alternative tests? Is the difference significant?

This is another example of how our efforts at precision in legal writing are so often self-defeating.

Banish doublets and triplets. Pick the one word that best conveys your meaning.

Break up long sentences. Manageable length isn't everything; you need orderly structure and syntax and the right emphasis. Nor should every sentence be short or the writing gets choppy; you need a mix of lengths and types.

Still, the long, overloaded sentence has always been one of the worst faults of legal writing. The sentences that follow are not especially bad, but they do illustrate some techniques for breaking up longish sentences.

Specifically, defendant claimed that the mobile crane was not a motor vehicle because it was not designed primarily for highway travel or, [.] [A]lternatively, [defendant claimed] that the mobile crane was not a motor vehicle because it was not designed for highway travel with the counterweights in place.

Although Dr. Woodward felt that there was a cause and effect relationship between the tubal ligation and the perforated bowel, [.] [But] neither he nor defendant-physician Stuber, whose deposition testimony was also presented by plaintiffs, could specify the cause of the perforation.

Section 366 of United States Bankruptcy Code represents a congressional attempt to balance the [two] competing interests[:] [first, the interest] of a debtor in bankruptcy needing utility services, such as electricity and telephone service[:] and [second, the interest of] a creditor utility needing some assurance of payment for services provided during the bankruptcy proceedings.

In the first example, we repeated the subject at the beginning of the second sentence. Don't worry about repeating the subject. It won't be noticed, and it's one of the best ways to keep the reader on track.

In the second example, we eliminated the dependent clause and started the second sentence with a coordinating conjunction ("but"). If you believe in the superstition about not starting sentences with "and,"

“but,” or “so,” you deny yourself a most useful technique for breaking up long sentences. Ask yourself whether you really need the slightly different emphasis conveyed by the subordinating conjunction (“although,” “because”).

In the third example, we broke up the sentence with a colon and semicolon, and again repeated key words.

If you have an even choice between one long sentence and two shorter ones, generally go with two shorter ones. Give your reader a break.

Keep the verb close to the subject. This point is related to the last one. By trying to stuff too many ideas into one long sentence, lawyers often put distance between the subject and the verb. This forces the reader to hold the subject in mind while waiting for the verb to show up.

The subject and verb anchor a sentence. The reader wants to know who or what is doing what. And the twain should meet quickly.

Sometimes the remedy is simply to move the intervening words to the beginning.

The court in *Young v Motor City Apartments Limited Housing*, 133 Mich App 671; 350 NW2d 790 (1984), held that the plaintiff had failed to prove special injury.

(In *Young v Motor City Apartments Limited Housing*, the court held. . .)

Sometimes the sentence needs a little revising.

The trial court's conclusion that the plaintiff showed special injury in the form of a seizure of person or property is clearly erroneous.

(The trial court clearly erred in concluding that. . .)

Use strong action verbs. Now comes one of the worst faults of all modern prose, including legal writing: abstract nouniness. Modern prose relies too much on nouns at the expense of action verbs. It tends to link nouns together with prepositions and weak verbs, generally in the passive voice. In the best writing, strong verbs carry the load. But lawyers are forever

turning verbs into nouns. They “effectuate service” instead of “serve.” They “impose a requirement” when they should just “require.” Some further examples:

make reference (**refer**)

there are cost savings attendant to standardized paper
(**using standardized paper saves money**)

upon completion of the examination
(**after you finish the examination**)

Inhalation of contents may prove harmful or fatal.

(**If you inhale this, you could hurt yourself or die.**)

In the first example, we see a telltale sign of the affliction: The meaning is mainly carried by the noun “reference” instead of the verb “refer.” And in the last example we see the debilitating results: An abstract nouny “inhalation” up in the air somewhere; there's nobody in the sentence *doing* anything.

I'm almost done teaching and preaching. It remains to just touch on three other important aspects of plain English.

First, organization. Organizing the document is hard and subtle work, and harder to describe. (Reed Dickerson's *Fundamentals of Legal Drafting* provides a quite sophisticated explanation.) I'm oversimplifying, but two main problems are division and sequencing. Division — creating parts at each level of breakdown that have roughly the same degree of generality and importance. And sequencing — ordering the parts and subparts in some kind of logical sequence. Here's a homely example, a sign at the local YMCA with obvious problems in division and sequencing:

For your own protection

1. Keep your keys with you at all times
2. Lock your locker
3. Check your wallet and valuables at the basketroom desk
4. Don't be careless

Second, plain English is increasingly concerned with the design of documents. We're finding that it's not just the words that count, but how they are presented on the page. Readability

can be greatly affected and improved by design features — size and character of type, ink that contrasts with the paper, length of line, white space, highlighting techniques, use of headings, question-and-answer format, use of examples, and the like.

A revolution is taking place in the design of documents and forms. Printing, says Felsenfeld, has become too important to be left to the printer.

Third, plain English delights in large-scale cutting. Sometimes conciseness is achieved not so much by a lot of small cuts and tightenings, but by cutting entire sentences and parts. Here you ask the broad questions: What does the reader really need to know? What can we assume the reader already knows? What does it all boil down to?

Legal writing is more likely to be overprecise than imprecise. Rudolf Flesch's *How to Write Plain English* contains many good examples of ►



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just how dramatic the difference can be between the old style and plain English. Flesch may go a little too far sometimes; he has been criticized for concentrating on readability to the detriment of clear structure and even accuracy. But he at least opens our eyes to the possibilities for large-scale cutting.

In the event of failure of Purchaser to pay any installment when due, whether such failure be voluntary or involuntary, the only right of Seller arising thereunder shall be that of termination of this Agreement and retention of all sums previously paid as liquidated damages and not as a penalty, because Seller has taken the property off the real estate market, incurred expenses in selling the property to Purchaser, turned away other prospective purchasers and incurred or will be incurring development and other expenses in connection with the property. Upon such termination, any and all rights Purchaser may have in the property shall immediately terminate

and Seller may return the property to its inventory and resell it free and clear of any claims, liens, encumbrances, or defects arising out of this Agreement or Purchaser's rights in the property.

(If you miss even a single payment, we can cancel this contract and keep all the money you've paid us. You'll lose all your rights.) (Flesch's version.)

If you are late with even one payment, the only thing we can do is cancel this contract and keep all the money you've paid us. You'll lose all your rights in the property. (A more accurate version? The seller is foregoing other remedies, but does he need the standard rationalizations for liquidated damages?)

This generation of lawyers is a good bet to finally break the cycle of centuries of legalese. The guidelines above are fundamental. Observing them will not guarantee good writing, for writing cannot be reduced to a set of guidelines. Writing ultimately depends on purpose and critical thought. Yet ignoring the guidelines is bound to produce bad writing in the old style.

Let me end with my wish for each of you as expressed by Professor Mellinkoff:

One day you will be . . . trying to find out what went wrong with a contract written by other lawyers, in other firms. In your memo, you point out that the contract is so wound up in long long sentences, and three words for one, that it is impossible to find a single meaning. You say that they botched the job of writing the contract. It's ambiguous, and the road is wide open to testimony about what the parties meant. Your memo convinces the powers. Your client wins. You move up a notch in the pecking order . . .

One day, you will be calling the shots. You'll be in a position to insist that the writing the firm turns out be simpler, clearer, shorter, better.

Good luck, and thanks for listening. ■

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**You're never too old
to quit blowing smoke.**



No matter how long or how much you've smoked, it's not too late to stop. Because the sooner you put down your last cigarette, the sooner your body will begin to return to its normal, healthy state.



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