Notes Toward Better Legal Writing

By Joseph Kimble

This article is reprinted, with a few additions, from 5 Scribes Journal of Legal Writing *142 (1994-1995).*

Myths and Realities About Plain Language[1]

Myth: Plain language means baby talk or street talk. It's not "literary."

Reality: Plain language has to do with clear and effective communication—the language that good writers use when they are determined to be understood. What's more, plain language has a long literary tradition. In American English, it goes back at least to Walt Whitman and Abraham Lincoln and Mark Twain.

If anything deserves to be called artless, it is the great bulk of traditional legal writing. Professor John Lindsey says that law books are "the largest body of poorly written literature ever created by the human race."[2]

Myth: Plain language is mainly concerned with getting rid of archaic terms like *hereby* and *aforesaid.*

Reality: Plain language is concerned with all the techniques for clear communication—dozens of them. These techniques and guidelines are flexible and varied. They range over planning, design, organization, sentences, words, and testing. Getting rid of archaic terms is only a liberating first step.

"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.*

But if plain language is about more than vocabulary, then why not change the name? First, most other terms would also be limited in some way, or would be too abstract. Second, *plain language* has come to signify the kind of fundamental change that we need to finally break the cycle of poor legal writing. Third, a body of literature has grown up around plain language and the plain-language movement. This literature goes beyond the typical "style" texts in its willingness to innovate, to consider research from other disciplines, and to test its advice to show that readers are better served by plain language.

Myth: Plain language is not as accurate or precise as traditional legal style.

Reality: In many demonstration projects worldwide, statutes and contracts have been redrafted into plain language with no loss of precision. Just one example: The Law Reform Commission of Victoria (Australia) rewrote Victoria's complex Takeovers Code. They cut it by almost half. The redraft was checked and rechecked for accuracy by substantive experts. And in testing, lawyers and law students took between a half and a third of the mean time to comprehend the new plain-language version of the statute.

So plain language is not normally at odds with precision. In fact, clarity and precision are most often complementary goals. Clear, plain writing lays bare the uncertainties and inconsistencies that traditional style tends to hide. At the same time, the process of revising into plain language will often reveal all kinds of unnecessary detail.

The notion that traditional legal writing is precise is a dubious assumption to begin with. As Professor David Mellinkoff showed in *The Language of the Law*, the law has only a "nubbin of precision."[3]

Myth: Judges and clients expect and prefer traditional legal style.

Reality: In a study that was carried out in four states, almost 1,500 judges and lawyers were invited to choose between the A or B version of six different legal paragraphs. One choice was written in plain language and the other one in traditional style. In all four states, the judges and lawyers preferred the plain-language versions by margins running from 80% to 86%.

Similarly, in California, ten appellate judges and their research attorneys, reading passages from appellate briefs, rated the passages written in legalese as "substantively weaker and less persuasive than the plain English versions." And the readers inferred that the attorneys who wrote in legalese came from less prestigious firms than those who wrote in plain English.

As for clients, a survey conducted for the State Bar of California found that 90% of the public said there is a need for simpler legal documents. In another public survey, for the Plain Language Institute in Vancouver, British Columbia, 57% said that legal documents are poorly written and hard to read; and 33% said that lawyers do not even try to communicate with the average person.

If some clients expect legalese, it's because they have been conditioned to think that legal documents have to be that way. Increasingly, clients are learning that it's not true.

Myth: Plain language is impossible because lawyers have to use terms of art.

Reality: Real terms of art are a tiny part of any legal document—less than 3% in one study. The rest can be written in plain language, or a lot plainer than lawyers are used to writing. And even technical terms can often be translated into plain language at the cost of some extra words.

What the ABA Has Said About Legal Writing

- "Given the central importance of effective writing to a wide range of lawyer work, the Task Force believes that too few students receive rigorous training and experience in legal writing during their three years of law study.... [M]any students, probably most students, receive very little

opportunity to write with close supervision and critique as a continuing part of their law school experience."[4]

- "Legal writing is at the heart of law practice, so it is especially vital that legal writing skills be developed and nurtured through carefully supervised instruction."[5]
- "One theme that arose with regularity at the Just Solutions conference was language. In its simplest form, it found its expression in questions such as 'Why can't lawyers speak and write in simple declarative sentences?' Again and again, public delegates spoke of widespread public failure to understand the courts, the strange language that is spoken there, and the law's mysterious processes.

... [C]omprehensible legal language is not just a positive public relations effort, not merely helpful to counter negative public opinion about lawyers and the law, but... actually confers a competitive advantage on the practitioners who use it. A just solution would be the creation of Plain English committees in every state bar association and charging them with rooting out unneeded legalese wherever it occurs."[6]

- Finally, the American Bar Foundation carried out a large survey of practicing lawyers. They asked these lawyers what skills are the most important—from a list of about 17 different skills. At the top of the list, in a class by themselves, were oral communication and written communication.[7]

Outline of an Effective Law-School Legal-Writing Program[8]

- It should be taught primarily by full-time professionals who teach writing full-time and who have long-term job security or at least multiyear contracts.
- It should include all three years of law school, with six or eight required credit hours plus electives.
- It should include several rounds of feedback in each course, the more individualized the better.
- It should make use of adjunct or student assistants, closely supervised, to help give some of the feedback in large classes (over 30).
- It should build on the same writing principles and models throughout the courses, and even the faculty members who don't teach writing should be made aware of those principles.
- It should include all forms of legal writing—memorandums, briefs, litigation documents, and the form that we now call drafting (statutes, contracts, wills).
- It should work assignments into some of the nonwriting courses.
- It should provide remedial help for students who need it.
- It should include a course in advanced research, at least as an elective.

The Current State of Legal-Writing Programs[9]

- To begin, remember that most law schools teach legal writing together with legal research; so only about half the time is devoted to legal writing.
- 74% of schools require two semesters of legal research and writing; 11% require three semesters; the rest vary.
- 14% of schools give two credits to legal research and writing; 25% give three credits; 34% give four credits; only 22% give more than four credits.
- At 85% of the schools, students receive written feedback on over four papers during the basic first-year course.
- Very few schools require legal drafting; less than half offer it even as an elective.
- This shameful failure to teach legal drafting is reflected in the American Bar Foundation study mentioned earlier (under "What the ABA Has Said"). Of all the skills that were considered, the lawyers surveyed felt most miserable about their failure to learn legal drafting in law school.[10]
- At 44% of schools, legal research and writing is taught by full-time teachers who are on a "contract track"; the rest vary considerably, from tenure-track teachers to adjuncts.
- More and more schools—from 31 to 35, or about 20% of all ABA-accredited schools—use tenure-track writing teachers.[11] And yet...
- "While the MacCrate Report [*Legal Education and Professional Development—An Educational Continuum* (1992)] continues to generate interest in improving skills teaching, ABA support may be curtailed by antitrust concerns. Tight funding and the depleted admissions market are putting renewed financial and political pressures on many legal writing programs. For every legal writing colleague or program with a success story, we hear of another in crisis.

Still,... the long-term picture for legal writing is bright. Applicants know that they need to learn to write, and schools that commit to a good writing program will be

better able to compete for the shrinking applicant pool. Lawyers interviewing job applicants know that their new associate must write, and schools that commit to a good writing program will be better able to compete for the shrinking employer pool. Practicing lawyers know that students need to learn to write, so alumni and the bar will continue to ask what schools are doing about this crucial need."[12]

What the Legal-Writing Teachers Say

At the 1992 Conference of the Legal Writing Institute, which has about 1,800 members worldwide, the participants adopted the following resolution:

1. The way lawyers write has been a source of complaint about lawyers for more than four centuries.

2. The language used by lawyers should agree with the common speech, unless there are reasons for a difference.

3. Legalese is unnecessary and no more precise than plain language.

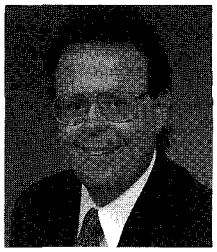
4. Plain language is an important part of good legal writing.

5. Plain language means language that is clear and readily understandable to the intended readers.

6. To encourage the use of plain language, the Legal Writing Institute should try to identify members who would be willing to work with their bar associations to establish plain-language committees like those in Michigan and Texas.

What Can Be Done After Law School?

- Programs of continuing legal education.[13]
- In-house editors at larger firms.[14]
- In-house training programs for new associates.
- Activities within national, state, and local bar associations. Three states—Michigan, Texas, and Missouri—now have Plain English Committees.
- Other organizations devoted to legal writing and plain language. If you have published a book or two articles or published a judicial opinion in an official reporter, you should join Scribes. For an application form, write to Scribes, School of Law, Wake Forest University, Box 7206, Winston-Salem, NC 27109. And everyone should join CLARITY, an international organization of lawyers and others with an interest in plain language. Write to Joseph Kimble, Thomas Cooley Law School, Box 13038, Lansing, MI 48901.
- Most of all, a willingness to learn new things and to change. Law schools are changing.[15] But will the profession allow these new lawyers to practice the clear style that law schools are trying to teach?



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The Benefits of Clear Writing[16]

- The U.S. Department of Commerce, under the direction of the late Malcolm Baldrige, documented 12 case studies showing that when a company clarifies its visual and verbal language, it "builds business . . . , streamlines procedures, eliminates unnecessary forms, and reduces customer complaints."
- The Motorola Corporate Finance Department has substantially improved its operation after a quality movement. They now close their books in 4 days, down from 12 in 1987. Changes such as clearer directions on forms and an easy-to-use format for computer screens have helped streamline the process—and save $20,000,000 a year.
- The Allen-Bradley Corporation, a maker of programmable controllers, found that customer-service calls dropped from 50 calls a day to 2 calls a month after they redesigned their documents using plain language and readable formats.
- A technical-publications group at AT&T reports that after streamlining the process of technical documentation, they reduced the cost of documentation by 53%, reduced production time by 59%, and increased the number of projects individual writers were able to complete by 45%.
- The Federal Communications Commission rewrote its regulations for citizen-band radios and was able to reassign five employees who had done nothing but answer questions.
- In 1984, the Department of Health and Social Security in the United Kingdom spent $50,055 to develop and test a series of new forms for legal aid. They report saving about $2,900,000 in staff time every year by using the plain-language forms.
- Also in the United Kingdom, after the Department of Defense revised its claim form for travel allowances, they reduced the time spent completing the form by 10%, the processing time by 15%, and the error rate by 50%. The savings amount to about $600,000 a year.
- Since the British government began its review of forms in 1982, it has scrapped 27,000 forms, redesigned 41,000 forms, and saved over $28,000,000.
- In Holland, a division of the Department of Education and Science reported that a form for applying for educational grants created so many difficulties that on average 60,000 forms had to be returned each year because of incorrect or missing answers. After a revision, only 15,000 to 20,000 forms have to be reprocessed each year, saving enormous clerical costs, postage, and handling.
- In Australia, by rewriting one legal document, the Victorian government saved the equivalent of $400,000 a year in staff salaries.
- Two of the largest law firms in Australia have committed themselves to drafting legal documents in plain language. This commitment has attracted major new clients and generated new work from old clients. Imagine that. ■

Footnotes

1. *See generally* Bryan A. Garner, The Elements of Legal Style 7-15 (1991); A Dictionary of Modern Legal Usage 661-65 (2d ed. 1995); Law Reform Comm'n of Victoria, Plain English and the Law 45-62 (1987; repr. 1990); Robert W. Benson, *The End of Legalese: The Game Is Over,* 13 N.Y.U. Rev. L. & Soc. Change 519, 559-67 (1984-1985); Joseph Kimble, *Plain English: A Charter for Clear Writing,* 9 Thomas M. Cooley L. Rev. 1, 11-27 (1992); *Answering the Critics of Plain Language,* 5 Scribes J. Legal Writing 51 (1994-1995). The studies mentioned in this section, under the last three myths, are discussed in the *Thomas Cooley* article at 20, 23-25, 26.
2. John M. Lindsey, *The Legal Writing Malady: Causes and Cures,* N.Y. L.J., Dec. 12, 1990, at 2.

3. David Mellinkoff, The Language of the Law 388 (1963).
4. Section of Legal Education and Admissions to the Bar, Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools 15 (1979).
5. Council of the Section of Legal Education and Admissions to the Bar, Long-Range Planning for Legal Education in the United States 29 (1987).
6. Stephen P. Johnson, Report on the American Bar Association's "Just Solutions" Conference and Initiative, Just Solutions: Seeking Innovation and Change in the American Justice System 35 (1994).
7. Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence,* 43 J. Legal Educ. 469, 473, 477 (1993).
8. From the *Thomas Cooley* article, *supra* note 1, at 7.
9. The figures in this section—except in the items with their own footnotes—are all from Jill J. Ramsfield, Survey for the Legal Writing Institute (1995) (results on file with author). The results will be summarized in the next issue (Volume 2) of *Legal Writing: The Journal of the Legal Writing Institute.* A total of 130 law schools responded to the survey.
10. *Instilling Skills: Are New Lawyers Prepared to Practice?,* Researching Law: An ABF Update, Winter 1994, at 1, 6.
11. Jan M. Levine, *Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs,* 45 J. Legal Educ. 530, 537 (1995).
12. Linda Holdeman Edwards, *Message from the Chair,* Sec. on Legal Writing, Reasoning and Res. (Association of American Law Schools), Spring 1996, at 1-2.
13. *See* Bryan A. Garner, *Planning An In-House Writing Workshop? Reflections from a Veteran CLE Instructor,* Law. Hiring & Training Rep. (Prentice-Hall Law & Business), June 1993, at 4.
14. *See* C. Edward Good, *The "Writer-in-Residence": A New Solution to an Old Problem,* 74 Mich. B.J. 568 (1995); Mark Mathewson, *In-House Editors: Letting the Experts Do It,* 1 Scribes J. Legal Writing 152 (1990).
15. *See* Ted Gest, *Combating Legalese: Law Schools Are Finally Learning That Good English Makes Good Sense,* U.S. News & World Rep., Mar. 20, 1995, at 78.
16. For citations to the individual items in this section—except the last one—see Karen A. Schriver, *Quality in Document Design: Issues and Controversies,* 40 Technical Comm. 239, 250-51 (1993). For the last item, *see* Mark Duckworth & Christopher Balmford, *Convincing Business That Clarity Pays,* 73 Mich. B.J. 1314, 1315 (1994); Edward Kerr, *Using Plain Language in Law Firms,* 73 Mich. B.J. 48, 51 (1994).

CONTEMPT, ETHICS & ORDER IN THE COURT Solution

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