

Clarity Awards for 1993

By the Plain English Committee

In our March article we reviewed lawsuit papers and selected two examples of legal writing for Clarity Awards. In our June article we reviewed laws and rules and selected four more examples of legal writing for Clarity Awards. We officially presented these six Clarity Awards on Law Day, May 1, 1993 (Figure 1). We now discuss the awards in more detail.

1. Lawsuit Formbook. Lisa Fox and Laurel Lester of Lawyers Cooperative Publishing for their plain English lawsuit forms in revised volume 2 of *Michigan Civil Practice Forms*, published in 1992. According to Celia Cena, Managing Editor of State Practice Publications:

"Lawyers Cooperative Publishing (LCP) has adopted the goal of publishing law books that use a concise, clear, and simple writing style, with information organized in the most readily understandable format possible. Revised volume 2 of *Michigan Civil Practice Forms* is but one example of LCP's commitment to clear legal writing. Other titles, including *Michigan Pleading and Practice* and Gillespie's *Michigan Criminal Law and Procedure*, reflect an equal commitment to clarity.

Our editorial policy requires editors to observe the following guidelines: (1) write concisely; (2) use modern, simple language; (3) favor the active verb form over the passive form; (4) maintain neutrality in tone and word choice; (5) keep paragraphs and sentences short; (6) begin each



FIGURE 1—Seated, left to right: John Nussbaumer, co-reporter, Committee on Pattern Criminal Jury Instructions, Sixth Circuit District Judges Association; Celia Cena, managing editor, state practice publications, Lawyers Cooperative Publishing; Dennis Catlin, executive director, Michigan Judicial Institute. Standing, left to right: Joseph Kimble, editor, "Plain Language" column, Michigan Bar Journal; Lynn Chard, director of publications, Institute of Continuing Legal Education; Susan Andreini, director, Legal Division, Michigan Legislative Service Bureau; Hon. William Caprath, chair, Michigan Special Committee on Standard Criminal Jury Instructions; George Hathaway, chair, Plain English Committee, State Bar of Michigan.

paragraph with a "topic" sentence; (7) in presenting ideas, move from the general to the specific; and (8) use connective language where appropriate.

To achieve conciseness, LCP tries where possible to eliminate surplusage and redundant language. Thus, our publications replace:

- "in order to" with "to"
- "the general rule is that" with "generally"
- "indemnify and hold harmless" with "indemnify"
- "above-mentioned contract" with "contract"

In these examples, the surplusage and redundant language do nothing but impair communication.

LCP also tries to avoid outdated or esoteric language where modern or sim-

pler alternatives exist. For example, we will replace:

- "forthwith" with "immediately"
- "shall" with "must"
- "to wit" with "namely"
- "thereunder" with "under the ____"

Legalese does nothing but hinder communication. The plain English alternatives convey ideas more forcefully.

LCP writing style favors strong verbs in the active voice over abstract nouns and the passive voice. Thus, our policy is to replace:

- "is in violation of" with "violates"
- "it was agreed" with "the parties agreed"
- "it is stated in the contract" with "the contract states"

"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

We also follow a policy of neutrality in tone and in word choice: the writing is objective, the language gender-neutral.

We generally try to keep sentences and paragraphs short, and at the same time vary sentence length to give variety and freshness to writing.

Paragraphs typically begin with a topic sentence to introduce and summarize the paragraph's central idea. For example:

The statute provides a variety of remedies. An aggrieved party may bring a civil action for damages, or may seek injunctive relief. In the case of willful violations, the attorney general may bring criminal proceedings...

The presentation of ideas moves from the general to the specific. Also, to facilitate the flow of ideas, the writing incorporates connective words ("In contrast," "Similarly," "Otherwise," "In short," "Conversely," etc.) where appropriate to link or contrast the concepts expressed in successive sentences or paragraphs.

By observing these simple writing guidelines, LCP believes that its law publications have contributed to the Plain English Committee's cause: improving communication in the legal profession and making the law more accessible to the public."

2. Judicial Opinions. The Michigan Judicial Institute for its 1979 through 1987 seminars and materials on opinion writing for trial judges. According to Dennis Catlin, Executive Director of the Institute:

"The Michigan Judicial Institute was created in 1977 by the Michigan Supreme Court. The Institute is responsible for providing educational programs and written material for Michigan's judges and court personnel. The Institute conducts formal continuing education seminars in four broad categories: education for judges, development for administrative personnel and for court-professional personnel, and training for court-support personnel. In addition to the formal seminar offerings, the Institute is engaged in a broad range of publication activities, services, and projects to enhance the professional skills of all those serving in the Michigan court system.

In the past, judicial writing seminars were offered to judges each year from 1979 through 1987. This intensive three-day seminar was designed to develop skill in writing clear and concise opinions. The seminars were taught by professors of technical communications from the College

of Engineering at the University of Michigan. The workshop leader was a pioneer in developing judicial writing programs on a national level. During the three days, judges took their own opinions and re-wrote the opinions on principles which made them more clear, plain, and concise. Judges were provided with a *Trial Court Opinion-Writing Manual* for use when they returned to their courts.

During the 1993-1994 program year, a new judicial writing seminar will be offered which combines the principles of clear judicial writing with judicial decision-making skills."

3. and 4. Michigan Criminal Jury Instructions. Committee on Standard Criminal Jury Instructions (the Honorable William Caprathé, chair) and the Michigan Institute of Continuing Education (Lynn Chard, director of publications) for *Michigan Criminal Jury Instructions* (Second Edition). According to Judge Caprathé:

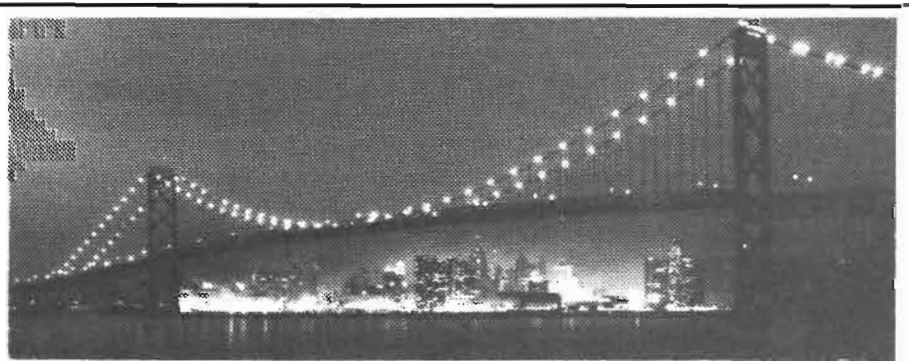
"The Committee on Standard Criminal Jury Instructions was formed by the State Bar in 1976. One year later, the Committee

produced the *Michigan Criminal Jury Instructions*, published by ICLE. Although judges are not required to use the instructions, it appears that most judges do use them regularly.

In 1987, a sub-committee conducted a study of juror comprehension. The sub-committee presented circuit, district, and recorders court judges with a questionnaire to determine whether the instructions were being used and whether they were accurate. The results were published in the *Thomas Cooley Law Review*. Among the conclusions:

"The survey suggests an apparent anomaly—although many of the judges question whether petit jurors fully and accurately comprehend the instructions, most judges rely on them, and use them verbatim." Koenig, Kerr, & Van Hoek, Michigan Standard Criminal Jury Instructions: Judges' Perspectives After Ten Years' Use, 4 Cooley L R 347, 349 (1987).

This anomaly led the Committee to seek more information about juror comprehension. Through its own royalties as well



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as a grant from the Michigan State Bar Foundation, the Committee conducted an exit poll of jurors. Some of the jurors had served on a jury and heard instructions, and others had not. The results were published in the *University of Michigan Journal of Law Reform*:

"The relatively low rate of comprehension for some concepts, both among more- and less-educated jurors, the apparent ineffectiveness of instructions to improve comprehension, and the negative effect of certain instructions, constitute the most striking findings in the present study. Particularly startling are the results of instructions concerning reasonable doubt, defendant impeachment by prior conviction, and some aspects of mixed direct and circumstantial evidence." Kramer & Koenig, Do Jurors Understand Criminal Jury Instructions?, 23 U Mich J L Ref 401, 429 (1990).

When that article was published, the Committee had already begun to rewrite the Criminal Jury Instructions in plain language. In 1988, the chair of the Committee, Judge Caprath, created a Plain English Sub-Committee. Any member of the standing committee could take part in the sub-committee's work, and many members did.

From 1988 through 1991, the Plain English Sub-Committee met every other month, in between the meetings of the standing committee. In addition, the sub-committee met for three three-day retreats. It was a delicate task to rewrite all of the instructions in simpler language without losing the legal meaning. We had extensive drafting help from ICLE. And we generally tried to follow the Federal Judicial Center's excellent guidelines for improving juror understanding (described in last month's Plain Language column).

The goal was to be accurate and at the same time be clear for the jury. The cooperation between sub-committee members—judges, prosecutors, defense attorneys, and law professors—was inspirational. The sub-committee's work was then submitted to the standing committee. After review and revision, the second edition of the Criminal Jury Instructions was published—one volume each in 1989, 1990, and 1991.

The response to the instructions has generally been very favorable. Of course, they are not perfect, and they will need to be revised as the law evolves. The Committee welcomes comments from the bench

and bar. They can be sent to the reporter for the Committee, the Honorable Randy L. Tahvonen."

5. **Federal Criminal Jury Instructions.** Committee on Pattern Criminal Jury Instructions of the Sixth Circuit District Judges Association for *Pattern Criminal Jury Instructions* (1991). The co-reporter was John Nussbaumer:

"The Sixth Circuit Pattern Criminal Jury Instructions were written by the Pattern Criminal Jury Instruction Committee of the Sixth Circuit District Judges Association. The Committee consisted of judges, prosecutors, defense attorneys, and academics from around the Sixth Circuit, and was assisted by a separate group of judges, prosecutors, and defense attorneys who served as reactors, reviewing each instruction. The chair of the Committee was the Honorable Julian Abele Cook, Jr., Chief Judge of the Eastern District of Michigan. The other Committee members from Michigan were Sheldon Light, Miriam Siefer, Joseph Kimble, and John Nussbaumer. The project was funded in part by grants from the Michigan State Bar Foundation.

The process used to write the instructions took about three years to complete. The instructions were first written by one of the Committee's two reporters, who researched the relevant law and presented the Committee with draft instructions and accompanying commentaries. The Committee then reviewed these materials and made appropriate changes. The revised instructions were then sent for comments to the judges, prosecutors, and defense attorneys who served as reactors. After this, the Committee reviewed the instructions again and made additional changes. The last step, when all of the individual instructions were completed, was to circulate the complete set for review. Final changes were then made.

The Committee's main goals were to promote uniformity among the various judicial districts in the Sixth Circuit, to assist busy judges and practitioners, to reduce appellate litigation over the wording of instructions, and to state the law in an understandable way. Building on other pattern federal instructions, especially those of the Federal Judicial Center, the Committee tried to eliminate unnecessary legal jargon and to simplify and clarify the law without sacrificing substance. The instructions were published by West in 1991."

6. **Michigan Statutes.** Legal Division of the Legislative Service Bureau for new Michigan statutes written in 1992. According to Susan Andreini, Director of the Legal Division:

"By authority of the state Constitution and as provided by state statute and legislative rule, all bills introduced in the Michigan Legislature are drafted by the Legal Division of the Legislative Service Bureau (LSB). The Legal Division consists of 22 attorneys, one of whom acts as division director, and 18 support staff. Division attorneys convert bill requests—submitted to the LSB by members of the state House and Senate in the form of ideas or objectives—into bills or joint resolutions appropriate for introduction and consideration by the body. As a bill introduced in the house of origin proceeds through committee and to the floor and opposite house, the attorney is available to give legal advice and to draft amendments, substitute bills, and, if necessary, conference reports. (The nature of the legislative process sometimes requires that amendments be drafted hastily during committee or floor debate, in response to objections to the bill based on policy or political differences. Often this is the only way to obtain majority approval. Therefore, amendments to bills are sometimes drafted by legislators or non-LSB staff.)

It is the consistent practice in the Division that every attorney's final work is read and critiqued (in Division parlance, "checked") by another Division attorney. "Checkers" look at organization, consistency, structure, grammar, and clarity, as well as substantive legal issues. In drafting legislation, the Division places a strong emphasis on the principles of general writing style and legislative drafting style developed by Reed Dickerson in *The Fundamentals of Legal Drafting* and Stunk and White in *The Elements of Style*."

Conclusion

Why do some legal groups write their documents in plain English and other legal groups don't? The answer is the leaders. If the leaders want to write documents in plain English, they will. If they don't, they won't. The six 1993 Clarity Award winners prove that lawsuit formbooks, judicial opinions, jury instructions, and statutes can be written in plain English. ■