

Seeing Through Legalese

Seeing Through Legalese
More Essays on Plain Language

Joseph Kimble

CAROLINA ACADEMIC PRESS
Durham, North Carolina

Copyright © 2017 by Joseph Kimble
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Kimble, Joseph.

Seeing through legalese: more essays on plain language /
Joseph Kimble

p. cm.

Includes bibliographical references and index.

ISBN 978-1-53100-864-2 (alk. paper)

1. Legal composition. 2. Law — United States — Language.
2. Law — United States — Terminology.

KF250 .K534 2017

808.06/634—dc23

2017037660

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

*To all my students, for their commitment
during my three decades of teaching at
Western Michigan University–Thomas Cooley
Law School. And to all the school's librarians,
for never failing to deliver.*

CONTENTS

Prefaceix

PART ONE: ON LEGAL DRAFTING

You Think Lawyers Are Good Drafters?3

You Think the Law Requires Legalese?13

Guiding Principles for Restyling the Federal Rules
of Civil Procedure21

Lessons in Drafting from the New Federal Rules
of Civil Procedure35

A Drafting Example from the New Federal Rules
of Evidence.....97

Another Example from the New Federal Rules
of Evidence.....105

Still Another Example from the New Federal Rules
of Evidence.....113

One Last Example from the New Federal Rules
of Evidence.....119

Symposium on the Restyled Federal Rules
of Evidence: My Comments.....127

Littering with Legalese, or Get a Load of
This Release133

Cleaning Up a Release.....139

Wrong — Again — About Plain Language.....141

PART TWO: ON LEGAL WRITING GENERALLY

You Think Anybody Likes Legalese?	157
Tips for Better Writing in Law Reviews (and Other Journals)	161
How to Dominate Your Reader — and Make Stewie Griffin Proud	167
A Study in Editing	173
Please Vote on Two Citation Formats	183
Where Should the Citations Go?	187
The Best Test of a New Lawyer’s Writing	193
A Curious Criticism of Plain Language	201

PART THREE: INTERVIEWS AND REMARKS

Interview in <i>Bimonthly Review of Law Books</i>	217
Interview in <i>Issues in Writing</i>	225
Remarks on Accepting the 2010 Award from the Section on Legal Writing, Reasoning, and Research of the Association of American Law Schools.....	241
Remarks on Accepting the 2015 John W. Reed Lawyer-Legacy Award from the State Bar of Michigan	245
Acknowledgments.....	247
Index.....	249

PREFACE

This is my third — and possibly my last — book on legal writing. In recent years, I've been writing mainly about legal interpretation. While I plan to continue that pursuit, I'll no doubt still keep plugging away at the good fight for clear, plain legal writing, my life's work.

The first book, *Lifting the Fog of Legalese: Essays on Plain Language*, collected articles and shorter pieces I had written up until about 2006. In the Introduction, I said what I have to say about the general state of legal writing — and concluded like this (page xv):

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.

In the second book, *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law*, I listed 40 or so elements of plain language, addressed 10 false criticisms, described 40 historical highlights in the push for reform, and summarized 50 empirical case studies showing the extraordinary benefits of using plain language in legal and official writing. My emphasis, as expressed in the subtitle, was on the foundations of plain language and not on how to practice it.

Now this third book, collecting essays since 2006 and returning to a mix of guidance, rebuttal, and reflection. Have things improved in the last decade, or indeed in the last 30 years? I think so. But nobody knows for sure, because how could you even begin to assess the great mass of legal writing and drafting then and now? And in any event, gains will

always be incremental in a profession as tied to tradition as law.

So forget the revolution. Just know that more forces are at work for better legal writing than ever before — in the law schools, in the literature, in the CLE courses, in various pockets of government, and in multiple organizations and groups worldwide. No revolution; just a gradual cutting down and cleaning up of one verbose pile after another, until readers can see more easily through the legalese — to the light of clarity.

A few words about these essays.

Much of the practical benefit will come from close attention to the examples, the side-by-side comparisons, and my comments on the differences. I realize that some of the boxed columns are narrow and that some of the comments (especially the footnotes on pages 98–123) are extensive, but I'm confident that they will repay study.

The technical bane of all scholarly writers these days is ever-changing URLs. I honestly thought about omitting them entirely and just telling readers to Google the cited sources. I decided against that, but I'll give readers the same advice as a backup: if a URL fails, Google the author and title. All three were last checked in August 2017.

Finally, although I've tweaked and updated many of the essays, each one appears almost as it did originally. If this makes for a little repetition, so be it. Let's just say that those points were especially important.

I hope you enjoy this collection, learn some things, nod in agreement often, and even smile from time to time.



I am indebted to so many people.

First, the group of readers who regularly agree to comment on new work and invariably sharpen it: Mark Cooney, Thomas Myers, Laurel Romanella, and MaryAnn Pierce.

Then those people who kindly reviewed at least one of these essays: Judge Lee Rosenthal, Bryan Garner, Joseph Spaniol, David Schultz, Fred Baker, Jery Payne, Annetta Cheek, Christopher Balmford, Ross Guberman, and Ginny Redish.

Then my long-suffering assistant, Cindy Hurst, who first typeset all the essays. And Linda Novak, the patient and proficient editor of the *Michigan Bar Journal*, where many of the essays first appeared. (See the acknowledgments on page 247.)

Finally, Karen Magnuson, who copyedits just about everything I write, including the two previous books. She is the best.

To all of you, my deep and abiding thanks.