Results of the Search for Legalese "Required by Statute," and the Conclusion of the Three Searches

By George H. Hathaway

In the December 1990 Plain Language column, we asked readers if they thought some legalese is required by statute. If they did, we asked them to send in the words of legalese and the citation to the statute that requires the legalese. Here are the replies and our comments on the replies.

Michigan Security Deposit Statute from Chris Campbell, Lansing, Michigan:

"I found one example. The statutes governing security deposits in residential leases demand specific notices, which 'shall include the following statement in 12-point boldface type':

You must notify your landlord in writing within 4 days after you move out of a forwarding address where you can be reached and where you will receive mail, otherwise your landlord shall be relieved of sending you an itemized list of damages and the penalties accrued to that failure. [MCL 554.603; MSA 26.1138(3).]

"Other statutes strongly encourage standard language, without compelling it. The Truth in Renting Act requires in leases 'in a prominent type, or in legible print with letters not smaller than 1/8 inch, a notice in substantially the following form': MCL 554.634; MSA 26.1138(3). Now, what rational lawyer is going to mess with the Legislature's language, when it has gone so far as to delve into type sizes? I suspect that the provision for 'substantially the following form' in this instance was an allowance for misplaced punctuation, misspellings, and the like by lay people—not for creativity by lawyers."

Author's Comments

First, the words you refer to are not legalese. Legalese consists primarily of long sentences, passive-voice verbs, weak verbs, negative form, non-parallel form, obsolete formalisms, archaic words, redundant phrases, compound phrases, and needlessly long words. The semicolon in the security deposit statute is just as good as a period in reducing sentence length. And the words "adherent to," although not very plain, are not as bad as hard-core legalese such as "hereby." The search was not to find words that are required by statute, but to find legalese that is required by statute. (Think of it as the difference between statutes that require certain words and statutes that require George Carlin's seven dirty words.)

Second, we can't discuss what you can or cannot do under the guidelines of "substantially the following form" unless we have a specific example of statutorily required legalese. See the comment below on a state security-law rule.

Federal EPA Regulation from R. Eric Vogt, White Plains, New York:

"I regret that I can cite several instances of legalese required by statute, in that it is required by the EPA administrative regulations under the Resource Conservation and Recovery Act (RCRA). In order to maintain an RCRA Permit for a hazardous waste storage, treatment, or disposal facility, the owner or operator must demonstrate financial ability to comply with closure and post-closure requirements. See 40 CFR Part 264, Subpart H and Part 265, Subpart H. This is done by filing with EPA (or the equivalent state agency) one of several alternative legal documents. The prescribed forms for these instruments are set out in 40 CFR 264.151, and they are uniformly couched in fairly thick legalese. My experience has been that EPA is usually quite rigorous in enforcing the required wording down to the last comma. This example aside, I know of no other instance of statutorily required legalese, certainly none that would apply to a consumer transaction."

Author's Comments

First, the words you refer to are not required by a federal statute. The words are required by a federal administrative regulation that is written under authority of a federal statute. There is, of course, a big difference between the two. If a federal statute directly requires specific words of legalese, then you have to convince Congress to amend the statute to eliminate the legalese. If a federal regulation requires specific words of legalese, then you have to convince the federal administrative agency to amend the regulation to eliminate the legalese.

Second, I agree that the EPA regulation requires a nightmare of legalese. The EPA Trust Agreement requires
"by and between," "whereas," "Now therefore," "witness whereof," "hereunto," and many other archaic terms. The Acknowledgment is awful. And the Performance Bond starts out with "Know All Persons By These Presents..." (non-sexist baloney is still baloney). A worthwhile project would be to convince the EPA to eliminate the legalese in 40 CFR 264.151.

State Securities Law Rule
from Iris K. Socolofsky, Lansing, Michigan:

"I practice in the area of securities law. One of my ‘favorite’ complaints over the years has been the fact that the legends required to be included at the beginning of prospectuses and private placement memoranda are written in such an obscure manner that I suspect they fail in their intention to provide special emphasized notices to prospective investors. I have worked very hard to write in plain and simple English in the text of my documents. However, the one time that I tried to modify the required legends to convey the same information in more understandable language, a (North Carolina) state regulator informed me that I could not do that.

"I am enclosing just a few samples for your review. The enclosed Rule 451.705.6 from the State of Michigan, appears to have wiggle room in using the term ‘in substantially the following form’:

This preliminary prospectus and the information contained therein are subject to completion or amendment. These securities shall not be sold nor shall offers to buy be accepted prior to the time the prospectus is delivered in final form. Under no circumstances shall this preliminary prospectus constitute an offer to sell or the solicitation of an offer to buy nor shall there be any sale of these securities in any state in which such offer, solicitation, or sale is unlawful prior to registration or qualification under the securities laws of any such state.

"However, the remaining enclosed examples do not, on their face, provide any room for variance. The prospectus

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instructions from the Michigan Department of Commerce include a number of leg¬
ends, each of which are written in a manner that obscures the message
they are supposed to convey.

This is a best efforts offering, and the
issuer reserves the right to accept or re-
ject any subscription and will promptly
notify the subscriber of acceptance or rejec-
tion. There is no assurance that this
offering will all be sold. There are no as-
surances as to what size the issuer
may reach.

The issuer has not yet engaged in busi-
ness. The securities offered hereby in-
volve a high degree of risk. The offering
price has been arbitrarily selected by
this issuer. No market exists for these
securities, and unless a market is es-
tablished, purchasers might not be able
to sell them.

There is no assurance that our opera-
tions will be profitable or that losses
will not occur.

It is not the policy of the issuer to re-
dem these securities.

Any representations contrary to any
of the foregoing should be reported
forthwith to the Lansing office of the
Bureau.

"Finally, enclosed are the uniform
disclosure guidelines for legends prom-
ulgated by the North American Securi-
ties Administrators Association. Most
states follow these requirements as a
matter of policy. This means that if
one tries to use language that deviates,
.it will probably be rejected.

In making an investment decision in-
vester must rely on their own exami-
nation of the issuer and the terms of
the offering, including the merits and
risks involved. These securities have not
been recommended by any federal or
state securities commission or regula-
tory authority. Furthermore, the fore-
giving authorities have not confirmed the
accuracy or determined the adequacy
of this document. Any representation to
the contrary is a criminal offense."

Author's Comments

First, the words you refer to are not
required by a Michigan statute. They
are required by a Michigan administra-
tive rule written under authority of a
Michigan statute. Again, there is a big
difference between the two.

Second, concerning Michigan Rule
451.705.6, I agree that the words
"therein" and "prior to," and a 54-word
sentence are legalese. However, under
the guidelines of "substantially the fol-
lowing form," the passage could be im-
proved by rephrasing as follows:

The information in this preliminary
prospectus is subject to completion or
amendment. These securities shall not
be sold, nor shall offers to buy be ac-
cepted, before the preliminary prospec-
tus is delivered in final form. Under no
circumstances is this preliminary pro-
spectus an offer to sell or the solicita-
tion of an offer to buy. There shall not
be any sale of these securities in a state
in which an offer, solicitation, or sale is
unlawful before registration or qualifi-
cation under the securities laws of any
such state.

The Rule could also be improved by
naming an agent ("applicant?" "distri-
butor?"), and by putting the action in
verbs ("registers," "qualifies"). Never-
theless, we agree that the acceptance of
any rephrasing depends on the reason-
ableness of the administrative agency.

Third, concerning the prospectus in-
struction from the Michigan Depart-
ment of Commerce, I agree that the
words "hereby" and "forthwith" are
legalese. The instructions could be
more plain.

Finally, from the Uniform Disclo-
sure Guidelines, I don't consider the words
to be legalese. The words are cer-
tainly not in the category of the EPA
regulations.

Other Replies

The other replies we received ei-
ther did not cite specific statutes or
did not refer to words I considered to
be legalese.

Results of the Statute Search

The results of our search are: (1) no
federal or Michigan state statute di-
rectly requires legalese, and (2) only
one federal administrative regulation
and two Michigan state administrative
rules require legalese. These are in two
very narrowly defined areas of law—
a permit for a hazardous waste facility,
and a new securities offering.

Conclusion of the Three Searches

This completes the three searches we
started in June 1989. We asked for
legalese required because a topic was
too complex for plain English1 and
did not get any.2 We asked for legalese
required by case precedent3 and did
not get any. And finally we asked for
legalese required by statute4 and did
did not get any. The conclusion we reach
from the results of our three-year search
is that legalese is not required by com-
plexity, case precedent, or statute. Fur-
thermore, legalese is not required by
federal administrative regulation or
Michigan administrative rule, except
for federal regulation 40 CFR 264.151
(concerning a permit for a hazardous
waste facility), and Michigan Rule
451.705.6 and Michigan Department
of Commerce prospectus instructions
(both concerning a new securities
offering).

Why then do lawyers say that le-
gealese is required by complexity, case
precedent, and statute? The answer is—
because they want to write legale-
se. Therefore, to eliminate legalese we
must convince lawyers to stop wanting
to write legalese.

Footnotes

1 Hathaway, The Search for the Sentence "Too
Complex for Plain English," 68 Mich B J
532 (1989).
2 Hathaway, Results of the "Too Complex for
Plain English" Search, 68 Mich B J 1194
(1989).
3 Hathaway, The Search for Legalese "Required
4 Hathaway, The Search for Legalese "Required