Flimsy Claims for Legalese and False Criticisms of Plain Language: A 30-Year Collection

Joseph Kimble

Author's note: This article is taken from conference talks I've given. 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 volume 5 of this journal).

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.

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[1] Thomas Dilley, Letter to the Editor, Mich. B.J., Nov. 2004, at 11.
[2] John M. Lindsey, *The Legal Writing Malady: Causes and Cures*, 204 N.Y. L.J. 2 (Dec. 12, 1990).

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.*

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[3]   Jack Stark, as quoted in *Death to Government Mumbo Jumbo*, Bridge (Mar. 2, 2017), http://www.bridgemi.com/public-sector/death-government-mumbo -jumbo [https://perma.cc/JVF2-FFR8].

[4]   David Mellinkoff, *The Language of the Law* 24 (1963); for a litany of similar complaints, see Joseph Kimble, *Lifting the Fog of Legalese: Essays on Plain Language* app. 1 (2006).

[5]   Joseph Kimble, *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* 35–37 (2012); *Seeing Through Legalese: More Essays on Plain Language* 17–19 (2017).

[6]   *See, e.g.*, Jeffrey S. Ammon, Indemnification*: Banish the Word! And Build Your Indemnity Clause from Scratch*, Mich. B.J., Oct. 2014, at 44; Time Is of the Essence *(To Banish That Phrase from Your Contracts!)*, Mich. B.J., Feb. 2016, at 40; *Waivers of* Consequential Damages*: Banish the Term (It Doesn't Mean What Your Clients Think Anyway)*, Mich. B.J., Sept. 2017, at 40–42.

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 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]

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[7]   Kimble, *Seeing Through Legalese* at 14–17.
[8]   *Id.* at 3–12.
[9]   Bryan A. Garner, *Why Lawyers Can't Write*, A.B.A. J., Mar. 2013, at 24, 24.
[10] Soha Turfler, *Language Ideology and the Plain Language Movement*, 12 Legal Comm. & Rhetoric: JALWD 195, 205 (2015).
[11] Kimble, *Seeing Through Legalese* at 207–08.

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* (4th ed. 2016), 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

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12 Turfler, 12 Legal Comm. & Rhetoric at 205.

13 Kimble, *Lifting the Fog of Legalese* app. 1.

14 Turfler, 12 Legal Comm. & Rhetoric at 206.

15 *Id.* at 208.

16 Kimble, *Seeing Through Legalese* at 209–12.

once contemplated incorporating "honesty" into the defini-
tion 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, pre-
    sumably] 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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[17] Turfler, 12 Legal Comm. & Rhetoric at 211–12.
[18] *See* Kimble, *Writing for Dollars, Writing to Please* at 134–67 (summarizing 50
      case studies).
[19] *Id*. at 28–29.
[20] Turfler, 12 Legal Comm. & Rhetoric at 212.
[21] Kimble, *Seeing Through Legalese* at 212–13.

Constricted Views of Plain Language

12. "Typically, there are lists of 10 or 12 [plain-language] rules."[22]

Actually, there are dozens of guidelines (not rules), and they are flexible and varied.[23] 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."[24]

Plain language doesn't *require* fewer words, but that will usually be the result.[25]

14. Advocates "command that short sentences be used."[26]

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.[27] And by the way, research does show that as

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[22] Jack Stark, *Plain Language*, Legis. Law. (June 2012), https://www.ncsl.org /legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff /june-2012-plain-language.aspx [https://perma.cc/BPN4-M3Z5].

[23] Kimble, *Writing for Dollars, Writing to Please* at 5–10, 22; *Seeing Through Legalese* at 149–50.

[24] Brian Hunt, *Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?*, Paper for the Fourth Biennial Conference of PLAIN (Sept. 27, 2002), at 11, https://tinyurl.com/sv7rrj3 [https://perma.cc/6LUW -6N3A].

[25] *See, e.g.*, Kimble, *Seeing Through Legalese* at 5, 69, 75–78, 101, 109, along with countless other examples that advocates have put forward for decades.

[26] Stark, *Plain Language*, note 22 above.

[27] Kimble, *Seeing Through Legalese* at 150–51.

sentences increase in average length, they increase in difficulty for readers.[28]

15. Advocates have a rule to address readers as *you* in statutes.[29]

    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.[30]

16. "The most damaging Plain Language rule is to write only words that are commonly used by laypeople in ordinary speaking and writing."[31]

    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.[32]

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.[33]

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[28] William H. Dubay, *Smart Language: Readers, Readability, and the Grading of Text* 106 (2007).

[29] Stark, *Plain Language*, note 22 above.

[30] Rudolf Flesch*, How to Write Plain English* 44–50 (1979); Kimble, *Writing for Dollars, Writing to Please* at 10; *Seeing Through Legalese* at 150.

[31] Stark, *Plain Language*, note 22 above.

[32] Kimble, *Lifting the Fog of Legalese* at 163–64; *Seeing Through Legalese* at 151–52.

[33] Barbara Goldman, *The War Against Words*, Mich. B.J., Nov. 2004, at 42, 42.

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.[34]

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.[35] 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."[36]

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

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[34] Kimble, *Lifting the Fog of Legalese* at 56–58.

[35] Kimble, *Writing for Dollars, Writing to Please* at 49–51; Karen A. 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, kschriver@earthlink.net.

[36] Stark, *Plain Language*, note 22 above.

competing — goals. By striving for clarity, you invariably improve accuracy.[37]

20. Plain language generates errors. It's not accurate or precise.[38]

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.[39] 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.[40] 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.[41]

21. "A concept expressed in plain language will not always carry a clear and unambiguous meaning. . . . Some words are

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[37] Kimble, *Writing for Dollars, Writing to Please* at 148–49.

[38] Hunt, *Plain Language in Legislative Drafting*, note 24 above, at 10; Stark, *Plain Language*, note 22 above.

[39] For examples, see Kimble, *Lifting the Fog of Legalese* at 40–44, 121–22, 137–43, 145–49; *Seeing Through Legalese* at 4–12, 29–30, 43–44, 107 n.7, 114 n.8, 115 nn.9 & 15, 129, 135–40.

[40] Kimble, *Lifting the Fog of Legalese* at 37–47; *Writing for Dollars, Writing to Please* at 37–43; *Seeing Through Legalese* at 141–47; *see also* the examples in note 39.

[41] *See* Kimble, *Seeing Through Legalese* at 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").

designedly imprecise and permit of a subjective interpretation by a third party such as a judge. Examples . . . are: *satisfactory*, *necessary*, *fair*, *reasonable*, and *viable*."[42]

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.)[43]

22. "Most of the advocates are not professional drafters but academics and others who may never have drafted a bill."[44]

That would be news to the more than 2,200 members of the Commonwealth Association of Legislative Counsel — a group that, according to a past president, "has helped promote plainer drafting across the world."[45] 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).[46] In short, a good many professional drafters have taken plain language to heart.

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[42] Hunt, *Plain Language in Legislative Drafting*, note 24 above, at 6, 9.

[43] Kimble, *Lifting the Fog of Legalese* at 119–22.

[44] Stark, *Plain Language*, note 22 above.

[45] Kimble, *Seeing Through Legalese* at 148.

[46] Ben Piper, *What If There Was a Revolution and No One Knew About It?*, Commonwealth Ass'n of Legis. Couns. Newsl., July 2017, at 44, 56, http://www.calc .ngo/publications [https://perma.cc/P4ET-VJRM].

23. Advocates believe that citizens read statutes and that every-
one has a right to understand them.[47]

Not exactly. We know that statutes are used by many peo-
ple — 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)?[48] 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.[49]

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.) Besides, if you strive to make stat-
utes as clear as possible to lawyers, you'll probably make
them clear to most other literate citizens.[50] And in any event,
the traditional style of legislative drafting hasn't exactly been
successful in making statutes clear even to lawyers.

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47 Hunt, *Plain Language in Legislative Drafting*, note 24 above, at 3–6; Stark, *Plain
Language*, note 22 above.

48 Kimble, *Writing for Dollars, Writing to Please* at 31–33; *Seeing Through Legalese*
at 146–47.

49 Hunt, *Plain Language in Legislative Drafting*, note 24 above, at 13.

50 For examples, see Kimble, *Lifting the Fog of Legalese* at 145–49 (using the terms
civil damages, *immunity*, and *gross negligence*); Mark Cooney, *Emergency!*,
Mich. B.J., Nov. 2012, at 50 (using the terms *immunity* and *gross negligence*).

25. The way to make statutes clear to citizens is to provide separate explanatory guides.[51]

Why shouldn't the law be as clear as possible to begin with? Why make this an either/or choice?[52]

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.[53]

27. "Plain style is . . . no[t] more consistently effective . . . than other styles."[54] "The rules for employing Plain English remain a grab bag of [unsupported] admonitions."[55]

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.[56] As for all the individual

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[51] Hunt, *Plain Language in Legislative Drafting*, note 24 above, at 14; Stark, *Plain Language*, note 22 above.

[52] Kimble, *Seeing Through Legalese* at 147.

[53] Kimble, *Writing for Dollars, Writing to Please* at 23–25.

[54] Turfler, 12 Legal Comm. & Rhetoric at 198.

[55] Robyn Penman, *Plain English: Wrong Solution to an Important Problem*, 19 Austl. J. Comm. no. 3, 1992, at 1, 3, *available at* http://stc2.uws.edu.au/pwe /Assets/week11_penman.pdf [https://perma.cc/VS7K-TKMB].

[56] Kimble, *Writing for Dollars, Writing to Please* at 134–67; Christopher R. Trudeau, *The Public Speaks: An Empirical Study of Legal Communication*, 14 Scribes J. Legal Writing 121, 135–50 (2011–2012).

plain-language guidelines, there is considerable research to support the validity of those that have been studied.[57]

28. Plain language is dull and drab, it dumbs down, it's simple-minded, etc. We advocate "the writing style of a fourth grader."[58]

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.[59]

29. Advocates "assume that all writing is the same. That's moronic. Elizabethan sonnets are not written like telephone directories."[60]

So absurd that it doesn't deserve a response.

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[57] Daniel B. Felker et al., *Guidelines for Document Designers* (1981); Jeffrey Barnes, *The Continuing Debate About "Plain Language" Legislation: A Law Reform Conundrum*, 27 Statute L. Rev., no. 2, 2006, at 83, 111–12 & nn.259–66 (citing various articles by Edwin Tanner); Karen A. Schriver, *On Developing Plain Language Principles and Guidelines*, *in Clear Communication: A Brief Overview* 55 (Katrin Hallik & Kate Harrison Whiteside eds., 2014), *available at* https://www.researchgate.net/publication/282735182 [https://perma.cc/7BDM-NBMN]; Schriver, *Developing Plain Language Guidelines Internationally*, YouTube (June 24, 2015), https://www.youtube.com/watch?v=1oB1bYIu5us.

[58] Cameron Phillips, Letter to the Editor, Mich. B.J., Sept. 2004, at 9.

[59] Kimble, *Writing for Dollars, Writing to Please* at 11–14; Mark Cooney, *Plain Isn't Plain*, Mich. B.J., June 2012, at 52.

[60] Stark, as quoted in *Death to Government Mumbo Jumbo*, note 3 above.

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.