

## Plain English: A Charter for Clear Writing<sup>©</sup> (Part One)

By Joseph Kimble

*This article was originally published in April 1992, in the Thomas M. Cooley Law Review. We have shortened it here. Some of the omissions are indicated; most are not.*

*The article grew out of a resolution that I submitted two years ago to the Legal Writing Institute, whose membership includes writing teachers at almost all law schools in the United States. The resolution has now been adopted by the 1992 Conference of the Institute, and the vote was virtually unanimous. The resolution as adopted appears toward the end of Part One of this excerpt, and at the beginning of Part Two and Part Three.*

*The resolution is good news for plain writing, for if it is ever going to happen, we must poison the well of legalese at the source—which is law school.*

—JK

At the 1990 conference of the Legal Writing Institute, in Ann Arbor, Michigan, I submitted a resolution in favor of Plain English. The Board of Directors debated and then decided, for the first time, that this was

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"Plain Language" is a regular feature of the **Michigan Bar Journal**, edited by Joseph Kimble for the State Bar Plain English Committee. Assistant editor is George H. Hathaway. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901.

a question that all the members of the Institute should consider and vote on. It was recently considered in the Institute's newsletter—six articles, all generally favorable.<sup>1</sup> It should be voted on at the next conference, in July 1992, when the Institute returns home to the University of Puget Sound.

I plan to vote yes. This article explains why: why Plain English is so important; what it means; and where it stands, four centuries after that English chancellor ordered the drafter of a wordy document to wear it around his neck.<sup>2</sup>

### About the Movement and Legal Writing

Ann Arbor in 1990 seemed like a good place and good time to act, because Michigan is the home of the first Plain English Committee of any state bar association.<sup>3</sup> And the Plain English movement, so-called, has now come of age, to the point where the Legal Writing Institute should offer its support.

The movement gained force, most agree, as part of the consumer movement in the 1970s.<sup>4</sup> The symbolic birthdate is variously given as 1974, when Nationwide Mutual Insurance Company simplified two of its insurance policies;<sup>5</sup> or 1975, when Citibank in New York introduced its famous promissory note, which in turn inspired the first state statute that requires Plain English in consumer contracts;<sup>6</sup> or 1978, when President Carter issued his executive order directing that federal regulations be "as simple and clear as possible."<sup>7</sup> There followed in the next ten years, from the mid-1970s to the mid-1980s, a flurry of legislative activity. Seven more states passed Plain

English statutes that apply to consumer contracts (generally leases, loans, and other contracts for personal, family, or household purposes).<sup>8</sup> As of 1986, half the states had Plain English statutes that apply to insurance contracts.<sup>9</sup> And nine federal statutes were on the books as well.<sup>10</sup>

Although the legislative activity has tapered off in recent years, the movement continues to win converts and gain ground. We see advances in theory and practice from the Document Design Center of the American Institutes for Research; at communications firms like Siegel & Gale; and in graduate-school writing programs like the one at Carnegie Mellon. In 1989, the State Bar of California unanimously adopted a resolution that calls for lawyers and legal organizations to simplify documents, and that commits the State Bar to developing guidelines for attorneys to follow.<sup>11</sup> The State Bar has since produced a booklet called *Are You Misunderstood? Try Plain English*.<sup>12</sup> In 1990, the State Bar of Texas created its own Plain-Language Committee.<sup>13</sup> The Committee has already issued its first annual Legaldegook Awards<sup>14</sup> and has surveyed Texas judges about their language preferences, making Texas the fourth state to participate in the survey.<sup>15</sup>

Other countries are also becoming more and more active. The Canadian Bar Association, for example, recently passed a resolution in favor of plain language, with specific recommendations concerning the legal profession, Canadian banks, all governments in Canada, and a proposed "Canadian Coalition for Plain Legal Language."<sup>16</sup> Canada also has a Plain Language Institute in Vancouver. In England, there's

the Plain English Campaign, a pioneering private firm; an organization of lawyers called Clarity; and a government-wide effort to simplify forms.<sup>17</sup> Australia now has a Centre for Plain Legal Language, created by the Law Foundation of New South Wales and the University of Sydney.

[The appendix to this article, in 9 *Thomas M. Cooley Law Review* 1, 31-58 (1992), has a current list of statutes and regulations in the United States, along with other developments in Plain English worldwide.]

Plain English is now a part of the culture of law, business, and government. But still—the beat goes on, and everyday practice lags behind the movement.

Other forces have been at work during these years. One is the research in a number of fields, including psycholinguistics, cognitive psychology, and instructional theory, about how we communicate, think, and learn.<sup>18</sup> This research has proved useful to those who are involved in creating clearer public documents.<sup>19</sup> And it has provided an intellectual climate that allowed the movement to grow and mature.

One other strong and continuing force is the national concern over writing. Hardly a month passes without someone or some group suggesting that we are becoming a post-literate society.

[References omitted here.]

The same concern has carried over into the legal profession and the law schools. Headlines trumpet lawyers' poor writing,<sup>20</sup> and one of them asks that lawyers "stand mute until they speak English."<sup>21</sup> Articles cite witness after witness and example after endless example to support the indictment.<sup>22</sup> No wonder that writing seminars and consulting have become an industry.<sup>23</sup>

Nor is it any wonder that the literature on legal writing and Plain English has exploded.<sup>24</sup> Significantly, this literature now includes two new journals: *The Scribes Journal of Legal Writing*, which published its second volume in 1991; and *Legal Writing: The Journal of the Legal Writing Institute*, which published its first volume in 1991.

At the law schools, there is good news and bad news. The good news is that we have made progress in the last ten years. The bad news is that we are halfway there, at best.

In 1979, a special committee of the American Bar Association recommended that law schools give their students "at least one rigorous legal writing experience in each year of law study."<sup>25</sup> Although less than twenty percent of schools have met this goal, at least the vast majority now require two semesters of writing in the first year.<sup>26</sup>

The number of full-time writing teachers has also grown, as those of us in the field can tell. According to data from the American Bar Association, in 1990-1991 there were 352 full-time faculty members teaching legal writing.<sup>27</sup> And when you include all the adjunct professors (at my school, about twenty-five each term in various parts of the program) and all the student assistants, legal writing instructors must number a thousand or more.

In the writing part of these first-year courses, students typically write a series of office memorandums and at least one trial or appellate brief. This means that during the year, students will receive comments on five or six papers.<sup>28</sup> The courses are very demanding, so much so that the students' main, insistent complaint is that the courses deserve more credit hours. But you never hear a complaint about their value.

On the darker side, writing programs are plagued by low salaries and high turnover. Of the 352 full-time writing teachers in 1990-1991, only 31 were on tenure-track, and 50 had long-term job security.<sup>29</sup> That's a total of 81 long-term teachers at 176 ABA-approved schools, a deplorable figure. The other full-time teachers, most of them, make less than \$30,000 a year.<sup>30</sup>

The message seems to be that experience hardly matters in a legal writing teacher. No one would say that about a contracts teacher. Or if it is just an issue of money, then schools ought to consider the importance of writing and

the signal they send by trying to do it on the cheap.

In addition, the writing programs are expected to accomplish too much in too little time. They must address themselves not only to legal writing, but also to legal research, to oral advocacy, and, more than any other course does, to legal analysis.<sup>31</sup> In the writing courses, students spend weeks with one client and a legal problem, having to analyze, synthesize, and apply a group of cases. Students reason by deduction and analogy, both. On exams, they reason mainly by deduction (think of the organizational formula known as IRAC: issue, rule, application, conclusion). And the analysis in papers has to be more careful, sustained, coherent, and thorough than it can ever be in class discussion or on an exam. In other courses, the analysis may cover a wider range of issues and rules, but in legal writing it runs deeper.

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One year is not enough for all that needs to be accomplished. The only answer, the essential remedy for our professional affliction, is to include more writing in the second and third years of law school.<sup>32</sup> Some innovative schools that have taken this step—notably Chicago-Kent, Puget Sound, the University of Montana, John Marshall—have found out that it pays off in the competence and reputation of their students.<sup>33</sup>

It is easy enough to outline a serious program. Basically, it does take money and more credit hours, consistent with the central importance of writing. More specifically:

- It should be taught primarily by full-time professionals who teach writing full-time and who have long-term job security or at least multi-year contracts.

- It should include all three years of law school, with six or eight required credit hours plus electives.

- It should include several rounds of feedback in each course, the more individualized the better.

- It should make use of adjunct or student assistants, closely supervised, to help give some of the feedback in large classes (over thirty).

- It should build on the same writing principles and models throughout the courses, and even the non-writing faculty should be made aware of those principles.

- It should include all forms of legal writing—memorandums, briefs, litigation documents, and the form that we now call drafting (statutes, contracts, wills).

- It should work assignments into some of the non-writing courses.



Joseph Kimble is an associate professor at Thomas Cooley Law School. He teaches research and writing, legal methods, and legal drafting.

### Resolution

At the 1992 Conference of the Legal Writing Institute, which has 900 members worldwide, the participants adopt the following resolution:

1. The way lawyers write has been a source of complaint about lawyers for more than four centuries.

2. The language used by lawyers should agree with the common speech, unless there are reasons for a difference.

3. Legalese is unnecessary and no more precise than plain language.

4. Plain language is an important part of good legal writing.

5. Plain language means language that is clear and readily understandable to the intended readers.

6. To encourage the use of plain language, the Legal Writing Institute should try to identify members who would be willing to work with their bar associations to establish plain language committees like those in Michigan and Texas.

- It should provide remedial help for students who need it.

- It should include a course in advanced research, at least as an elective.

And one more: It should liberate students by instilling in them a passion, or at least a preference, for Plain English. Hence the Resolution, which appears above in this column.

Number 2 in the resolution comes from David Mellinkoff's classic, *The Language of the Law*.<sup>34</sup> Although the critics of legal writing are legion, from Thomas Jefferson<sup>35</sup> to Fred Rodell,<sup>36</sup> I believe that Professor Mellinkoff can fairly be called the intellectual founder of the Plain English movement. He discredited for all time, through careful scholarship, the notion that traditional legal writing is precise.<sup>37</sup> He

showed that the argument from precision is, for the most part, an excuse for mindless repetition.<sup>38</sup> He cited the volumes of litigation over such jargon as *aforesaid*,<sup>39</sup> *and/or*,<sup>40</sup> *herein*,<sup>41</sup> and *whereas*.<sup>42</sup> He revealed the imprecision of such supposed terms of art as *heir*,<sup>43</sup> *seisin*,<sup>44</sup> and *proximate cause*.<sup>45</sup> He made the case against "worthless doubling"<sup>46</sup> and against the unnecessarily long and involved sentence.<sup>47</sup> And he showed what by now, thirty years after, should be undisputed: the law can usually be made clear even to the public.<sup>48</sup> ■

### Footnotes

1. Symposium, *Plain English*, The Second Draft (Legal Writing Institute), Oct. 1991, at 2. The newsletter is prepared at the University of Texas School of Law by Dr. Terri LeClercq. The Institute's home base is the University of Puget Sound School of Law, where it was founded in 1984. Besides the newsletter, the Institute publishes a journal, *Legal Writing: The Journal of the Legal Writing Institute*, and holds a three-day conference every other year.
2. Recounted in Richard Wydick, *Plain English for Lawyers* 3 (2d ed. 1985). Strangely enough, it may have been the plaintiff's son who drafted the document and had to wear the collar. See Michele M. Asprey, *Plain Language for Lawyers* 31 & n.26 (1991). He probably used a lawyer's form.
3. The Committee was formed in 1981. Since May 1984, the Committee has produced a monthly *Plain Language* column for the *Michigan Bar Journal*.
4. See Betsy A. Bowen et al., *Analyzing the Various Approaches of Plain Language Laws, in Plain Language: Principles and Practice* 19, 20-23 (Erwin R. Steinberg ed., 1991); George H. Hathaway, *An Overview of the Plain English Movement for Lawyers*, 62 Mich. B.J. 945, 948-49 (1983).
5. Gertrude Block, *Plain Language Laws: Promise v Performance*, 62 Mich. B.J. 950, 951 (1983); Hathaway, *supra* note 4, at 946.
6. Carl Felsenfeld, *The Future of Plain English*, 62 Mich. B.J. 942, 942 (1983). The statute is N.Y. Gen. Oblig. Law § 5-702 (McKinney 1989).
7. Rudolf Flesch, *How to Write Plain English* 1 (1979). The order was Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978). The order applied only to executive agencies, and not independent agencies. It directed agency officials to make sure that significant regulations were "written in plain English." The order was revoked by Exec. Order 12,291, 46 Fed. Reg. 13,193 (1981).
8. Conn. Gen. Stat. Ann. §§ 42-151 to -158 (West 1987); Haw. Rev. Stat. § 487A-1

- (1985); Me. Rev. Stat. Ann. tit. 10, §§ 1121-1126 (West 1980 & Supp. 1991); Minn. Stat. Ann. §§ 325G.29 to .36 (West 1981 & Supp. 1992); Mont. Code Ann. §§ 30-14-1101 to -1113 (1991); N.J. Stat. Ann. §§ 56:12-1 to -13 (West 1989); W. Va. Code Ann. § 46A-6-109 (Michie 1986).
9. See Barbara Child, *Drafting Legal Documents* 68-69 (1988); Carl Felsenfeld & Alan Siegel, *Simplified Consumer Credit Forms S-xxxvi to -xxxvii* (Cum. Supp. 1987).
  10. See Child, *supra* note 9, at 69; Hathaway, *supra* note 4, at 947.
  11. See *State Bar Report*, Cal. Law., Oct. 1989, at 87.
  12. Office of Communications & Public Affairs, *State Bar of California* (1990).
  13. Telephone Interview with Bryan A. Garner, Chair of the Committee (Dec. 20, 1991).
  14. *Id.*
  15. See Kevin Dubose, *The Court Has Ruled, The Second Draft* (Legal Writing Institute), Oct. 1991, at 8.
  16. See David Elliott, *Plain Language: A Global Perspective*, 70 Mich. B.J. 562, 567 (1991).
  17. See Robert D. Eagleson, *The Plain English Movement in Australia and the United Kingdom*, in *Plain Language: Principles and Practice*, *supra* note 4, at 30, 32-36.
  18. See, e.g., Document Design: A Review of the Relevant Research (Daniel B. Felker ed., 1980); Karen A. Schriver, *Document Design from 1980 to 1989: Challenges That Remain*, 36 Technical Comm. 316, 326-31 (1989).
  19. Document Design: A Review of the Relevant Research, *supra* note 18, at 1-2 (suggesting that the term "document design" best describes this broad field); Schriver, *supra* note 18, at 316-18 (noting that the boundaries of document design are still expanding).
  20. See, e.g., Charlotte Low Allen, *Skilled Legal Writing Becomes Exceptional*, *Insight on the News*, Dec. 25, 1989-Jan. 1, 1990, at 50; Rorie Sherman, "Obscure, Opaque, Ungrammatical, Dull, Boring," *Nat'l L.J.*, Sept. 18, 1989, at 1.
  21. Nickie McWhirter, *May Lawyers Stand Mute Until They Speak English*, *Det. Free Press*, June 30, 1986, at 1C.
  22. See, e.g., Allen, *supra* note 20 at 50 (statement of Ruggero J. Aldisert, U.S. Court of Appeals for the Third Circuit) ("Brief writing runs from abysmal to mediocre. About 10 percent of the briefs I read are briefs that really show professional skill at written communications."); Tom Goldstein, *Drive for Plain English Gains Among Lawyers*, *N.Y. Times*, Feb. 19, 1988, at B7 (statement of Joel Henning, a lawyer whose firm trains other lawyers) ("There is, alas, a real decline in the writing skills of new lawyers."); see also Richard D. Lee, Presentation at the Annual Meeting of the Association of American Law Schools, Mini-Workshop on Legal Writing Throughout the Law School Curriculum (Jan. 3, 1991) (audiotape available from Recorded Resources Corp., Millersville, Md.) ("Among law firms that I have dealt with over the last ten years [giving seminars and helping to develop training programs], the single greatest area of training need that law firms articulate to me is writing."): 23. See, e.g., Edward A. Adams, "The Write Stuff": *Lawyers Look to Improving Quality of Prose*, *N.Y. L.J.*, June 26, 1989, at 1; Sharman Stein, *Writing Coaches Helping to Stamp Out Legalese*, *N.Y. Times*, Sept. 15, 1989, at B7.
  24. For bibliographies, see Plain Language Centre, Canadian Legal Information Centre, *Plain Language Resource Materials* (rev. ed. 1990); George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 Mich. L. Rev. 333, 366-80 (1987).
  25. Section of Legal Education and Admissions to the Bar, American Bar Association, Report and Recommendations of the Task Force on Lawyer Competency: *The Role of the Law Schools 3* (1979) [Report on Lawyer Competency].
  26. Jill J. Ramsfield, *Legal Writing Institute, Legal Research and Writing Questionnaire* (1990) (on file with author). Question 5 asked how many semesters of legal research and writing are required. Of 127 schools that responded, only 17 require more than two semesters; 101 require two semesters; and 9 require one semester. Question 7 asked how many semester credit hours are allocated to legal research and writing. Of 125 schools, 2 require one credit; 23 require two credits; 35 require three credits; 40 require four credits; and 25 require more than four credits. The survey has now been published in full in the first volume of *Legal Writing: The Journal of the Legal Writing Institute*.
  27. Memorandum QS9091-82 to Deans of ABA-Approved Law Schools from Kathleen S. Grove, Assistant Consultant, Office of the Consultant on Legal Education, Section of Legal Education and Admissions to the Bar, American Bar Association [1] (June 25, 1991).
  28. Ramsfield, *supra* note 26. Question 24 asked how many times a year that students receive written feedback. Of 124 schools, 99 give comments on more than four papers a year.
  29. Memorandum to Deans, *supra* note 27, at 1.
  30. Ramsfield, *supra* note 26. Question 63 asked about salaries for non-tenured full-time teachers. Of 75 schools, over half pay less than \$30,000 a year; about a third pay between \$30,000 and \$40,000; and the rest pay more. Presumably, the higher salaries go with long-term contracts.
  31. See Douglas Laycock, *Why the First-Year Legal-Writing Course Cannot Do Much About Bad Legal Writing*, 1 *Scribes J. of Legal Writing* 83, 83-85 (1990); see also Allen Boyer, *Legal Writing Programs Reviewed: Merits, Flaws, Costs, and Essentials*, 62 *Chi.-Kent L. Rev.* 23, 23 (1985) ("Legal writing is the only course in which analysis is systematically taught...").
  32. See *supra* note 25 and accompanying text; Gopen, *supra* note 24, at 357; Laycock, *supra* note 31, at 85-86; John C. Dernbach, *The Wrongs of Legal Writing*, *Student Law.*, Oct. 1987, at 18, 21. See generally Association of American Law Schools, Mini-Workshop: *Legal Writing Throughout the Law School Curriculum* (1991) (handout, on file with author) (summarizing the presentations of speakers on this subject at the 1991 Annual Meeting).
  33. See Gopen, *supra* note 24, at 356-58; Mark Mathewson, *Verbatim*, *Student Law.*, Dec. 1987, at 11.
  34. David Mellinkoff, *The Language of the Law* vii (1963).
  35. 1 Thomas Jefferson, *The Writings of Thomas Jefferson* 65 (Andrew A. Lipscomb ed., 1904) (complaining about statutes "which, from their verbosity, their endless tautologies, . . . and their multiplied efforts at certainty, by *said*s and *aforsaid*s, by *ors* and by *ands*, to make them more plain, are really rendered more perplexed and incomprehensible, not only to common readers, but to the lawyers themselves").
  36. Fred Rodell, *Woe Unto You, Lawyers!* 120-21 (1939; repr. 1980) ("Almost all legal sentences . . . have a way of reading as though they had been translated from the German by someone with a rather meager knowledge of English. Invariably they are long. Invariably they are awkward. Invariably and inevitably they make plentiful use of . . . abstract, fuzzy, clumsy words . . .").
  37. Mellinkoff, *supra* note 34, at 290-398.
  38. *Id.* at 295-97.
  39. *Id.* at 305-06.
  40. *Id.* at 306-10.
  41. *Id.* at 315.
  42. *Id.* at 321-25.
  43. *Id.* at 328-31.
  44. *Id.* at 342-45.
  45. *Id.* at 379-83.
  46. *Id.* at 349-66; cf. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 197-200 (1987) (observing that the use of doublets depends heavily on context).
  47. Mellinkoff, *supra* note 34, at 366-74.
  48. *Id.* at 423-36.