

The Clarity Awards (After Five Years)

By George H. Hathaway

Step One—Criticize

Everyone criticizes legalese. It's easy to do, and it's the first step toward eliminating legalese. But just criticizing legalese isn't enough, because there is a tremendous gap between *just criticizing* legalese and *actually writing* clear legal documents. To fill that gap, you must not only criticize, but also recommend, teach, and persuade.

Step Two—Recommend

Legal-writing teachers not only criticize legalese, but also recommend ways to write clear legal documents. They do this primarily in the textbooks and articles they write.

Step Three—Teach

Legal-writing teachers also take the third step by teaching clear writing in legal-writing classes in law school. But here is where the gap begins. First, law-school legal-writing classes concentrate more on writing office memos and appellate briefs than on writing transactional documents such as consumer-finance contracts, deeds, or durable powers of attorney. Second, even if law-school writing classes did cover these documents, when law students become lawyers they usually follow the existing legalese

"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.

Plain-English Hit List

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

styles and forms that practicing lawyers have always used.

Step Four—Persuade

Therefore, the critical last step is to persuade practicing lawyers to actually write clear legal documents. Many people assume that this is the job of legal-writing teachers. Not so. The main job of legal-writing teachers is to teach legal writing to law students. Thus the gap between law-school writing classes and what practicing lawyers actually write. This gap can only be filled by the State Bar. And that's why we have formed the Plain English Committee. The job of the Plain English Committee is to *finish* the drive by persuading practicing lawyers to actually write clear legal documents. But how do you do it? How do you overcome all the ignorance, stubbornness, and deceit covered up by all those excuses that legalese must be used because of complexity, case precedent, statutes, precision, and tradition? You do it with Clarity Awards and persistence.

The Awards

In 1992 we started giving Clarity Awards for legal documents that are written without legalese. We did this because we believe the best way to promote clear writing in legal documents is to publicize the

legal documents that are already written in a plain style.

By publicizing *actual* documents, we eliminate the rationales and excuses that legal documents *must* be written in legalese because of complexity, case precedent, statutes, and precision, or that people *won't* eliminate legalese because of tradition and inertia.

We have organized these documents into 5 categories and 20 types. We then look for Clarity Award winners in each of the 20 types of legal documents.

In the first five years we have given the 23 awards shown in Figure 1. These Clarity Award documents prove that legal writing can be free of legalese.

Elements of Unclear Writing

As we have said before, clear writing is hard to define. In our November 1992 column we published Joe Kimble's list of 36 "Elements of Plain English." But it's hard to coordinate a review of 36 items. Therefore, we take a more manageable approach for our review. We use what we call "basic elements of unclear writing" and separate these into "legalese" and "legalese compounded." See Figures 2 and 3.

We believe that you can improve the clarity of writing—and begin to move lawyers off dead center—if you eliminate these eight elements of unclear writing. That is

our goal—to at least eliminate these eight elements of unclear writing 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 various elements of plain English, that's great. But for 400 years, regardless of 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.

In addition, we also developed a legalese list of the most common formalisms, archaic words, and redundancies that legal-writing instructors have been encouraging lawyers to eliminate for the last 20 years. These words are actually a plain-English hit list. If lawyers, legal assistants, and legal

secretaries do not eliminate these egregious words and phrases, then they certainly are not going to adopt any of the other elements of clear writing.

Clarity Today

We discussed the clarity of current legal documents in our July 1996 and September

Figure 1—Clarity Awards for 1992-1996

Categories	Specific Types of Documents	Clarity Awards (with references to respective columns)
Laws	1. Resolutions	
	2. Statutes	<ul style="list-style-type: none"> • 1993 Award to Legislative Service Bureau's Legal Division for new Michigan statutes written in 1992 (July 93)
	3. Executive orders	
	4. Rules	<ul style="list-style-type: none"> • 1996 Award to Michigan Department of Treasury for Property Transfer Affidavit form (May 96)
Lawsuits	5. Complaints, answers, motions, orders	<ul style="list-style-type: none"> • 1992 Award to State Court Administrative Office for developing and promoting plain-language court forms (May 92) • 1993 Award to Lisa Fox and Laurel Lester of Lawyers Cooperative Publishing for lawsuit forms in revised volume 2 of <i>Michigan Civil Practice Forms</i> (July 93) • 1994 Award to Bruce Laidlaw for a Proof-of-Service stamp (May 94) • 1996 Award to Judge S. J. Elden for starting the Court Forms Project (May 96) • 1996 Award to Keith Beasley for Request for Hearing on a Motion form (Jan. 96 and May 96)
	6. Briefs	
	7. Sworn statements (affidavits)	
	8. Jury instructions	<ul style="list-style-type: none"> • 1993 Award to State Bar Committee on Standard Criminal Jury Instructions and Michigan Institute of Continuing Legal Education for <i>Michigan Criminal Jury Instructions</i> (July 93) • 1993 Award to Committee on Pattern Criminal Jury Instructions of the Sixth Circuit District Judges Association for <i>Pattern Criminal Jury Instructions</i> (July 93) • 1996 Award to Michigan Supreme Court Committee on Standard Civil Jury Instructions (Jan. 96 and May 96)
	9. Judicial opinions	<ul style="list-style-type: none"> • 1993 Award to Michigan Judicial Institute for seminars and materials on opinion-writing for trial judges (July 93)
Contracts	10. Consumer finance contracts	<ul style="list-style-type: none"> • 1995 Award to Carl Good, Deborah McCormick, and Michele Mulder of NBD Bank for credit-card application and disclosure statement (May 95)
	11. Insurance contracts	<ul style="list-style-type: none"> • 1994 Award to Representative Nick Ciaramitaro for Michigan statute requiring plain English in insurance contracts (May 94) • 1994 Award to Lisa Varnier of Michigan Blue Cross-Blue Shield for health-insurance certificates and riders (May 94)
	12. Construction, goods, services, and employment contracts	<ul style="list-style-type: none"> • 1995 Award to Lou Kasischke for contract forms in <i>Michigan Closely Held Corporations</i> (May 95) • 1996 Award to Ford Motor Credit for motor-vehicle lease agreement (Dec. 94 and May 95)
	13. Investment contracts	
Real Estate	14. Listing and purchase agreements	
	15. Deeds and easements	<ul style="list-style-type: none"> • 1994 Award to John Rohe for deeds and easements (May 94)
	16. Leases	
	17. Land contracts	
Estate Planning	18. Notes and mortgages	<ul style="list-style-type: none"> • 1994 Award to Joseph Backus for mortgage foreclosure by advertisement (Feb. 90 and May 94)
	19. Durable powers of attorney	<ul style="list-style-type: none"> • 1995 Award to Mike Love and Joan Dindoffer of Comerica Bank for durable power of attorney and will (May 95) • 1995 Award to Virginia Benner and John Cook for durable power of attorney for health-care decision-making (patient advocate form) (May 95)
	20. Wills and trusts	<ul style="list-style-type: none"> • 1995 Award to Perry Bullard and Fredric Systma for Michigan Statutory Will (May 95) • 1995 Award to Bradley Geller for forms in <i>Changes and Choices</i> (May 95) • 1996 Award to Harold Garcia-Shelton for <i>Questions from the Legal Hotline for Older Michigianians</i> (May 96)

Figure 2—Basic Elements of Unclear Writing

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

Figure 3—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</u> decisions on cases	decisions on cases <u>are made</u> by courts

Conclusion

Some types of legal documents in Michigan, such as statutes and insurance policies, are now written in a much clearer style than they used to be. Other types, such as purchase agreements and trusts, still contain much legalese. The best way to persuade Michigan lawyers, legal assistants, and legal secretaries to continue to voluntarily eliminate legalese and improve the clarity of legal documents is through Clarity Awards and persistence. ■

George Hathaway is a Senior Real Estate Attorney at the Detroit Edison Company, and the chair of the Plain English Committee of the State Bar of Michigan.

1996 columns. And we discussed sample tests for determining the clarity of documents in our November 1985 column and January 1994 overview article. The table at the right is an update.

Laws	1. Statutes	Michigan statutes published in the Michigan Legislative Service pamphlets every two months are written clearly without legalese. We gave the Legal Division of the Legislative Service Bureau a 1993 Clarity Award for these statutes.
	2. Rules	Michigan rules published in the monthly <i>Michigan Register</i> are written without legalese, but many still contain what we call legalese-compounded. This consists primarily of long average sentence length and weak passive verbs.
Lawsuits	3. Complaints	In August 1996 we sampled 10 newly filed complaints in Macomb County Circuit Court. All 10 complaints began with <i>Now Comes</i> , and 9 ended with <i>Wherefore</i> .
	4. Orders	In August 1996 we sampled 10 orders issued in Macomb County Circuit Court. Eight contained the phrase <i>It is hereby ordered</i> .
Contracts	5. Consumer finance contracts	The car-loan agreement of the largest bank or financial institution in Michigan still contains much legalese.
	6. Insurance contracts	The insurance policies of the largest sellers of life, health, car, and home insurance in Michigan are all written without legalese. We gave Michigan Blue Cross-Blue Shield a 1994 Clarity Award for its health-insurance policies.
Real Estate	7. Purchase agreements	The real estate purchase agreement of the largest realtor in Michigan still contains much legalese.
	8. Deeds	In August 1996 we sampled 10 newly recorded deeds at the Wayne County Register of Deeds. Seven of the deeds began with <i>Know all men by these presents</i> .
Estate Planning	9. Wills	The wills and trusts manual of the largest bank in Michigan still contains much legalese in its will forms.
	10. Trusts	The wills and trusts manual of the largest bank in Michigan still contains much legalese in its trusts forms.

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