

Flimsy claims for legalese and false criticisms of plain language: A 30-year collection (Part 2)

BY JOSEPH KIMBLE

Author's note: Last month, I addressed five flimsy claims and six false criticisms. This month, I continue with 19 more false criticisms. As I said last month, my responses to the criticisms are necessarily short because there are so many. More detailed responses are available in the cited sources. Readers will perhaps forgive the many citations to my own books, but I have been answering these claims and criticisms for a long time (including in this column, as far back as May 1990).

CONSTRICTED VIEWS OF PLAIN LANGUAGE

12. "Typically, there are lists of 10 or 12 [plain-language] rules."¹

Actually, there are dozens of guidelines (not rules), and they are flexible and varied.² Just because you can find top-10 lists, say, of especially important guidelines doesn't mean that that's all there are.

13. "[P]lain language . . . often requires compressing what might be a complex policy into a small number of words."³

Plain language doesn't *require* fewer words, but that will usually be the result.⁴

14. Advocates "command that short sentences be used."⁵

We don't "command." We typically say to prefer short and medium-length sentences. Or we say to break up long sentences. I'm waiting for critics to put forward an ultralong legal

sentence that can't be turned into a list or otherwise broken up.⁶ And by the way, research does show that as sentences increase in average length, they increase in difficulty for readers.⁷

15. Advocates have a rule to address readers as you in statutes.⁸

Again, there's no such "rule." Rather, we recommend using you in consumer documents — including regulations — when it works. Doing so engages readers by putting them directly into the picture.⁹

16. "The most damaging Plain Language rule is to write only words that are commonly used by laypeople in ordinary speaking and writing."¹⁰

Says who? Every reputable advocate makes it emphatically clear: use a longer, less familiar word if you think it's more precise or accurate, or you have a good stylistic reason.¹¹

17. The plain-language movement "has degenerated into a verbal witch hunt . . . in which the goal seems to be to . . . attack harmless phrases in any legal writing with the vigor of Moses crushing the golden calf." The time it takes to comprehend a few extra words is trivial.¹²

Phrase-crushers? Us? It's true that some advocates have taken aim at particular words and phrases, mostly as a kind of spur to action. But vocabulary is just one part of the push for plain

language. (See #12.) And just because we offer lists of alternatives to wordy phrases and inflated diction doesn't mean that we insist on the alternatives (see #16), although some are worse — more clumsy and stodgy — than others. Finally, while a few extra words here and there won't matter, the cumulative effect of a lot of extra words surely will.¹³

18. For advocates, clarity is measured by readability formulas.

In the 1980s, many states in the U.S. passed insurance regulations that did incorporate readability formulas. But advocates know, and have repeatedly said, that they are only one way of assessing clarity — or, more accurately, lack of clarity.¹⁴ User testing is, of course, the gold standard for public documents — when it's possible.

OTHER DISTORTIONS AND MISCONCEPTIONS

19. Advocates believe that “it is more important to be clear . . . than to be accurate.”¹⁵

Utter nonsense. We may not always say or emphasize that plain language doesn't change the meaning — because we take the need for accuracy as blindingly obvious. What's more, clarity and accuracy are complementary — not competing — goals. By striving for clarity, you invariably improve accuracy.¹⁶

20. Plain language generates errors. It's not accurate or precise.¹⁷

Here we have the illegitimate offspring of #19. Here is the great myth that traditional style is precise and plain language isn't. Actually, plain language is *more* precise than legalese and officialese. It brings error and ambiguity and confusion to light.¹⁸ How many projects and examples does it take to prove that? Critics love to dig up a possible mistake or uncertainty in some piece of a plain-language document. They would be quite deflated if they applied the same scrutiny to old-style documents.¹⁹ Down would go the claim for greater certainty in those documents — and with it a prime excuse for drafting deficiencies that are manifest and manifold.²⁰

21. “A concept expressed in plain language will not always carry a clear and unambiguous meaning. . . . Some words are designedly imprecise and permit of a subjective interpretation by a third party such as a judge. Examples . . . are: *satisfactory*, *necessary*, *fair*, *reasonable*, and *viable*.”²¹

We know, and we don't suggest replacing terms like those (except maybe *viable*). We perfectly understand that language is full of vague terms. Some may benefit from a little more explanation, and some may not. But they do not render a document unplain. (Ambiguity, by the way, is something else; those terms above are not ambiguous.)²²

22. “Most of the advocates are not professional drafters but academics and others who may never have drafted a bill.”²³

That would be news to the more than 2,500 members of the Commonwealth Association of Legislative Counsel — a group that, according to a past president, “has helped promote plainer drafting across the world.”²⁴ Another expert drafter said recently that “the writing of laws has substantially improved over the last 30 years from a plain language perspective” (although not, sadly, in the U.S. federal government).²⁵ In short, a good many professional drafters have taken plain language to heart.

23. Advocates believe that citizens read statutes and that everyone has a right to understand them.²⁶

Not exactly. We know that statutes are used by many people — such as administrators and small-business owners — who are not lawyers, and we think that drafters should make them intelligible to the greatest possible number of potential readers, especially those who are directly affected. Shouldn't people who want or need to read laws be able to understand them without travail (or having to pay someone else to explain them)?²⁷ At the same time, though, advocates should have reasonable expectations and measure success in terms of the great majority of readers.

24. The primary audience for our laws is lawyers. We should concentrate on making them clear to lawyers.²⁸

In most instances, I think it's arguable whether there is — or should be — a great difference between making laws clear to lawyers and citizens, except perhaps for the occasional use of technical terms. (See #3 in Part 1.) Besides, if you strive to make statutes as clear as possible to lawyers, you'll probably make them clear to most other literate citizens.²⁹ And in any event, the traditional style of legislative drafting hasn't exactly been successful in making statutes clear even to lawyers.

25. The way to make statutes clear to citizens is to provide separate explanatory guides.³⁰

Why shouldn't the law be as clear as possible to begin with? Why make this an either/or choice?³¹

26. Readers expect to see legalese and officialese in those kinds of documents.

If so, then shame on the writers who have conditioned readers to expect it. Readers detest complexity and overwhelmingly prefer plain language.³²

27. “Plain style is . . . no[t] more consistently effective . . . than other styles.”³³ “The rules for employing Plain English remain a grab bag of [unsupported] admonitions.”³⁴

The case studies prove otherwise: readers strongly prefer plain language in public and legal documents, understand it better than bureaucratic and legalistic style, find it faster and easier to use, are more likely to comply with it, and are more likely to read it in the first place.³⁵ As for all the individual plain-language guidelines, there is considerable research to support the validity of those that have been studied.³⁶

28. Plain language is dull and drab, it dumbs down, it’s simpleminded, etc. We advocate “the writing style of a fourth grader.”³⁷

And legalese is scintillating and eloquent, right? (We’re back where we started.) People don’t read a contract or a phone bill for fun. And they are delighted if — contrary to expectations — it’s easy to understand. What’s more, plain language can, in the right context, be lively and expressive. It has a long literary tradition.³⁸

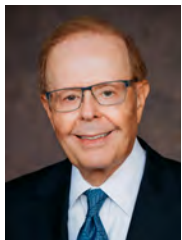
29. Advocates “assume that all writing is the same. That’s moronic. Elizabethan sonnets are not written like telephone directories.”³⁹

So absurd that it doesn’t deserve a response.

30. Anybody can write in plain language. It’s easy.

If that were true, you’d see a lot more of it. Writing clearly and plainly and directly just looks easy. Only the best minds and best writers can accomplish it — writers who have taken stock and freed themselves from the bad habits that plague professional writing everywhere.

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ENDNOTES

1. Stark, *Plain Language*, Legis Law, June 2012, available at <<https://perma.cc/BPN4-M3Z5>>.
2. Kimble, *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* (Durham: Carolina Academic Press, 2d ed 2023), pp 5–10, 21; Kimble, *Seeing Through Legalese* (Durham: Carolina Academic Press, 2017), pp 149–50.
3. Hunt, *Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?*, Paper for the Fourth Biennial Conference of PLAIN (Sept 27, 2002), p 11, <<http://en.copian.ca/library/research/plain2/legdraft/legdraft.pdf>> (accessed June 6, 2024), also available at <<https://perma.cc/6LUW-6N3A>>.
4. See, e.g., *Seeing Through Legalese*, supra n 2 at pp 5, 69, 75–78, 101, 109, along with countless other examples that advocates have put forward for decades.
5. Stark, supra n 1.
6. *Seeing Through Legalese*, supra n 2 at pp 150–51.
7. Dubai, *Smart Language: Readers, Readability, and the Grading of Text* (Costa Mesa: Impact Information, 2007), p 106.
8. Stark, supra n 1.
9. Fleisch, *How to Write Plain English* (New York: Harper & Row, 1979), pp 44–50; *Writing for Dollars, Writing to Please*, supra n 2 at p 10; *Seeing Through Legalese*, supra n 2 at p 150.
10. Stark, supra n 1.
11. Kimble, *Lifting the Fog of Legalese: Essays on Plain Language* (Durham: Carolina Academic Press, 2006), pp 163–64; *Seeing Through Legalese*, supra n 2 at pp 151–52.
12. Goldman, *The War Against Words*, 83 Mich B J 42, 42 (Nov 2004).
13. *Lifting the Fog of Legalese*, supra n 11 at pp 56–58.
14. *Writing for Dollars, Writing to Please*, supra n 2 at pp 49–51; Schriver, *Plain Language in the United States Gains Momentum, 1940–2015*, 60 IEEE Transactions Prof Comm 343, 345–46, 350–56, 361 (2017), available from the author, kschriv@earthlink.net.
15. Stark, supra n 1.
16. *Writing for Dollars, Writing to Please*, supra n 2 at pp 178–79.
17. Hunt, supra n 3 at p 10; Stark, supra n 1.
18. For examples, see *Lifting the Fog of Legalese*, supra n 11 at pp 40–44, 121–22, 137–43, 145–49; *Seeing Through Legalese*, supra n 2 at pp 4–12, 29–30, 43–44, 107 n 7, 114 n 8, 115 nn 9 & 15, 129, 135–40.
19. *Lifting the Fog of Legalese*, supra n 11 at pp 37–47; *Writing for Dollars, Writing to Please*, supra n 2 at pp 37–43; *Seeing Through Legalese*, supra n 2 at pp 141–47; see also the examples referenced in note 18.
20. See *Seeing Through Legalese*, supra n 2 at pp 35–126 (showing an array of examples from the Federal Rules of Civil Procedure and Federal Rules of Evidence before they were redrafted), 106 (describing the old Rules of Evidence as “riddled with inconsistencies, ambiguities, disorganization, poor formatting, clumps of unbroken text, uninformative headings, unwieldy sentences, verbosity, repetition, abstractitis, unnecessary cross-references, multiple negatives, inflated diction, and legalese”).
21. Hunt, supra n 3 at pp 6, 9.
22. *Lifting the Fog of Legalese*, supra n 11 at pp 119–22.
23. Stark, supra n 1.
24. *Seeing Through Legalese*, supra n 2 at p 148.
25. Piper, *What If There Was a Revolution and No One Knew About It?*, Commonwealth Ass’n of Legis Couns Newsl, July 2017, pp 44, 56, <<http://www.calc.ngo/publications>> (accessed June 6, 2024), also available at <<https://perma.cc/S7XR-9VRR>>.
26. Hunt, supra n 3 at pp 3–6; Stark, supra n 1.
27. *Writing for Dollars, Writing to Please*, supra n 2 at pp 30–32; *Seeing Through Legalese*, supra n 2 at pp 146–47.
28. Hunt, supra n 3 at p 13.
29. For examples, see *Lifting the Fog of Legalese*, supra n 11 at pp 145–49 (using the terms *civil damages*, *immunity*, and *gross negligence*); Cooney, *Emergency!*, 91 Mich B J 50 (Nov 2012) (using the terms *immunity* and *gross negligence*).
30. Hunt, supra n 3 at p 14; Stark, supra n 1.
31. *Seeing Through Legalese*, supra n 2 at p 147.
32. *Writing for Dollars, Writing to Please*, supra n 2 at pp 22–24.
33. Turfler, *Language Ideology and the Plain Language Movement*, 12 Legal Comm & Rhetoric: JALWD 195, 198 (2015).

34. Penman, *Plain English: Wrong Solution to an Important Problem*, 19 *Austl J Comm* no 3, 1992, at 1, 3 <http://stc2.uws.edu.au/pwe/Assets/week11_penman.pdf> (accessed June 6, 2024), also available at <<https://perma.cc/V57K-TKMB>>.
35. *Writing for Dollars, Writing to Please*, supra n 2 at pp 163–205; Trudeau, *The Public Speaks: An Empirical Study of Legal Communication*, 14 *Scribes J Legal Writing* 121, 135–50 (2011–2012).
36. Felker et al, *Guidelines for Document Designers* (Washington, D.C.: American Institutes for Research, 1981); Barnes, *The Continuing Debate About “Plain Language” Legislation: A Law Reform Conundrum*, 27 *Statute L Rev*, no 2, at 83, 111–12 & nn 259–66 (2006) (citing various articles by Edwin Tanner); Schriver, *On Developing Plain Language Principles and Guidelines*, in Hallik & Whiteside eds, *Clear Commu-*

- nication: A Brief Overview* (Tallinn, Estonia: Institute of the Estonian Language, 2014), p 55, <<https://www.researchgate.net/publication/282735182>> (accessed June 6, 2024), also available at <<https://perma.cc/7BDM-NBMN>>; Schriver, *Developing Plain Language Guidelines Internationally*, YouTube (June 24, 2015), <<https://www.youtube.com/watch?v=1oB1bYlu5us>>.
37. Phillips, Letter to the Editor, 83 *Mich B J* 9 (Sept 2004).
38. *Writing for Dollars, Writing to Please*, supra n 2 at pp 12–14; Cooney, *Plain Isn’t Plain*, 91 *Mich B J* 52 (June 2012).
39. Stark, as quoted in *Death to Government Mumbo Jumbo*, Bridge, Mar 2, 2017, <<https://www.bridgemi.com/michigan-government/death-government-mumbo-jumbo>> (accessed June 6, 2024), also available at <<https://perma.cc/JVF2-FFR8>>.

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