

# A Summary of Our Review of Legal Writing

By George H. Hathaway

The Plain English Committee has now finished its two-year review of legal writing in Michigan. We began in January 1993 by separating legal writing into four categories (laws and lawsuits, real estate and insurance, consumer finance and other contracts, and wills and trusts) and by outlining the method we were using to improve clarity and eliminate legalese.<sup>1</sup> In the following months, we reviewed the categories and, in a series of columns, summarized our review of each category.<sup>2</sup> In each review, we subdivided the category, identified specific documents in each subdivision, and analyzed the documents.

## Elements of Unclear Writing

Clear writing is hard to define. In our November 1992 column, we published Joe Kimble's list of 36 "Elements of Plain English."<sup>3</sup> Most legal-writing experts agree with these principles. However, there is still no universally accepted definition of plain English in the international legal-writing community. But debating the definition of clear writing, or plain English, or plain language (or whatever you want to call it) doesn't eliminate the unclear writing that we still constantly see in actual legal documents.

Since it is hard to coordinate a review of 36 items—some of them general, as guidelines tend to be—we took a more manageable approach for our review. We developed

"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the State Bar's Plain English Committee. The 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.

Figure 1—Some Basic Elements of Unclear Legal Writing

| Legalese  | Legalese Compounded  |
|---|--|
| 1. Formalisms such as "Now Comes"                             | 1. Long average sentence length                                |
| 2. Archaic words such as "hereby"                             | 2. Weak passive-voice verbs—see Figure 2                       |
| 3. Redundancies such as "any and all" instead of "any"        | 3. Wordy phrases such as "prior to" instead of "before"        |
| 4. Latin words such as "per curiam" instead of "by the court" | 4. Unnecessarily long words such as "utilize" instead of "use" |

Figure 2—Combinations of Active/Passive Voice and Strong/Weak Verbs

|   | Active Voice                          | Passive Voice                                       |
|---|---------------------------------------|---|
| Strong Verb   | courts <u>decide</u> cases            | cases <u>are decided</u> by courts                  |
| Weak Verb with nominalization (noun made from verb) | courts <u>make decisions</u> on cases | <u>decisions</u> on cases <u>are made</u> by courts |

what we call "some basic elements of unclear legal writing" and separated these into "legalese" and "legalese compounded." We defined legalese as the following four types of words: formalisms, archaic words, redundancies, and Latin words (other than terms of art such as "res judicata"). And we defined legalese compounded as the following four types of problems associated with poor general writing: long average sentence length; overuse of passive-voice verbs and of weak verbs with nominalizations; wordy phrases; and unnecessarily long words. See Figures 1 and 2.

We believe that you can significantly improve the clarity and appeal of your writing if you eliminate these eight characteristics of traditional legal writing. That is our goal—to at least eliminate these eight negative elements in legal documents in Michigan by the year 2000. If more can be done, either by or after 2000, to encourage lawyers to use all the elements of plain English, that's great. But for 400 years, regardless of the definition or theory, no one has been able to persuade lawyers to stop using even the simplest of unnecessary words, such as "hereby." We believe we can do it with this approach.

## Summary of Specific Documents

Our summary table for all these categories, subcategories, and documents is shown in Figure 3. Our list of specific documents actually consists of 29 documents, 15 reference forms, and 6 sample surveys. We say that these 50 documents, forms, and samples represent legal writing in Michigan. We have rated these documents on their level of clarity, have given Clarity Awards to some documents and forms, and have identified major problems in other documents, forms, and samples.

We do not claim that these ratings are perfectly accurate or mathematically precise. Our "basic elements" are more of a negative measure than a guarantee of quality. We offer the ratings and Clarity Awards in the spirit of improvement, trying to move lawyers off dead center after four centuries.

## Laws and Lawsuits

For laws, we gave these awards:

- 1993 Clarity Award to the Legislative Service Bureau (Susan Andreini, Director of Legal Division) for newly written Michigan statutes.

Figure 3—Summary of the Four Categories of Legal Writing

| Categories                           | Subcategories                | 50 Specific Documents, Reference Forms, and Samples   | Level of Clarity |   |   |
|--------------------------------------|------------------------------|---|------------------|---|---|
| Laws and Lawsuits                    | Legislative                  | Michigan statutes published about every two months in <i>Michigan Legislative Service</i> pamphlets         | A                |   |   |
|                                      |                              | Michigan honorary resolutions published in daily House and Senate Journals                                  |                  | C |   |
|                                      | Executive                    | Governor's Executive Orders published in monthly <i>Michigan Register</i>                                   |                  |   | D |
|                                      |                              | Michigan rules published about every two months in <i>Michigan Legislative Service</i> pamphlets            | B                |   |   |
|                                      |                              | Opinions of Attorney General published in monthly <i>Michigan Register</i>                                  |                  |   | C |
|                                      | Judicial                     | Supreme Court opinions published in monthly advance sheets of <i>Michigan Reports</i>                       | ?                |   |   |
|                                      |                              | Court of Appeals opinions published in semimonthly advance sheets of <i>Michigan Appeals Reports</i>        | ?                |   |   |
|                                      |                              | Civil Jury Instructions published in monthly <i>Michigan Bar Journal</i>                                    | B                |   |   |
|                                      |                              | Criminal Jury Instructions published in monthly <i>Michigan Bar Journal</i>                                 | A                |   |   |
|                                      | Complaints, Answers          | Sample ten Wayne County Circuit Court complaints for "Now comes," and "Wherefore"                           |                  |   | D |
|                                      | Motions, Ord., & Affidavits  | Sample ten Wayne County Circuit Court orders for "hereby" and affidavits for "SS"                           |                  |   | D |
| Briefs                               |                              | ?   |                  |   |   |
| Real Estate and Insurance            | Possessory Interests         | Oakland County Boards of Realtors Exclusive Right to Sell Contract  |                  |   | D |
|                                      |                              | Grosse Pointe Board of Realtors Contract for the Sale of Real Estate  |                  |   | D |
|                                      |                              | American Land Title Association Residential Title Insurance Policy  | A                |   |   |
|                                      |                              | Sample ten deeds at Wayne County Register of Deeds  |                  |   | C |
|                                      |                              | Sample ten leases   |                  |   | C |
|                                      | Non-Poss. Interests          | Sample ten easements (right of ways) at Wayne County Register of Deeds                                      |                  |   | C |
|                                      |                              | Detroit Tiger baseball tickets (licenses or permits)  | B                |   |   |
|                                      | Financial Interests          | First American Land Contract form   |                  |   | D |
|                                      |                              | Federal National Mortgage Association note and mortgage forms   | B                |   |   |
|                                      |                              | Construction Lien Law forms   | B                |   |   |
|                                      | Life Insurance               | Metropolitan Life Insurance Policy  | A                |   |   |
|                                      | Health Insurance             | Michigan Blue Cross-Blue Shield certificate   | A                |   |   |
|                                      | Property/Liability Insurance | Michigan AAA Car Insurance Policy   | A                |   |   |
| State Farm Home Insurance Policy     |                              | A   |                  |   |   |
| Consumer Finance and Other Contracts | Consumer Finance             | NBD Bank Motor Vehicle Installment Sale Contract & Security Agreement                                       | B                |   |   |
|                                      |                              | NBD Bank credit card agreement  | A                |   |   |
|                                      | Construction                 | American Institute of Architects Form A101  |                  |   | C |
|                                      |                              | American Institute of Architects Form A107  |                  |   | C |
|                                      | Sales of Goods               | Michigan Automotive Dealers Association Vehicle Purchase Agreement  | B                |   |   |
|                                      |                              | Apple Computer warranty   | B                |   |   |
|                                      | Sales of Services            | Sears Maintenance Agreement   | A                |   |   |
|                                      |                              | Federal Express Airbill   | A                |   |   |
|                                      | Employment                   | 1990 United Auto Workers-General Motors collective bargaining agreement                                     |                  |   | C |
|                                      |                              | ICLE <i>Michigan Closely Held Corporations</i> , Employment Agreement Form 19.2                             | A                |   |   |
|                                      | Corporations                 | Michigan Department of Commerce, Corp. and Securities Bureau, Articles of Incorporation Form C&S 500        | B                |   |   |
|                                      |                              | ICLE <i>Michigan Business Formbook</i> : Corporations, Bylaws Form 5.3                                      | B                |   |   |
|                                      | Investments                  | Fidelity Investments Brokerage Account Application  |                  |   | C |
| Fidelity Magellan Fund Prospectus    |                              |   |                  | C |   |
| Wills and Trusts                     | Wills                        | ICLE <i>Michigan Will Drafting</i> with 1993 supplement (88-003)  | B                |   |   |
|                                      |                              | NBD Bank <i>Will and Trust Forms</i>  |                  |   | C |
|                                      |                              | Nolo Press "WillMaker" computer program   |                  |   | C |
|                                      |                              | Michigan Statutory Will (MCL 700.123c)  | A                |   |   |
|                                      | Trusts                       | ICLE <i>Michigan Revocable Grantor Trusts</i> with 1994 supplement (91-001)                                 | B                |   |   |
|                                      |                              | NBD Bank <i>Will and Trust Forms</i>  |                  |   | C |
|                                      | Powers of Attorney           | ICLE <i>Michigan Real Estate Sales Transactions</i> Form 15.1 (power of attorney for business transactions) | B                |   |   |
|                                      |                              | ICLE <i>Michigan Basic Practice</i> Form 2.3 (durable power of attorney for business transactions)          | B                |   |   |
|                                      | Living Wills                 | ICLE <i>Michigan Business Formbook</i> Form 9.13 (Living Will)  | B                |   |   |
|                                      |                              | Designation of Patient Advocate Form (durable power of attorney for health care, under MCL 700.496)         | A                |   |   |

- 1993 Clarity Award to the Michigan Institute of Continuing Legal Education (Lynn Chard, Director of Publications) and the Committee on Standard Criminal Jury Instructions (Hon. William Caprathe, Chair) for *Michigan Criminal Jury Instructions* (Second Edition).

- 1993 Clarity Award to Committee on Pattern Criminal Jury Instructions (Hon. Julian Abele Cook, Jr., Chair), Sixth Circuit District Judges Association, for *Pattern Criminal Jury Instructions* (West 1991).

- 1993 Clarity Award to the Michigan Judicial Institute (Dennis Catlin, Director) for seminars and materials on judicial opinion writing.

But governor's executive orders and legislative honorary resolutions contain the worst examples of legalese in Michigan. Administrative rules, attorney general opinions, civil jury instructions, and court opinions are all somewhere in between.

For lawsuit papers, we gave these awards:

- 1992 Clarity Award to Michigan Supreme Court's State Court Administrative Office (Marilyn Hall, Director) for approved Michigan court forms.

- 1993 Clarity Award to Lisa Fox and Laurel Lester of Lawyers Cooperative Publishing Company for *Michigan Civil Practice Forms*.

- 1994 Clarity Award to Bruce Laidlaw for a proof-of-service stamp.

But Michigan lawyers still purposely refuse to eliminate "Now comes," "Wherefore," "hereby," and "SS."

### Real Estate and Insurance

In real estate, we gave these awards:

- 1994 Clarity Award to John Rohe for deeds, easements, and construction liens.

- 1994 Clarity Award to Joseph Backus for a mortgage foreclosure by advertisement.

But the main printers and users of real estate forms still purposely refuse to write their documents in plain English.

In insurance, we gave these awards:

- 1994 Clarity Award to Blue Cross Blue Shield of Michigan (Lisa Varnier, Director of Regulatory Affairs) for health-insurance certificates and riders.

- 1994 Clarity Award to Rep. Nick Ciaramitaro for the statute on plain English in insurance contracts, MCL 500.2236; MSA 24.12236.

Furthermore, we found that as a group, insurance policies are among the better-written legal documents in Michigan.

### Consumer Finance and Other Contracts

We have announced these awards:

- 1995 Clarity Award to NBD Bank (Carl Good, Deborah McCormick, and Michele Mulder of the Law Department) for its credit-card application and disclosure statement.

- 1995 Clarity Award to Lou Kasischke of Dykema Gossett for the Michigan Institute of Continuing Legal Education's *Michigan Closely Held Corporations*.

However, most contracts are still badly written.

### Wills and Trusts

We have announced these awards:

- 1995 Clarity Award to Fredric Systzma of the Probate and Estate Planning Section of the State Bar of Michigan for the Michigan Statutory Will.

- 1995 Clarity Award to Virginia Benner and John Cook of the Health Care Committee of the State Bar of Michigan for the Designation of Patient Advocate Form.

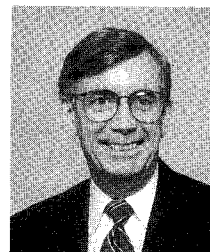
However, most wills, trusts, and other estate planning documents are still badly written.

### Legalese List

In addition to the Clarity Awards, we also developed a list of specific words that lawyers continue to use, even though legal-writing experts and commentators have been recommending for many years that lawyers eliminate these words. These words are actually a plain-English hit list. If lawyers, legal assistants, and legal secretaries do not eliminate these words, then they probably are not going to pay attention to any of the other elements of plain English. (See table below.)

### Conclusion

Categories and types of legal documents are hard to identify. They tend to blur, like the eyes and mind of someone who has to read them. Our list of well-known documents, forms, and samples at least gives us something on which to focus. Instead of generalizing by saying, "We've come a long way, but it will be years before most lawyers write well," we can now concentrate on these specific documents, forms, and samples to measure our progress. Plain-language advocates in other states can make up similar lists for their states. Concentrating on specific, well-known documents, forms, and samples is the best way to encourage lawyers to write in actual practice the way they were taught to write in law school, if they were taught at all. ■



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|               | Formalisms<br>(by type of document)           | Archaic Words<br>(in all types<br>of documents) | Redundancies<br>(in all types of documents) |
|---------------|---|---|---|
| Complaints    | 1. Now comes                                  | 1. hereby                                       | 1. any and all                              |
| Affidavits    | 2. Wherefore                                  | 2. herein                                       | 2. by and between                           |
|               | 3. SS   | 3. hereinafter                                  | 3. consent and agree                        |
|               | 4. being first duly sworn<br>deposes and says | 4. hereof                                       | 4. due and payable                          |
| Real Estate   | 5. further deponeth saith not                 | 5. hereon                                       | 5. each and every                           |
| All Contracts | 6. Know all men by<br>these presents          | 6. hereto                                       | 6. fit and proper                           |
|               | 7. Whereas                                    | 7. heretofore                                   | 7. free and clear                           |
|               | 8. Now therefore                              | 8. therein                                      | 8. null and void                            |
|               | 9. Witnesseth                                 | 9. thereof                                      | 9. terms and conditions                     |
|               | 10. In Witness Whereof                        | 10. thereon                                     | 10. true and correct                        |

### Footnotes

1. Plain English Committee, *1992-1993 Agenda for the Plain English Committee*, 72 Mich B J 72 (January 1993).
2. See the columns for March, June, July, September, October, and December 1993; and February, May, September, and October 1994.
3. Kimble, *Plain English: A Charter for Clear Writing (Part Two)*, 71 Mich B J 1190, 1192 (November 1992).