

The Great Myth That Plain Language Is Not Precise

Joseph Kimble

Occasionally, when you try to convert from legalese to plain language, someone will come forward and assert that you made a mistake. You missed something in the translation. You inadvertently changed the substance.

Never mind that translating legalese — like translating a foreign language — is no easy matter. Never mind that, despite the difficulties, good writers have successfully revised countless legal documents into plain — or plainer — language. Never mind that many of these documents have involved tough subjects like financial disclosure, corporate takeovers, and disability insurance, not to mention the Federal Rules of Appellate Procedure, Article 9 of the Uniform Commercial Code, and various federal regulations issued since the Presidential Memorandum on plain language.¹ Never mind that for every inadvertent change, you could probably identify several ambiguities or uncertainties in the original document. Never mind that the revised document will almost certainly be better — clearer and more accurate — than the original. The fact remains that revising and clarifying a legal document always involves some judgment and some risk.

¹ See DIV. OF CORP. FINANCE, U. S. SEC. & EXCH. COMM'N, BEFORE & AFTER PLAIN ENGLISH EXAMPLES AND SAMPLE ANALYSES (1998); LAW REFORM COMM'N OF VICTORIA, PLAIN ENGLISH AND THE LAW app. 2, PLAIN ENGLISH REWRITE — TAKEOVERS CODE (1987); DAVID ST. L. KELLY & CHRISTOPHER J. BALMFORD, LIFE INS. FED'N OF AUSTRALIA, SIMPLIFYING DISABILITY INCOME INSURANCE DOCUMENTS (1994); Bryan A. Garner, *The Substance of Style in Federal Rules*, CLARITY No. 42, Sept. 1998, at 15; Steven O. Weise, *Plain English Comes to the Uniform Commercial Code*, CLARITY No. 42, Sept. 1998, at 20; New Source Performance Standards for New Small Municipal Waste Combustion Units, 64 Fed. Reg. 47,275 (1999) (to be codified at 40 C.F.R. pt. 60) (proposed Aug. 30, 1999); Leasing of Solid Minerals Other Than Coal and Oil Share, 43 C.F.R. pt. 3500 (1999)

But the risk is worth it, and writers should not be dissuaded. Otherwise, the legal profession will never start to level the mountain of bad forms and models that we have created. We'll be stuck with the enormous inefficiencies of traditional style and the frustration it causes.² Change is hard, but change has to come.

Let me offer what I think is a perfect object lesson—a little story from Michigan.

The Story in Brief

The *Michigan Bar Journal* has a long-standing column called “Plain Language,” which I happen to edit. In the October 1999 column, an experienced corporate attorney, David Daly, wrote an article called “Taming the Contract Clause From Hell.”³ Daly undertook to straighten out a mutual-indemnification clause, one in which each party indemnifies the other. (I'll give you the full clause in a minute.) Another attorney then wrote a letter to the editor of the *Bar Journal*;⁴ the letter pointed to three possible “errors” in Daly's revised version.

First, the revised version said that if the indemnified party is sued and the indemnifying party assumes the defense, the indemnifying party “may select counsel satisfactory to the other party.” The original clause said that “the indemnifying party shall be entitled . . . to assume the defense thereof with counsel satisfactory to such indemnified party.” Hmm . . . not much difference. But presumably

² See Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51, 62-65, 69-71 (1994-1995) (citing 15 studies showing that plain language improves readers' comprehension of legal documents); *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEGAL WRITING 1, 7-31 (1996-1997) (summarizing 25 studies showing that plain language saves time and money and is strongly preferred by readers).

³ David T. Daly, *Taming the Contract Clause from Hell: A Case Study*, 78 MICH. B.J. 1155 (1999).

⁴ Published in “Opinion & Dissent,” 79 MICH. B.J. 150 (2000) (letter originally dated November 1999, when I first saw it and wrote this article).

the intended sense is that the counsel *must* be satisfactory to the other party. That could have been made clearer in both versions.

Second, the revised version did not say that until assuming the defense, the indemnifying party must pay the indemnified party's legal fees. The original said: "after notice . . . to assume the defense thereof, the indemnifying party shall not be liable to such indemnified party . . . for any fees of other counsel or any other expenses, in each case subsequently incurred by such indemnified party . . ." Now what does that mean — "in each case subsequently incurred"? (And why the comma after *expenses*?) Omit *in each case* and you'll probably get the intended meaning. So that dividing point, when the indemnifying party assumes the defense, should have been explicitly stated in the revised version.

Third, the original clause said that after assuming the defense, "the indemnifying party shall have no liability with respect to any compromise or settlement thereof effected without its consent." Without going into the reasons why, Daly dropped that provision as implicit in assuming the defense; and he added a comparable provision for the *indemnified* party. He might have explained the change. (A half-decent editor would have noticed and queried, but I didn't.)

Although these three points in the letter to the *Bar Journal* cannot really be counted as errors, the points were well taken. The troubling part of the letter, though, was this sentence: "As written, the turgid, repetitive and (nearly) unreadable original has a paramount advantage over the concise, clearer version: it gets the intended legal relations right." I hope no one will make too much of statements like this. Please don't conclude that a legal writer has to choose between precision and plain language — that legalese has the advantage of being more precise, and plain language is less likely to get the substance right. That's just not true. In fact, it's the biggest myth of all.

A Look at the Original Clause

Let's back up and review this wondrous clause. (The lines are numbered so I can refer to them later.)

8. Indemnification

...

1 (c) Promptly after receipt by an indemnified party under Section 1(g),
2 8(a) or 8(b) hereof of notice of the commencement of any action, such
3 indemnified party shall, if a claim in respect thereto is to be made against
4 an indemnifying party under such Section, give notice to the indemnify-
5 ing party of the commencement thereof, but the failure so to notify the
6 indemnifying party shall not relieve it of any liability that it may have to
7 any indemnified party except to the extent the indemnifying party
8 demonstrates that the defense of such action is prejudiced thereby. If any
9 such action shall be brought against an indemnified party and it shall give
10 notice to the indemnifying party of the commencement thereof, the
11 indemnifying party shall be entitled to participate therein and, to the
12 extent that it shall wish, to assume the defense thereof with counsel
13 satisfactory to such indemnified party and, after notice from the indemni-
14 fying party to such indemnified party of its election so to assume the
15 defense thereof, the indemnifying party shall not be liable to such indem-
16 nified party under such Section for any fees of other counsel or any other
17 expenses, in each case subsequently incurred by such indemnified party in
18 connection with the defense thereof, other than reasonable costs of
19 investigation. If an indemnifying party assumes the defense of such an
20 action, (i) no compromise or settlement thereof may be effected by the
21 indemnifying party without the indemnified party's consent (which shall
22 not be unreasonably withheld) and (ii) the indemnifying party shall have
23 no liability with respect to any compromise or settlement thereof effected
24 without its consent (which shall not be unreasonably withheld). If notice
25 is given to an indemnifying party of the commencement of any action
26 and it does not, within ten days after the indemnified party's notice is
27 given, give notice to the indemnified party of its election to assume the
28 defense thereof, the indemnifying party shall be bound by any determina-
29 tion made in such action or any compromise or settlement thereof
30 effected by the indemnified party.

In his article, David Daly summarized why this thing is so poorly drafted:

- The sentences don't begin with the main, or independent, clause.
- The sentences are too long.
- It uses too many words.
- It fails to break the material down into subparts.

True enough, but there's more. For all its supposed accuracy and precision, the clause is full of little holes that the dense surface hides.

One: *shall* is misused throughout. Lawyers are uneducable on *shall*, and we should give it up. Commentators and experts agree that it should be used to impose a duty.⁵ It means “has a duty to.” Essentially, if you can substitute *must*, then the *shall* is correct. So why not just use *must* to begin with?

At any rate, 8 of the 11 *shalls* in the indemnification clause are misused: the verb should be in the present tense. In line 11, for instance, it should be *is entitled*. Luckily, none of the misuses creates an ambiguity, but our professional mishandling of *shall* betrays us in more serious, problematic ways. You can see for yourself by checking *Words and Phrases*—93 pages and over 1,200 cases dealing with *shall*.

Two: in line 3, what does *thereto* refer to? The action? One of the sections? This typifies the pseudo-precision of our beloved antique jargon—words like *thereto* and *herein* and *such*.

⁵ BARBARA CHILD, DRAFTING LEGAL DOCUMENTS 204-06, 383-84 (2d ed. 1992); REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING §§ 6.7, 9.4 (2d ed. 1986); BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 940 (2d ed. 1995); Joseph Kimble, *The Many Misuses of Shall*, 3 SCRIBES JOURNAL L. WRITING 61, 64 (1992).

Three: in lines 4 and 16, what does *such Section* refer to? Does it refer to one section in particular or to any one of the three sections?

Four: lines 9–11 seem to say that the indemnifying party may participate in the defense only if the indemnified party gives notice. But why should that right depend on whether notice is given?

Five: in line 11, the *and* should be *or*, right? That is, the indemnifying party can participate in the defense without assuming the defense.

Six: lines 10–12 say that “the indemnifying party shall be entitled . . . , to the extent that it shall wish, to assume the defense thereof” Does this mean that the indemnifying party may somehow assume part, but not all, of the defense?

Seven: in line 17, the *in each case subsequently incurred* should be *in this case*, right? Better yet, omit *in each case*.

Eight: in lines 20, 23, and 29, what's the difference between “compromise” and “settlement”? Is this just another legal doublet, like *null and void*? Or do you need both terms?⁶

Nine: lines 26–27 say “within ten days after the indemnified party's notice [of the action] is given.” Shouldn't that be ten days after notice is *received*?

Ten: lines 24–30 set a practical limit of ten days on giving notice to assume the defense. Is there any time limit on when the indemnifying party can decide to *participate* in the defense? Apparently not.

There may be more questions, but that's enough to bring home the point: when you redraft in plain language, you inevitably uncover gaps and uncertainties in legalistic writing. The fog lifts, the drizzle ends, and the light shines through. So I'll say it again: plain language is usually *more* precise than traditional legal style.⁷ The imprecisions of legalese are just harder to spot.

⁶ See Garner, *supra* note 5, at 15 (noting a difference between *compromise* and *settlement*, but also noting that they “have been used with a variety of meanings and even synonymously”).

⁷ Kimble, *Writing for Dollars*, *supra* note 2, at 2.

Another Revised Version

David Daly's improved plain-language version of the indemnification clause can easily be tweaked to take into account the comments in the letter to the editor. You could do it like this:

8. Indemnification

...

8.3 Legal Action Against Indemnified Party**(A) Notice of the Action**

A party that seeks indemnity under § 1.7, 8.1, or 8.2 must promptly give the other party notice of any legal action. But a delay in notice does not relieve an indemnifying party of any liability to an indemnified party, except to the extent that the indemnifying party shows that the delay prejudiced the defense of the action.

(B) Participating in or Assuming the Defense

The indemnifying party may participate in the defense at any time. Or it may assume the defense by giving notice to the other party. After assuming the defense, the indemnifying party:

- (1) must select an attorney that is satisfactory to the other party;
- (2) is not liable to the other party for any later attorney's fees or for any other later expenses that the other party incurs, except for reasonable investigation costs;
- (3) must not compromise or settle the action without the other party's consent (but the other party must not unreasonably withhold its consent); and
- (4) is not liable for any compromise or settlement made without its consent. [Or omit this item as obvious?]

(C) Failing to Assume the Defense

If the indemnifying party fails to assume the defense within 10 days after receiving notice of the action, the indemnifying party is bound by any determination made in the action or by any compromise or settlement made by the other party.

Letting Go of the Myth

The choice is not between precision and plain language. Plain language can be at least as precise—or as appropriately vague—as traditional legal writing. The choice is between perpetuating the vices of four centuries and finally breaking free, between inertia and advancement, between defending the indefensible and opening our minds.

Lawyers continue to write in a style so impenetrable that even other lawyers have trouble understanding it—as the debate over the indemnification clause once again confirms. What would we think of engineers or doctors if they regularly could not understand what another engineer or another doctor had written? Do you suppose that the public's impression of lawyers is in any way influenced by our strange talk and even stranger writing?

I know that, in law, change is hard and progress is slow. But when it comes to legal drafting—contracts, wills and trusts, statutes, ordinances—progress is glacial. Why so? One possible explanation is that legal drafters are blindly overconfident. They believe that because their forms have been around a long time, the forms must be tried and true—a grossly exaggerated notion.⁸ Or perhaps the explanation is that legal drafters recognize that everyone else's

⁸ See DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 278-79, 375 (1963) (“[T]he formbooks . . . were decorated with decisions that had never passed on the language or arrangement of the form. . . . [Moreover,] that vast storehouse of judicial definitions known as *Words and Phrases* . . . is an impressive demonstration of lack of precision in the language of the law. And this lack of precision is demonstrated by the very device supposed to give law language its precision—precedent.”); CENTRE FOR PLAIN LEGAL LANGUAGE, *LAW WORDS: 30 ESSAYS ON LEGAL WORDS & PHRASES* (Mark Duckworth & Arthur Spyrou eds. 1995) (showing that a number of legal terms, like *force majeure* and *right, title, and interest*, are not precise or not required by precedent); Mark Adler, *Tried and Tested: The Myth Behind the Cliché*, CLARITY No. 34, Jan. 1996, at 45 (showing that a typically verbose repair clause in a lease is not required by precedent); Benson Barr et al., *Legalese and the Myth of Case Precedent*, 64 MICH. B.J. 1136 (1985) (finding that less than 3% of the words in a real-estate sales contract had significant legal meaning based on precedent).

drafting is poor, but they can't quite see the same deficiencies in their own work. Now that's what you'd call a severely limited critical sense. Yet Bryan Garner, our leading authority on legal writing, offers this evidence from years of teaching:

In my CLE seminars on legal drafting, I routinely ask audience members to answer two questions:

- (1) What percentage of the legal drafting that you see is of a genuinely high quality?
- (2) What percentage of legal drafters would claim to produce high-quality drafting?

Although there's some variation within any audience, the consensus is quite predictable: the lawyers say that 5% of the legal drafting they see is of a genuinely high quality, and that 95% of the drafters would claim to produce high-quality documents.

There's a big gap there. It signals that there's still much consciousness-raising needed within the profession — especially on the transactional side.⁹

Garner asserts that, in general, while litigators are very interested in trying to improve their writing, transactional lawyers are not.

In the end, the shame for legal writing is not just that even lawyers have trouble translating it. The shame is that legal writing so often and so unduly needs translating because lawyers don't write in plain language to begin with.

I give the last word on all this to the Law Reform Commission of Victoria (Australia), which in the mid-1980s produced a monumental four-volume study on plain language. Here is what the Commission said about one of its revisory projects:

If some detail has been missed, it could readily be included without affecting the style of the plain English version. It would not be necessary to resort to the convoluted and repetitious style of the original . . . Any errors in the plain English version are the result of difficulties of translation, particularly difficulties in understanding the original version. They are not inherent in plain

⁹ Bryan A. Garner, *President's Letter*, THE SCRIVENER (Scribes — Am. Soc'y of Writers on Legal Subjects, Fayetteville, Ark.), Winter 1998, at 1, 3.

English itself. Ideally, of course, plain English should not involve a translation. It should be written from the beginning.¹⁰

¹⁰ LAW REFORM COMM'N OF VICTORIA, *PLAIN ENGLISH AND THE LAW* 49 (1987; repr. 1990).