

## Lifting the Fog of Legalese



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## Essays on Plain Language

Joseph Kimble

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*For my parents, Ralph and Marjorie Kimble*



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## PREFACE

I wrote these essays over 15 years. They originally appeared in six publications, including two that I edit: the *Michigan Bar Journal's* “Plain Language” column (edited since 1988), *The Scribes Journal of Legal Writing* (edited since 2001), *Court Review*, *Business Law Today*, *Trial*, and *Clarity*. When an essay refers to the “column,” that means the “Plain Language” column.

Naturally, I’ve done a little updating and revising, but on the whole, the changes are fairly minor. I did split one essay into two parts to correspond with the two parts of the book.

I realize that I repeat points in some of the essays, and for a reason. I wanted each essay (except for the one that is split up) to remain more or less intact and self-contained, so you could dip into it without having read some other part of the book. At the same time, because the false criticisms of plain language are so persistent and the failings of legalese so recurring, they need to be addressed at every turn with the same arguments, evidence, sources, and remedies. Old thinking and old ways will not easily or quickly loosen their grip. Reformers must be relentless.



I’m indebted to three top-notch editors who read this entire book: Joseph Spaniol, the former Clerk of the United States Supreme Court; David Schultz of Jones McClure Publishing; and Karen Magnuson, a copyeditor like no other. We have worked together on other projects, so my debt only mounts.



## INTRODUCTION

These essays call on lawyers to face some terrible truths: although lawyers write for a living, most legal writing is bad and has been for centuries; most lawyers recognize this failing from what they read, but still fancy themselves to be rather good writers, thank you; likewise, most lawyers strongly prefer other writers' prose to be plainer, simpler, shorter, clearer, but they also strongly resist changing their own style (that's the great disconnect); every possible rationalization for traditional legal style has been discredited; and the costs of our bad writing and funny talk — the time and money wasted and the public disrespect — are incalculable.

So what's wrong with traditional style? It's a stew of all the worst faults of formal and official prose, seasoned with the peculiar expressions and mannerisms that lawyers perpetuate.

The legal vocabulary is commonly archaic and inflated. It abounds in doublets and triplets (*give, devise, and bequeath*); *here-, there-, and where-* words (*herein, thereto*); multiword prepositions (*with regard to, subsequent to*); other wordy phrases (*in the event that, until such time as*); and strange, useless jargon (*said injury; case at bar; inter alia; Further affiant sayeth naught; In witness whereof, the parties hereto have affixed their signatures*).

Legal sentences tend to be long and flabby. They overuse the passive voice and abstract nouns (in place of strong verbs). They often pile up conditions at the beginning of the sentence. They delay the verb by putting lists of items in the subject or by embedding clauses between the main subject and verb. And they tack exceptions onto the end (sometimes in so-called provisos) instead of putting them in a new sentence.

More generally, legal writing tends to be poorly organized and poorly formatted. The information is not broken down into manageable parts and subparts that are logically ordered for the readers and that use headings to guide them. The writing does not make effective use of summaries, vertical lists, examples, tables and charts, and modern techniques for document design. And in its effort to be precise and exhaustive, it becomes excessively detailed and too often sinks into redundancy, ambiguity, and error.

The result is legalese — a form of prose so jumbled, dense, verbose, and overloaded that it confuses and frustrates most everyday readers and even many lawyers.

Of course, this book is full of examples, but let me offer another small assortment to set the stage.

- *From a letter:* Please be advised that I am in receipt of your letter in regard to the above matter and have enclosed my response to the same.

*In other words:* I received your letter about the *Spann* case and have enclosed my response.

- *From another letter:* I am herewith returning the stipulation to dismiss in the above entitled matter; the same being duly executed by me.

*In other words:* I have signed and enclosed the stipulation to dismiss the *Byrd* case.

- *From a medical arbitration form:* This agreement to arbitrate is not a prerequisite to health care or treatment and may be revoked 60 days after execution by notification in writing.

*In other words:* You don't have to sign this to get treatment here. And if you do sign, you can cancel within 60 days after you sign by writing to \_\_\_\_\_.

- *From a ballot proposal:* Shall the previously voted increase in excess of the limitation on the amount of taxes that may be assessed on all property in the Charter Township of Meridian, Ingham County, Michigan, as reduced by the required millage rollback, which last

resulted in a levy of .2947 mills (\$0.2947 on each \$1,000 of State Equalized Valuation), be renewed for levy in the years 1995 through 2004 inclusive to continue the Township's existing program for engineering, constructing, and maintaining pedestrian/bicycle pathways within the Township, which will raise for the Township in the first year of the levy the estimated sum of \$253,000?

*In other words:* Should Meridian Township continue its property tax of .2947 mills for pedestrian and bike paths? Each year, this would cost you about \$15 for each \$50,000 of your state equalized valuation. The charge would last from 1995 through 2004. This tax would raise an estimated \$253,000 in the first year.

- *From a statute:* In case any building or structure is erected, constructed, reconstructed, altered, converted or maintained, or any building, structure or land is used, or any land is divided into lots, blocks or sites in violation of this article or of any local law, ordinance or other regulation made under authority conferred thereby, the proper local authorities of the town, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, conversion, maintenance, use or division of land, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure or land or to prevent any illegal act, conduct, business or use in or about such premises.

*In other words:* If any use of land or of a structure — or if the structure itself — violates this article or a local law or regulation, the proper town authorities may take legal action to correct or end the violation and to prevent any illegal use of the premises. [Incidentally, does the statute apply to preexisting uses and structures?]

- *From a contract* (a standard provision): If any term, provision, Section, or portion of this Agreement, or the application thereof to any person, place, or circumstance, shall be held to be invalid, void, or unenforceable by a

court of competent jurisdiction, the remaining terms, provisions, Sections, and portions of this Agreement shall nevertheless continue in full force and effect without being impaired or invalidated in any way.

*In other words:* If a court invalidates any portion of this agreement, the rest of it remains in effect.

- *From a mortgage:* The undersigned borrower(s) for and in consideration of The Mortgage Company, this date funding the closing of the above-referenced property, agrees, if requested by Lender or Closing Agent for Lender, to fully cooperate and adjust for clerical errors, any or all loan closing documentation if deemed necessary or desirable in the reasonable discretion of Lender to enable Lender to sell, convey, seek guarantee, or market said loan to any entity, including but not limited to an investor, Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, or the Federal Housing Authority. The undersigned borrower(s) do hereby so agree and covenant in order to assure that the loan documentation executed this date will conform and be acceptable in the market place in the instance of transfer, sale, or conveyance by Lender of its interest in and to said loan documentation.

*In other words:* If the lender asks us to, we will cooperate in fixing clerical errors in the closing documents so that the loan can be marketed and transferred to someone else.

- *From a motion in a lawsuit:* Now comes Richard Penniman, hereinafter referred to as “Penniman,” Third-Party Defendant in the above-styled and numbered action, and files this Motion to Dismiss pursuant to 12(b)(6) of the Federal Rules of Civil Procedure, and in support thereof will respectfully show unto this Court as follows.

*In other words:* Richard Penniman moves to dismiss under Rule 12(b)(6).

- *From a rule of court procedure:* When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if a party.

*In other words:* When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

- *From a jury instruction:* The fact that the defendant did not testify is not a factor from which any inference unfavorable to the defendant may be drawn.

*In other words:* Although Mr. Charles didn't testify, you should not hold that against him. Don't consider it in any way.

Such a mess we lawyers have gotten ourselves into. And because law touches almost everything in some way, so does the fog of legalese. I think no reform would more fundamentally improve our profession and the work we do than learning to express ourselves in plain language. To that end, this book.

