

# Plain English in Real Estate Papers

By George Hathaway

In March, June, July, September, and October we reviewed laws, rules, and lawsuit papers. This month we begin our review of real estate papers. We separated real estate papers into papers that concern possessory interests, non-possessory interests, and financial interests in real property. Figure 1 shows these interests, the main documents for each interest, and the specific document or sample that we reviewed.

1. **Listing Agreement.** A listing agreement is an agreement between the owner of real property and a real estate agent to find a buyer for the real property.<sup>1</sup> Most listing agreements in Michigan are written on printed forms prepared by a multiple listing service. There are about 50 of these services in Michigan. Each one serves a local board of realtors. Each listing service uses a form that is different from the form of every other listing service. We reviewed the form entitled "Exclusive Right to Sell Contract (1984)," which is used by four Oakland County boards of realtors. The form uses strong active-voice verbs and is on standard letter-size paper. However, the form still contains far too many archaic words, such as "hereby," "herein," "hereon," "hereof," "hereafter," "thereof," "aforesaid," and "aforementioned." Furthermore, we counted at least one 104-word sentence.

2. **Sales Agreement.** A sales agreement is an agreement between the seller and buyer of real property.<sup>2</sup> Most sales agree-

Figure 1. Main Types of Real Estate Papers

| Interest in Real Property | Document                | Specific Document or Sample Reviewed   |
|---------------------------|-------------------------|--|
| Possessory Interest       | Listing Agreement       | Exclusive Right to Sell Contract (Oakland County Boards)<br>Contract for the Sale of Real Estate (Grosse Pte. Board)<br>American Land Title Association (ALTA) Owners Policy<br>Sampled 10 Deeds at Wayne County Register of Deeds |
|                           | Sales Agreement         |  |
|                           | Title Insurance Policy  |  |
|                           | Deed                    |  |
|                           | Lease                   |  |
| Non-possessory Interest   | Easement (Right of Way) |  |
|                           | License (Permit)        |  |
| Financial Interest        | Land Contract           | First American and Lawyers Title Forms<br>Federal National Mortgage Association Forms  |
|                           | Note and Mortgage       |  |
|                           | Construction Lien       |  |

ments in Michigan are written on printed forms prepared by real estate companies. There are about 3,000 companies that belong to the Michigan Association of Realtors (MAR). They are geographically grouped into about 50 local boards of realtors. Most boards have a sales agreement form that is different from the form of any other board. Furthermore, some companies in some boards use a form that is different from the local board form. The result is that there are about 1,000 differently worded forms used in Michigan. We reviewed the sales agreement form used by the Grosse Pointe Board of Realtors, entitled "Contract for the Sale of Real Estate, New Mortgage (rev 5-9-88)." This form is fairly well written. However, it still contains the formalisms "in witness whereof" and "L.S.," and the archaic words "hereby," "herein," "hereof," "hereto," "herewith," "hereunder," "hereinafter," and "thereafter." Furthermore, it contains the redundancies "due and payable" and "null and void," and at least one 96-word sentence.

3. **Title Insurance Policy.** Title insurance companies first issue a title insurance commitment and then several months later a title insurance policy. Both the commitment and the policy are written on standard forms developed and approved by the American Land Title Association (ALTA). We reviewed the ALTA Commitment Form—1982, which is commonly used in

Michigan, and found that this form contains no obsolete formalisms, archaic words, or redundant phrases. Furthermore, the form is written in relatively short sentences with many active-voice verbs. We then reviewed the ALTA Owners Policy (10-21-87).<sup>3</sup> This form contains legalese such as "herein," "therein," "In Witness Whereof," "In the event," and at least one 128-word sentence.

4. **Deeds.** A deed is a document signed by the grantor that transfers the title of real property from a grantor to a grantee. Most of the deeds prepared in Michigan are written on printed forms on legal-size paper.<sup>4</sup> We sampled 10 deeds recently filed at the Wayne County Register of Deeds. Nine out of these ten deed forms contained the unnecessary formalism "Know All Men By These Presents." The State Bar deed form does not contain this formalism. But none of the ten deeds used the State Bar deed form.

5. **Leases.** A lease conveys a temporary possessory interest in real property.<sup>5</sup> One of the most common types of leases is an apartment lease. These leases are prepared on printed forms, usually on legal-size paper. We did not review in detail any one apartment lease form. We may do this later. However, we did review many apartment lease forms in general and found that most still contained much unnecessary legalese.

"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 Hathaway, chair of the Committee. The Committee seeks 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.

We have not yet seen an apartment lease form that we feel deserves a Clarity Award. If you know of one, please send it to Professor Joseph Kimble at Cooley Law School.

**6. Easements (Rights of Way).** An easement is a permanent non-possessory interest in real property. Although it is possible to give easements for storm-water retention or for light and air, more than 99% of all easements are for rights of way for either roads or public utilities (electric, telephone, cable TV, gas, water, and sewer). Most of the easement documents in use in Michigan contain much unnecessary legalese. We have not yet sampled any recorded easements. However, we will do so in the future.

**7. Licenses (Permits).** A license, usually referred to as a permit, is a temporary non-possessory interest in real property. The difference between a license and an easement is that a grantor can revoke a license, but can't revoke an easement. We found licenses hard to review because there are so many miscellaneous types of licenses and because so few of them are recorded. Nevertheless, we have never seen a license that didn't contain legalese. But if you've seen one that deserves a Clarity Award, send it to Professor Joseph Kimble at Cooley Law School.

**8. Land Contract.** A land contract is an agreement for the sale of land by a series of periodic or installment payments. A more appropriate title for this document would be "Installment Sales Agreement." In a land contract the seller immediately transfers possession of the real property to the buyer, but does not transfer title to the real property until all the installment payments have been paid. Many of the land contracts in Michigan are written on one of two printed forms. One form is printed and distributed by First American Title Insurance Company. The other form is printed and distributed by Lawyers Title Insurance Company. Both forms contain much unnecessary legalese such as "hereby," "herein," "hereof," "hereafter," "hereinafter," "heretofore," "thereof," "thereon," "thereto," "thereby," "said," "aforesaid," "any and all," and at least one 96-word sentence.

**9. Note and Mortgage.** A note is a written promise to repay a loan, and a mortgage is a written promise to give real property to a creditor. The word "mortgage" comes from the French words "mort" (meaning dead) and "gage" (meaning pledge). If the

note is being paid on time, the mortgage remains dead. But if not, then the pledge becomes alive and the creditor takes the real property. Most notes and mortgages in Michigan are written on printed forms developed and distributed by the Federal National Mortgage Association in conjunction with the Federal Home Loan Mortgage Corporation. The forms are referred to as the Fannie Mae Freddie Mac mortgage forms. The note forms are written in clear language. They contain no formalisms, archaic words, redundancies, or long sentences. Furthermore, most of the verbs are strong active-voice verbs. The mortgage forms, except for a few "herebys," are also written in clear language. The one improvement we suggest concerns the size of paper. Many of the forms are on legal-size paper. However, the Graduated Payment Note (Form 3258, 3/85) is on 8½ by 22-inch paper folded to letter-size (8½ by 11-inch). This is the ideal solution for keeping a rather long document all on one piece of paper but still in standard letter-size form. If Fannie Mae Freddie Mac put all of their forms in this format, they could help standardize letter-size paper for all real estate documents.

**10. Construction Lien.** If contractors, subcontractors, laborers, and suppliers of materials for a construction project and have not yet been paid for the labor or materials, the Michigan Construction Lien Act (MCL

570.1101-.1305; MSA 26.316-.333) allows these people to place a construction lien on the real property involved in the construction project. If the land owner does not pay these construction liens, then the lien claimants can foreclose on the construction liens and force the sale of the real property to obtain payment of their construction lien. The Construction Lien Act discusses the following main forms: Notice of Commencement, Notice of Furnishing, Sworn Statement, Waiver of Lien, and Claim of Lien. The Act does not prescribe each word in the forms. The Act only requires that the forms be "in substantially the following form." One publisher, Target, has developed a clear, plain English set of these forms on letter-size paper and has sold these plain English forms for many years. These forms prove that construction lien forms can be written in plain English. Nevertheless, many subcontractors and suppliers of materials still use one of the many types of forms written in legalese on legal-size paper.

**Legalese List.** We add the following formalism to our legalese list: "Know All Men By These Presents."

**Associations.** The Michigan Supreme Court has led the way in Michigan for the last 15 years in promoting plain English in lawsuit papers on standard letter-size paper. However, during that same time, real estate associations have either actively opposed or passively ignored plain English

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and have continued to use real estate papers that are still written in legalese on legal-size paper. Most real estate papers are written on printed forms. Therefore, the key to plain English real estate papers in Michigan is printed forms. And the only way to get these forms printed in plain English on letter-size paper is to convince the groups and associations who control the forms to write the forms in plain English. The two key groups are as follows:

**Michigan Association of Realtors.** The 25-member Board of Directors of the Michigan Association of Realtors (MAR) is the key to plain English listing agreements and sales agreements. MAR has developed a plain English listing agreement and a plain English sales agreement. See footnotes 1 and 2. MAR offers these forms to its member companies for voluntary use. But MAR does not actively promote these forms. Consequently, none of the listing services in Michigan use the MAR plain English listing agreement. Each listing service uses its own unique agreement written in legalese. Furthermore, less than 5% of the MAR real estate companies use the MAR plain English sales agreement. The typical company uses its own unique sales agreement form written in legalese. Yet for the last ten years MAR has opposed the Plain English bill in the state legislature "on the grounds that the delicacy and precision of certain terms expressed in a certain order spell out definitely what is required of both parties to a contract."<sup>6</sup>

However, that statement is directly contradicted by 100 differently worded listing agreements and 1,000 differently worded sales agreements. Furthermore, the State Bar of Michigan has always supported the bill. Nevertheless, plain English in listing agreements and sales agreements will not be achieved until the MAR Board of Directors feels that plain English is in their best interest.

**Michigan Land Title Association.** Title insurance companies are the key not only to plain English title insurance policies, but also to many other real estate forms that the companies distribute free of charge: deeds, land contracts, memorandums of

land contracts, assignments of land contracts, escrow agreements, affidavits, and so on. Some of the title insurance company forms are more clearly written than others. However, there are still many forms that contain much legalese.

Furthermore, title companies usually prepare the closing package of forms for a real estate closing. A house closing often completes the most expensive investment that a typical couple makes in their lifetime. Yet the closing package is usually a collection of 8½ by 14-inch paper, with 8½ by 13-inch paper, with 8½ by 11-inch paper, with 8½ by 6-inch paper. The entire package is usually one step more difficult to read because all the papers are not on standard letter-size paper. The Michigan Supreme Court promoted and finally mandated standard letter-size paper for lawsuit papers. The Michigan Land Title Association could do so much to promote plain English on standard letter-size paper in real estate transactions. But for the last ten years they have continued to passively ignore the plain English movement in the law. Meanwhile . . . the public continues to tell lawyer jokes, and the American Bar Association continues to search for ways to try to improve the public opinion of lawyers.

**Clarity Awards.** More and more real estate papers are now being prepared by computer. This means that the person who prepares the paper is not restricted by a printed form. And even though the associations who print the forms have not promoted plain English, we have identified two individual real estate practitioners in Michigan who have. And it is to these individuals, who have developed and are using plain English real estate documents, that we give Clarity Awards.

John Rohe, an attorney in Petoskey, Michigan, has developed and uses plain English real estate forms on letter-size paper for warranty deeds, quit claim deeds, easements, and construction liens. The forms are clear and readable. They contain no formalisms, archaic words, redundancies, or long sentences. Although we might tinker with the format and with some of the language, the forms are a big step forward—and Mr. Rohe deserves great credit. Contact Mr. Rohe if you would like more information on the forms.

Joseph Backus, an attorney in Lansing, Michigan, wrote a plain English mortgage foreclosure by advertisement, which we reprinted in the February 1990 Plain Lan-

guage column. This foreclosure advertisement is a model of clarity. It proves that real estate attorneys can do their job without formalisms, archaic words, redundancies, and long sentences . . . if they want to. ■

#### Footnotes

1. In 1988 the Plain English Committee helped the Michigan Association of Realtors (MAR) Forms Committee develop a plain English listing agreement form which was approved by MAR. This form, the MAR Exclusive Right to Sell Contract (Form G 1989), proves that listing agreements can be written in plain English. However, none of the MAR Multiple Listing Services use the MAR plain English form. Instead, each listing service continues to use its own unique form written in legalese. We discussed this in the December 1991 Plain Language column, "Plain English in Residential Real-Estate Listing Contracts."
2. In 1988 the Plain English Committee helped the MAR Forms Committee develop a plain English sales contract form which was approved by MAR. This form proves that sales contracts can be written in plain English. However, less than 5% of the MAR real estate companies use this plain English form. Most of the 3,000 companies continue to use their own unique sales contract form written in legalese. We discussed this in a February 27, 1989, *Michigan Lawyers Weekly* article entitled "New Sales Agreement Helps Prove Case for Plain English."
3. In 1987 the American Land Title Association developed a plain language Residential Title Insurance Policy. This policy is used significantly in at least 22 states. Furthermore, the Michigan Insurance Bureau has approved the form for use in Michigan. Nevertheless, Michigan title insurance companies do not use the form. We discussed this in the February 1990 Plain Language column, "Plain English in Title Insurance Policies."
4. In 1979 the Real Property Law Section of the State Bar of Michigan developed standard Warranty Deed and Quit Claim Deed forms and published them in the *Michigan Bar Journal*. The Section encouraged use of the forms "in the belief that their standardized language and format will reduce the ambiguity and potential confusion inherent in the use of a wide variety of land conveyance forms. Also, the Committee has replaced archaic terminology with modern language of well-established meaning."
5. We wrote about leases in the January 1990 Plain Language column, "Plain Language in Apartment Leases."
6. *Detroit Free Press* editorial, February 27, 1987, p 8A.

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