

Jury Instructions

By George Hathaway

"Whenever you want to express an idea more complex than 'let's have lunch,' plain English just isn't exact." That's what Los Angeles County Municipal Court Judge S. Clark Moore said a few years ago to a reporter for California Lawyer. He was explaining why the committee that prepared California's criminal pattern jury instructions chose not to rewrite jury instructions in plain English.

Judge Moore seems to be saying that it takes a complex style to convey a subtle or complex idea. Surprisingly, that's a common theme among critics of the plain English movement—surprising because it is so clearly wrong. If anything, complex ideas cry out for clear, simple, transparent prose. The substance is challenging enough; don't compound the challenge with a difficult prose style. As for Judge Moore's assertion that plain English isn't "exact," it is hard to know what he means. How could translating from the passive to active voice or removing the long strings of subordinate clauses separating subject from verb make the instructions less "exact"?

Mark Mathewson wrote this in his Verbatim column in the October 1989 *Student Lawyer*. Since then, Michigan judges and

lawyers have proved that Mark Mathewson was right and Judge Moore was wrong.

Michigan Criminal Jury Instructions

In 1993 our committee gave Clarity Awards for the following two sets of standard criminal jury instructions that had been written in plain English without legalese:²

a) One set had been written for state courts in Michigan by the State Bar of Michigan's Committee on Standard Criminal Jury Instructions. The chair at that time was Judge William Caprathe, and the reporter was Judge Randy Tahvonen. This set of instructions was published by the Michigan Institute of Continuing Legal Education as *Standard Criminal Jury Instructions* (2d ed, 1991).

b) Another set had been written for federal courts in the Sixth Circuit by the Committee on Pattern Criminal Jury Instructions of the Sixth Circuit District Judges Association. The chair was Judge Julian Abele Cook, Jr., and the reporter was Professor John Nussbaumer. This set was published by West as *Pattern Criminal Jury Instructions* (1991).

Both sets of jury instructions were developed by applying research from several earlier studies.³

Michigan Civil Jury Instructions

Standard civil jury instructions in Michigan are written by the Standard Jury Instruction Committee appointed by the Michigan Supreme Court. (MCR 2.516.) The Committee is composed of 20 members, including the chair, Judge Harold Hood. Sharon Brown serves as reporter. Proposed new or amended instructions are published for comment in the *Michigan Bar Journal*. Forty-five days are allowed for comments from bench and bar, and the instructions as adopted by the Committee are again published in the *Bar Journal*. (MCR 2.516.6(1).) The complete set of instructions is published, with annual supplements, in ICLE's *Michigan Standard Jury Instructions—Civil* (2d ed). An example of a newly adopted civil jury instruction is as follows:

SJ12d 105.10

EMPLOYMENT DISCRIMINATION— SEXUAL HARASSMENT

Sexual harassment is a form of discrimination prohibited by state law. Sexual harassment means [sexual advances/requests for sexual favors/(and other) verbal or physical conduct or communication of a sexual nature] unwelcome to the plaintiff, if:

a. (a person explicitly or implicitly makes the plaintiff's submission to such conduct or

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"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.

communication a term or condition to obtain employment, or)

b. (a person uses the plaintiff's submission to or rejection of such conduct or communication as a factor in decisions affecting the plaintiff's employment, or)

c. (under all the circumstances, a reasonable person would have perceived the conduct or communication as:

1. substantially interfering with the plaintiff's employment, or

2. having the purpose or effect of creating an intimidating, hostile or offensive employment environment).

The plaintiff has the burden of proving that [he/she] was sexually harassed by the defendant(s).

Your verdict will be for the plaintiff if you find that defendant(s) sexually harassed the plaintiff.

Your verdict will be for the defendant(s) if you do not find that defendant(s) sexually harassed the plaintiff.

Civil jury instructions such as these are written in reasonably clear language. Of course, some ideas are difficult and some instructions will be clearer than others. But in general the civil jury instructions are a big improvement over those written in traditional style.

Therefore, we give a Clarity Award to the Michigan Supreme Court Committee on Standard Civil Jury Instructions for the instructions that they have recently written and published in the *Michigan Bar Journal*. These jury instructions prove that judges and lawyers can explain complex legal issues to lay people without using legalese. According to Sharon Brown:

Avoiding legalese is certainly one of the goals of the Committee in drafting instructions, but it is not the only drafting principle we follow. The Committee endeavors to make the standard instructions accurate, unslanted,

and nonargumentative as well as concise, conversational, and understandable. ■

Footnotes

1. Mathewson, *Verbatim*, Student Lawyer, p 13 (October, 1989).
2. Plain English Committee, *Clarity Awards for 1993*, 72 Mich B J 692 (July 1993).
3. E.g., Elwork, Sales & Alfini, *Making Jury Instructions Understandable* (1982); Federal Judicial Center, *Pattern Criminal Jury Instructions* (1988); Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum L Rev 1306 (1979). The Federal Judicial Center suggested that courts avoid the following: 1) words that are uncommon in everyday speech and writing; 2) words to convey their less common meanings; 3) legal terms; 4) sentences with multiple subordinate clauses; 5) omission of relative pronouns with auxiliary verbs; 6) double negatives; 7) abstract style; and 8) instructing the jury about things they don't need to know. The Federal Judicial Center's research and models have inspired the work of a number of federal and state committees.

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