PLAIN LANGUAGE

Flimsy claims for legalese and false criticisms of plain language: A 30-year collection (Part 1)

BY JOSEPH KIMBLE

Author's note: In this Part 1, I'll take up five flimsy claims and six false criticisms. My responses to the various claims and 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).

EXAGGERATIONS ABOUT TRADITIONAL LEGAL LANGUAGE AND LEGAL DRAFTING

1. "[T]he great protectors of the integrity of the English language . . . may be found in only three spheres: the ministry, the Senate, and the legal profession."[1]

   Really? Legal writing as gloriously uncorrupted and eloquent? Some is, of course. But on the whole: "[Lawbooks are] the largest body of poorly written literature ever created by the human race."[2] At bottom, the integrity of legal writing lies in clarity.

2. Traditional style "has been defined and refined by first-rate minds over the centuries."[3]

   In fact, according to an exhaustive historical study, "[t]he language of the law has a strong tendency to be wordy, unclear, pompous, and dull."[4] The critics of legalese greatly outnumber its defenders.

3. The law has any number of irreplaceable technical terms that have been honed to a fairly settled, precise meaning.

   First, even on a broad view of what qualifies as a "term of art," those terms are a tiny part of most legal documents. Second, many can be replaced by plainer words with no loss of legal nuance, or can at least be explained in consumer documents.[5] Third, for some of the most commonly used terms of art, lawyers overrate how settled their meaning actually is.[6] If a particular term is so settled and precise, then why can you find a multitude of cases trying to interpret or apply it? U.S. lawyers see that fact whenever they use the huge set called *Words and Phrases*.

4. Statutes and regulations often specify that certain language be included in legal documents.

   Sometimes, but far less often than lawyers might think. If someone tells you that the wording is prescribed, ask for the legal citation so that you can look it up.[7]

5. Lawyers are, by training, skilled legal drafters.

   If only. Historically, law schools everywhere have devoted little time or resources to legal drafting. So when most lawyers practice, they tend to copy or imitate the lumbering old forms and "models." Yet a supermajority still consider themselves to be

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good drafters.[8] The Dunning–Kruger effect in action: "lawyers on the whole . . . have no clue that they don't write well."[9]

PLAIN LANGUAGE AS ELITIST, PRESCRIPTIVE, MORALISTIC, AND INFLEXIBLE

6. Advocates are trying to "purify or control language use."[10]

   Say what? The author does not quote one advocate who takes any kind of authoritarian stance on language. (In fact, her article is replete with unsubstantiated claims about what advocates believe and promote.) Our guidelines are not dictates. And our goal is clear language, not pure language, whatever that means.[11]

7. Advocates believe that "legal style is in a state of . . . decay" and "on a downhill path."[12]

   No, we believe that most legal writing has been pretty awful for centuries.[13] The author cites nobody who commends the state of legal style.

8. Advocates don't recognize that "language . . . is in a constant state of change."[14]

   We are not so benighted. Bryan Garner, in his *Modern English Usage* (5th ed. 2022), includes a "language-change index" that tries to measure, in five stages, the changing usage of different words and phrases.

9. Advocates are prescriptivists who believe in a "standard-language ideology" and wish to stigmatize or exclude anyone who uses language "improperly."[15]

   Plain language is inclusive, not exclusive. We seek to make legal and official writing clear and accessible to the greatest possible number of intended readers. To that end, we strongly recommend testing high-volume public documents with typical users. It is legal style that marginalizes people.[16]

10. Advocates believe that plain language is "linguistically superior" and "morally superior" to legalese. Linguistically, because it is more clear or understandable. Morally, because we once contemplated incorporating "honesty" into the definition of plain language and are concerned that legalese "can be used to deceive and manipulate."[17]

    The evidence is overwhelming: plain language, taken as a whole, *is* more clear and comprehensible than legalese.[18] And "honesty" has not been a significant part of the modern push for plain language. I've said explicitly: "very few [lawyers], when pressed, would argue for deliberate obscurity. There's no vast conspiracy to perpetuate legalese." It persists for many other reasons.[19]

11. "[L]anguage guardians [like plain-language advocates, presumably] often portray certain styles and usages as signs of 'stupidity, ignorance, perversity, moral degeneracy, etc.'"[20]

    Again, the author does not cite one advocate who uses terms or a tone like that. She had cited me earlier, but in a clipped way that misrepresented what I said.[21] Clinging to legalese may be stubborn or closed-minded, but it's not immoral.

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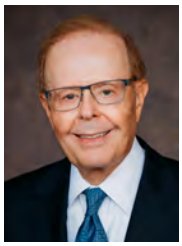

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ENDNOTES

1. Dilley, *Letter to the Editor*, 83 Mich B J 11 (Nov 2004).
2. Lindsey, *The Legal Writing Malady: Causes and Cures*, 204 NY L J 2 (1990).
3. Stark, as quoted in *Death to Government Mumbo Jumbo*, Bridge, Mar 2, 2017, <https://www.bridgemi.com/michigan-government/death-government-mumbo-jumbo> [perma.cc/JVF2-FFR8] (website accessed October 17, 2024).
4. Mellinkoff, *The Language of the Law* (Boston: Little, Brown, 1963), p 24; for a litany of similar complaints, see Kimble, *Lifting the Fog of Legalese: Essays on Plain Language* (Durham: Carolina Academic Press, 2006), app 1.
5. 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 34–36; *Seeing Through Legalese: More Essays on Plain Language* (Durham: Carolina Academic Press, 2017), pp 17–19.
6. *See, e.g.*, Ammon, Indemnification*: Banish the Word! And Build Your Indemnity Clause from Scratch*, 93 Mich B J 44 (Oct 2014); Time Is of the Essence *(To Banish That Phrase from Your Contracts!)*, 95 Mich B J 40 (Feb 2016); *Waivers of* Consequential Damages*: Banish the Term (It Doesn't Mean What Your Clients Think Anyway)*, 96 Mich B J 40 (Sept 2017).
7. Kimble, *Seeing Through Legalese, supra* n 5 at 14–17.
8. *Id.* at 3–12.
9. Garner, *Why Lawyers Can't Write*, 99 ABA J 24 (2013).
10. Turfler, *Language Ideology and the Plain Language Movement*, 12 Legal Comm & Rhetoric: JALWD 195, 205 (2015).
11. Kimble, *Seeing Through Legalese, supra* n 5 at 207-08.
12. Turfler, *supra* n 10 at 205.
13. Kimble, *supra* n 4 at app 1.
14. Turfler, *supra* n 10 at 206.
15. *Id.* at 208.
16. Kimble, *Seeing Through Legalese, supra* n 5 at 209–12.
17. Turfler, *supra* n 10 at 211–12.
18. *See* Kimble, *Writing for Dollars, Writing to Please, supra* n 5 at 163–205 (summarizing 32 case studies).
19. *Id.* at 28.
20. Turfler, *supra* n 10 at 212.
21. Kimble, *Seeing Through Legalese, supra* n 5 at 212–13.