

Plain English in the Twenty Types of Legal Documents

By George H. Hathaway

To eliminate legalese from legal documents, you must do more than just criticize legal writing in general. You must zero in on the specific legal documents themselves. Furthermore, you must do this in an organized way, rather than randomly selecting a sample of legal writing and critiquing it. Therefore, we have grouped all legal documents that lawyers write into five categories and 20 specific types as shown in Figure 1.

We have published many articles about these 20 types of documents in our Plain English theme issues of November 1983 and January 1994, and in our monthly Plain Language column from May 1984 to the present. Now we will discuss: 1) the level of clarity at which each type of document is presently written; 2) improvements, if any, that have been made in the clarity of each type of document; and 3) problems that are still unresolved . . . and why.

Resolutions¹

Whereas, it is a privilege to congratulate Kyle David Gibbs for achieving the rank of Eagle Scout . . .

Resolutions are written by the Michigan House and Senate to express a position on an issue. The resolutions are published by the clerks each day in the House and Senate journals. The substantive material is simple, and therefore the main body of the

"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. 20 Types of Legal Documents

Categories	Specific Types of Documents	Written By
Laws	1. Resolutions	Michigan House and Senate
	2. Statutes	Legislative Service Bureau: Legal Division
	3. Executive orders	Governor's Executive Office: Legal Division
	4. Rules	Legislative Service Bureau: Legal Editing Division
Lawsuits	5. Complaints, answers, motions, orders	Michigan Trial Lawyers Association and Michigan Defense Trial Counsel
	6. Briefs	
	7. Affidavits	Michigan Association of Legal Support Professionals
	8. Jury instructions	Committees on Standard Civil and Standard Criminal Jury Instructions
Contracts	9. Judicial opinions	Michigan Supreme Court and Court of Appeals
	10. Consumer-finance contracts	banks
	11. Insurance contracts	insurance companies
	12. Construction, goods, services, and employment contracts	Michigan Association of Home Builders, Michigan Automotive Dealers Association, and United Auto Workers
Real Estate	13. Investment contracts	investment firms
	14. Listing and purchase agreements	Michigan Association of Realtors: 50 local boards and 3,000 companies
	15. Deeds and easements	members of Real Property Law Section of State Bar
	16. Leases	
Estate Planning	17. Land contracts	First American Title Insurance Company
	18. Notes and mortgages	Federal National Mortgage Association
	19. Durable powers of attorney	banks and members of Estate Planning Section of State Bar
	20. Wills and trusts	

resolution is usually clear. However, resolutions have always contained one persistent blemish—the prominent and unnecessary word *Whereas*.

Trying to eliminate this word from resolutions illustrates the intractability of those who write legalese on purpose. So far the House and Senate have refused to eliminate *Whereas*. Why? First, some facts. Lawyers make up only 15% of the Legislature. This means six out of seven legislators are not lawyers. Furthermore, the clerks of the House and Senate are not elected officials, but are employed under civil service. Why doesn't the Michigan Legislature eliminate *Whereas* from its resolutions? There are still too many people (lawyers, non-

lawyers, elected officials, and civil servants) who simply refuse to give up this self-perceived symbol of power and prestige.

Statutes²

Michigan statutes are written by the Legal Division of the Legislative Service Bureau. (Of course, the drafters often do not have a free hand during the process.) The statutes are published about every two months in the Michigan Legislative Service pamphlets and each year in the Public and Local Acts of Michigan. In 1994 we reviewed newly written statutes and gave a Clarity Award to the Legal Division of the Legislative Service Bureau for its work.

Executive Orders³

Whereas, Article V, Section 2, of the Constitution of the State of Michigan of 1963 empowers the Governor to make changes in the organization of the Executive Branch or in the assignment of functions among its units which he considers necessary for efficient administration; and . . .

These orders are written by the Governor's legal counsel and are published each month in the Michigan Register. They are directions that the Governor makes to specific agencies within the administration. The format for executive orders has not changed in the last 100 years. It has always contained much legalese. We are told that it's this way on purpose, because Michigan governors have never been confident that their orders carried as much weight as legislative statutes, administrative rules, or case opinions. They believe that if the orders are filled with impressive looking legalese, then the orders will look more important and will have a better chance of being followed. But this is what critics of legal writing have always charged—that lawyers write legalese on purpose to make their writing look more complicated and impressive.

Rules

Owners or operators of facilities that are not included in the provisions of subdivision (a) of this subrule and for which the owner or operator, or both, is or was subject to the interim status requirements defined in RCRA, except for facilities that have received formal written approval of the withdrawal of their EPA part A hazardous waste permit application from the director or the EPA, shall institute corrective action for all releases of hazardous waste from the facility, regardless of when the hazardous waste may have been placed in or released from the facility.

Administrative rules are written by the 12 departments of state government, edited by the Legal Editing Division of the Legislative Service Bureau, and published each month in the Michigan Register and each year in the Michigan Administrative Code Supplement. Many of these rules are written clearly. For example, in 1996 we gave a Clarity Award to the Michigan Department of Treasury for its Homestead Exemption Affidavit and Property Transfer Affidavit forms. However, so many people write administrative rules that it's difficult to ensure that all the rules are written clearly. The rules do not contain legalese. But many

rules simply contain bad general writing, with long sentences, weak passive verbs, and intervening clauses between subject and verb and verb and object.

Complaints, Answers, Motions, Orders⁴

*Now Comes the plaintiff . . .
Wherefore, plaintiff requests the court . . .
It is hereby ordered: . . .*

Each year lawyers file more than 100,000 new civil lawsuits in Michigan's district and circuit courts. In each of these lawsuits, a plaintiff's complaint and a defendant's answer typically begins with *Now comes the plaintiff (or defendant)* and ends with *Wherefore, plaintiff (or defendant) requests that the court*. Each year lawyers file an es-

timated 500,000 motions in civil cases in Michigan's district and circuit courts. A corresponding number of orders are then written by lawyers or judges and issued by these courts. The orders typically begin *It is hereby ordered*.

The Michigan Supreme Court's State Court Administrative Office is helping to eliminate legalese in lawsuit papers by developing plain English court forms. In 1992 we gave the State Court Administrative Office our first Clarity Award for promoting the voluntary use of plain English in lawsuit forms in Michigan. And in 1996 we gave a Clarity Award to Judge Elden, who started the forms project. Nevertheless, many lawyers and legal secretaries still have not voluntarily eliminated legalese such as *Now Comes, Wherefore, and hereby*



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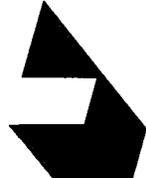
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from the complaints, answers, motions, and orders that they write.

Briefs

Most of the briefs written in Michigan are either supporting briefs for motions in district or circuit courts, or appellate briefs for cases in the Court of Appeals or Supreme Court. One of the law school legal writing classes usually concentrates on brief writing. Because of this, briefs are usually written clearer than other legal documents. Furthermore, a brief is the one kind of legal document that is truly written lawyer to lawyer. The general public rarely sees briefs. For these two reasons, we will not concern ourselves with briefs.

Affidavits⁵

State of Michigan)
) SS
County of Wayne)
Subscribed and sworn to before me
this 16th day of December, 1994.

An affidavit is a sworn statement taken by a notary. Affidavits contain some of the worst legalese written in Michigan. These affidavits should be called "sworn statements" and should use a clear, direct, plain English format. Lawyers, legal assistants, and legal secretaries could write sworn statements with the following words: *Signed and sworn to before me in Wayne County, Michigan on December 16, 1994.* But they don't. And why not? They say it's inertia, meaning that they just don't want to change.

Jury Instructions⁶

Jury instructions are not really written; they are read to the jury by the judge. Nevertheless, we include them in legal writing because they are originally written. In Michigan, standard jury instructions are in general clearly written. We gave Clarity Awards for standard criminal jury instructions and standard civil jury instructions in 1993 and 1996.

Judicial Opinions

Like briefs, judicial opinions are usually written lawyer to lawyer. The general pub-

lic doesn't read them. We gave a 1993 Clarity Award to a training source for judicial opinions, the Michigan Judicial Institute's opinion-writing seminar for trial courts. However, for the reasons above we haven't concentrated on judicial opinions.

Consumer-Finance Contracts⁷

Warning: The insurance afforded hereunder does not cover liability for injury to persons or damage to property of others unless so indicated hereon.

Consumer finance was one of the first subjects of the plain English movement in the early 1970s. Citibank of New York led the way with a simplified loan note. Consumer finance is normally subdivided into closed-end agreements such as a new car loan, and open-end agreements such as a credit card or line-of-credit agreement. We gave a 1995 Clarity Award to NBD Bank for its credit-card application and disclosure statement. Yet most consumer-finance documents in Michigan are poorly written. Two glaring problems are archaic words (primarily the here- and there- words), and long sentences.

Insurance Contracts⁸

The four most common types of personal (consumer) insurance policies are life, health, car, and house insurance. These and other types of insurance policies in Michigan are now written in plain English. In 1994 we gave a Clarity Award to Blue Cross-Blue Shield of Michigan for its health-insurance policies.

Construction, Goods, Services, and Employment Contracts⁹

In witness whereof, the parties have caused their names to be subscribed by their duly authorized officers and representatives the day and the year first above written.

In 1995 we gave a Clarity Award for plain-language employment agreements in the book *Michigan Closely Held Corporations*. And in 1996 we gave a Clarity Award to Ford Motor Credit for its plain-language motor-vehicle lease agreement. This book and agreement prove that contracts can be written in plain language without legalese. Yet most lawyers still refuse to eliminate even the simplest of legalese in contracts—archaic words such as *Whereas*, *Witnesseth*, and *Now therefore*.

Investment Contracts

FMR has voluntarily agreed, subject to revision or termination on 90 days' notice to shareholders, to reimburse the Portfolio of and to the extent that the Portfolio's aggregate operating expenses (including the management fee, but generally excluding interest, taxes, brokerage commissions and extraordinary expenses) exceed an annual rate of .28% of the average net assets of the Portfolio for any fiscal year or for a portion of such year if FMR's agreement is terminated or revised before a year end.

A prospectus for a stock, bond, or mutual fund is the most common type of investment contract that most people see. The Securities and Exchange Commission has recently improved the writing of prospectuses by promoting the use of "profile prospectuses" that contain a summary of important information about the investment. But many prospectuses still contain the number one problem in the clarity of investment contracts—the horribly long sentence.

Real Estate Documents¹⁰

We have written about real estate documents in detail in previous articles. And we gave 1994 Clarity Awards to several real estate attorneys for the plain English documents that they have written. All real estate documents can and should be written in clear language without legalese. But as far as clarity is concerned, real estate documents are the second worst written group of legal documents.

Estate Planning Documents¹¹

We have also written about estate planning documents in detail in previous articles. In 1995 we gave a Clarity Award to Comerica Bank for the plain language durable power of attorney and will that they developed and included in their *Estate Planning Forms* book. All estate planning documents can and should be written in clear language without legalese. But as far as clarity is concerned, estate planning documents are the worst written group of legal documents.

Clarity Awards¹²

The 20 types of legal documents can all be written in clear language without legalese. Legalese is not required by precision,

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Young Lawyers Section

Sixth Circuit Court of Appeals Admissions Ceremony

The Young Lawyers Section has arranged for a program of admission to the Sixth Circuit Court of Appeals on Thursday, September 19, 1996 in conjunction with the Annual Meeting of the State Bar and the Section in Grand Rapids. The admissions ceremony will begin at 10:00 a.m. in the U.S. District Ct., 616 Federal Bldg., 110 Michigan N.W. in Grand Rapids.

It may not be possible to accommodate everyone who desires admission because the courtroom can conveniently seat only about 80 attorneys. If demand exceeds available time and space, participation will be on a first-come, first-served basis.

Applications for admission must be submitted to David E. Einstandig, Thav, Gross, Steinway and Bennett, P.C., 30150 Telegraph Rd., Ste. 444, Birmingham, Michigan 48025-4519, on or before September 1, 1996. There will be no cost to attorneys participating except for payment of the \$50 admission fee at the time of filing the application. Check must accompany application. All applicants must attend this event to be admitted.

SIXTH CIRCUIT ADMISSION APPLICATION REQUEST

Return to: David E. Einstandig
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30150 Telegraph Rd., Ste. 444
Birmingham, MI 48025-4519
(810) 645-1700

Please send me an application for admission to practice before the Sixth Circuit Court of Appeals. Enclosed is a self-addressed, stamped envelope for this purpose.

I understand that this application is to be returned to you, together with a check in the amount of \$50 made payable to the "Sixth Circuit Court of Appeals."

Signed: _____
 Member, State Bar of Michigan State Bar No.

Address _____

City _____ State _____ Zip Code _____

(Area Code) _____ Telephone _____

complexity, case precedent, or statute. We have proven this by finding clearly written legal documents in almost all of the 20 types of legal documents and by publicizing the documents through Clarity Awards. It is not a question now of *can* a legal document be written in clear language without legalese. It is also not a question of *should* a legal document be written in clear language without legalese. It is now a question of *why* aren't all legal documents written in clear language without legalese? ■

Footnotes

1. See also *Resolutions*, 74 Mich B J 695 (July 95); *Legalese List for Laws*, 74 Mich B J 194 (Feb 95); *Summary of Laws, Rules, and Lawsuit Papers (1992-1993) (Part One)*, 72 Mich B J 932 (Sept 93); *Plain English in Laws and Rules*, 72 Mich B J 566 (June 93).
2. See also *Clarity Awards for 1993*, 72 Mich B J 692 (July 93).
3. See also *Executive Orders*, 74 Mich B J 938 (Sept 95).
4. See also *Legalese List for Laws*, 74 Mich B J 324 (Mar 95); *Summary of Laws, Rules, and Lawsuit Papers (1992-1993) (Part Two)*, 72 Mich B J 1066 (Oct 1993); *Plain English in Lawsuit Papers*, 72 Mich B J 340 (Mar 93); *Plain English in Judicial Administration: Michigan's Standardized Court Forms*, 63 Mich B J 390 (May 84).
5. See also *Affidavits*, 74 Mich B J 1199 (Nov 95).
6. See also *Jury Instructions*, 75 Mich B J 298 (Mar 96).
7. See also *Plain English in Consumer Finance and Other Contracts*, 73 Mich B J 956 (Sept 94).
8. See also *Plain English in Insurance Papers*, 73 Mich B J 196 (Feb 94).
9. See also *Motor Vehicle Leases*, 74 Mich B J 1284 (Dec 95); *Buddhists, Running, and Plain Language in Calgary (Part Two)*, 73 Mich B J 828 (Aug 94); *Business Agreements in Letter Form*, 65 Mich B J 212 (Feb 86).
10. See also *Plain English in Real Estate Papers*, 72 Mich B J 1308 (Dec 93); *Plain English in Residential Real-Estate Listing Contracts*, 70 Mich B J 1320 (Dec 91); *Plain English Acknowledgment Forms*, 70 Mich B J 338 (Mar 91).
11. See also *Plain English in Wills and Trusts*, 73 Mich B J 1086 (Oct 94); *Estate Planning Documents Clients Can Understand*, 67 Mich B J 54 (Jan 88); *Use of Plain English in Drafting Wills and Trusts*, 63 Mich B J 612 (July 84).
12. See also *Clarity Awards for 1996*, 75 Mich B J 421 (May 96); *Clarity Awards for 1995*, 74 Mich B J 440 (May 1995); *Clarity Awards for 1994 and Summary of Real Estate and Insurance Papers*, 73 Mich B J 436 (May 1994); *Clarity Awards for 1993*, 72 Mich B J 692 (July 1993); and *The "Clarity" Award*, 71 Mich B J 430 (May 1992).