

# Promoting Plain English in Laws, Lawsuits, and Contracts

By George H. Hathaway

In July we discussed five categories and 20 types of legal documents, and referred to many of the articles that we had written about each type of document. We also discussed the level of clarity in each type and problems in clarity that are still unresolved. In this article we discuss what we have done and are doing to promote plain English in the first three categories—laws, lawsuits, and contracts.

## Resolutions

We are focusing on Michigan House and Senate resolutions that are published each day in the House and Senate Journals. These resolutions have always contained the unnecessary word *Whereas*. Two members of the Michigan House of Representatives, Karen Willard and Nick Ciaramitaro, are members of our Plain English Committee. They have been trying to eliminate *Whereas*. In October 1995, Representative Willard wrote a resolution that did not contain the word *Whereas*. But even though it is against the law to alter what a legislator writes, someone added the *Whereases* after she had submitted the resolution to the clerk's office. She discovered this in time to publish the resolution without *Whereas*.

Therefore, of the approximately 400 resolutions published in the House Journal in 1995, one resolution had no *Whereas* and 399 had *Whereas*. This indicates that

"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.

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, 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
	9. Judicial opinions	Michigan Supreme Court and Court of Appeals
Contracts	10. Consumer finance contracts	banks, credit unions, and other financial institutions
	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
	13. Investment contracts	corporations and mutual funds

neither the legislators nor the civil servants in the clerk's office are going to eliminate *Whereas* easily. We plan to do this in steps. First, the Michigan House; second, the Michigan Senate; third, the Detroit City Council; and fourth, the cities and townships in the Michigan Municipal League.

## Statutes

We are focusing on Michigan statutes 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 these newly written statutes and gave a Clarity Award to the Legal Division of the Legislative Service Bureau for these statutes. The Director of the Legal Division, Carol Cousineau, is a member of the Plain English Committee. We are now going to look at city of Detroit ordinances and ordinances written by cities and townships in the Michigan Municipal League. We plan on giving a Clarity Award each year to a clearly writ-

ten state statute, city ordinance, or township ordinance.

## Executive Orders

These orders have always been written in classic legalese, and the current administration does not want to change the format.

## Rules

We are focusing on the rules published each month in the Michigan Register and compiled each year in the Michigan Administrative Code Supplement. For an unfortunate example, see Figure 1. They are written by the 12 departments of state government and edited by the Legal Editing Division of the Legislative Services Bureau. In 1996 we gave a Clarity Award to the Michigan Department of Treasury for the clearly written real-property tax-affidavit forms that they wrote. Furthermore, LuAnn Frost of the Attorney General's Office is a member of the Plain English Committee.

Figure 1. from Proposed Administrative Rule R 336.1201 from March 1996 Michigan Register

(4) If a person decides not to install, construct, reconstruct, relocate, alter, or modify the process or process equipment as authorized by a permit to install, the person, or the authorized agent pursuant to R 336.1204, shall notify the department, in writing, and upon receipt of the notification by the department, the permit to install shall become void. If the installation, reconstruction, relocation, or alteration of the equipment, for which a permit has been issued, has not commenced within, or has been interrupted for, 18 months, then the permit to install shall become void unless otherwise authorized by the department as a condition of the permit to install. "Commenced," for purposes of this subrule, means undertaking a continuous program of on-site fabrication, installation, erection, or modification, or having entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

In the future we hope to give a Clarity Award each year to a clearly written state administrative rule or opinion of the attorney general.

**Complaints, Answers, Motions, Orders**

We are focusing on the lawsuit papers that Michigan lawyers write, especially complaints, answers, motions, and orders. And we are trying to eliminate legalese such as *Now Comes*, *Wherefore*, and *hereby* from these lawsuit papers. Here are some of the things we have either done or participated in:

- In 1985 the State Bar sent a copy of Irwin Alterman's book *Clear and Accurate Style in Lawsuit Papers* to every lawyer in Michigan.

- In the late 1980s the State Court Administrative Office developed many plain-language court forms that have since been published each year by West Publishing.

- In 1990 we developed the "No Hereby" symbol (the word *hereby* in a circle with a diagonal line through it) as a symbol for eliminating legalese.

- In 1991 we asked the Representative Assembly of the State Bar to recommend that Michigan lawyers eliminate *Now Comes*.

- In the 1990s we have given Clarity Awards to the State Court Administrators Office, Lawyers Cooperative, Judge Elden, and Keith Beasley for their work in clarifying lawsuit papers and forms. Elden and Beasley are now members of our committee.

- In 1993 the Michigan Judges Association and Michigan Defense Trial Counsel endorsed our recommendations to eliminate *Now Comes*, *Wherefore*, and *hereby* from lawsuit papers.

- In 1993 we started a friendly contest with plain-English proponents in several other states to see which state could be the first to eliminate the word *hereby* from all legal writing in their state.

- In 1993 and 1995 we took sample surveys of federal, circuit, and district courts to determine the prevalence of *Now Comes*, *Wherefore*, and *hereby*.

- In the future we hope to give a Clarity Award each year to a legalese-free complaint, answer, motion, and order.

**Briefs**

Briefs are of course written lawyer to lawyer. The general public rarely sees briefs, so we are not concentrating on them.

**Affidavits**

Affidavits should be called sworn statements and written in plain language. They can be now. But to act as a catalyst and promote their use, we wrote an amendment that Representative Ciaramitaro introduced into the Committee on Regulatory Affairs as House Bill 5173 in September 1995. This bill has not yet been reported out of committee.

**Jury Instructions**

We already gave Clarity Awards to standard civil and standard criminal jury instructions. Therefore, we won't concentrate on jury instructions anymore, although we may still take an occasional look.

**Judicial Opinions**

Again, the general public doesn't read judicial opinions, and we won't concentrate on them. But we are willing to consider a model opinion—clear and tight—for a Clarity Award.

**Consumer-Finance Contracts**

In 1995 we gave a Clarity Award to NBD Bank for its credit-card application and disclosure statement. However, most consumer-finance contracts in Michigan still contain legalese. Ciaramitaro has been trying since 1981 to pass a plain-language bill in consumer contracts in the Michigan Legislature, but it has never passed.

**Insurance Contracts**

Insurance contracts are now written in plainer language than they were for many years. In 1990 Ciaramitaro succeeded in passing an amendment that requires plain English in insurance contracts (1990 PA 305, MCL 500.2236; MSA 24.12236, effective 1/1/92); it is now administered by

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**THE SUPREME COURT Solution**

H	O	L	M	E	S	S	C	A	L	I	A
A	B	R	I	E	F	I	N	G	N	L	
R	A	J	B	A	R	N	E	B	F		
L	N	R	A	T	A	M	E	E	Y	E	R
A	N	T	I	N	R	A	R	E			
N	D	E	K	E	T	O	D	D			
I	N	D	I	F	F	E	R	E	N	T	
B	O	R	K	T	U	F	T	B			
Y	O	B	A	R	A	C	L	U			
R	A	T	A	N	T	H	I	N	S	R	
N	C	T	F	E	U	D	A	U	G		
E	T	T	H	U	R	G	O	D	E		
S	A	M	U	E	L	O	L	I	V	E	R

the Michigan Insurance Bureau. We gave a Clarity Award to Blue Cross-Blue Shield for its health-insurance contracts. And Lisa Varnier of Blue Cross-Blue Shield is now on our committee.

### Construction, Goods, Services, and Employment Contracts

This is the category of contracts that contains the most legalese. For example, see Figure 2. But a few of these contracts are written in plain English. In 1996 we gave a Clarity Award to Ford Motor Company for its motor-vehicle lease. In the future we hope to give a Clarity Award each year to a contract in this category.

### Investment Contracts

The clarity of most investment contracts, referred to as prospectuses, is terrible. But in September 1994 the new chair of the Securities and Exchange Commission decided to do something about it. Now, mutual funds are experimenting with profile prospectuses that are written more clearly. Furthermore, the SEC's corporate securities group is now gearing up to persuade corporations to write their prospectuses in plain language. This year we hope to join forces with the SEC and begin annual Plain English Committee/Securities and Exchange Commission Clarity Awards for clearly written prospectuses.

### Public Journalism

In 1995 Davis Merritt, the editor of the *Wichita Eagle*, wrote *Public Journalism & Public Life*. He said that for decades the pervasive model of American journalism had been distance. Now, however, he advocates becoming more actively involved in the news. Public journalism moves beyond the limited mission of "telling the news" to a broader mission of helping public life go well. It moves from detachment to being a fair-minded participant. It moves beyond only describing what is "going wrong" to also imagining what "going right" would be like. We will try to get newspapers to practice public journalism in legal writing. We will try to get them to go beyond simply criticizing legalese to promoting clear legal writing by publicizing Clarity Awards.

Figure 2.

#### 1990 GM-UAW CONTRACT SETTLEMENT AGREEMENT

Agreement dated this 17th day of September, 1990 between General Motors Corporation, hereinafter called the Corporation, and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, hereinafter called the Union.

The parties hereto agree as follows:

##### 1. New National Agreement

A new National Agreement to be dated September 17, 1990 and to become effective as hereinafter provided in Paragraph 28 of this Agreement has been negotiated by the parties hereto and consists of the provisions of the National Agreement between the parties dated October 8, 1987 except for the changes hereinafter noted.

### Conclusion

Legal-writing texts have already been written for the three categories that we are concentrating on—laws, lawsuits, and contracts. See *The Fundamentals of Legal Drafting* (2d ed), by Reed Dickerson; *Plain and Accurate Style in Lawsuit Papers*, by Irwin Alterman; and *Writing Contracts in Plain*

*English*, by Carl Felsenfeld and Allen Siegel. What we are simply trying to do is persuade practicing lawyers to write laws, lawsuits, and contracts the way these authorities suggest. The best way to do this is to give Clarity Awards to the growing number of legal documents that are now being written without legalese. ■

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