

Interview with Joseph Kimble, Author of *Lifting the Fog of Legalese: Essays on Plain Language* (Carolina Academic Press, 2006), ISBN 1-59450-212-3, cloth, \$23.00

*Interviewer: Michael L. Rustad, Co-Editor
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Q. Your law school is named after Justice Thomas M. Cooley, former Michigan Supreme Court justice and a treatise writer in the grand style. How would you assess Justice Cooley's ability to write in plain language?

A. A tough question to start with. I'm not a Cooley scholar, but I have browsed through a couple of his books. I wouldn't say that he had a crisp or conversational style. As you suggest, his style — consistent with the style of his day — was more elevated than you might see in the best contemporary writers. A simple example: "A law is sometimes said to be unconstitutional, by which is meant that it is opposed to the principles or rules of the constitution of the state." I might write: "A law is sometimes said to be unconstitutional — meaning that it violates the principles or rules of the state constitution." And his sentences tended to be longer, on average, and more winding than I would write. But on the whole, Cooley's writing was clear and free from unnecessary jargon. And I'm pleased to note that he regularly started sentences with *And*, *But*, and *So*.

Q. What books do you assign in your Research and Writing course? Advanced Research and Writing?

A. In Research and Writing:

- John Dernbach (and others), *A Practical Guide to Legal Writing and Legal Method*.
- Richard Wydick, *Plain English for Lawyers*.
- Bryan Garner, *The Redbook*.
- The *ALWD Citation Manual*.
- My own course workbook.

In Advanced Research and Writing:

- Mary Barnard Ray and Barbara Cox, *Beyond the Basics*.
- Barbara Child, *Drafting Legal Documents*.
- My own workbook on drafting documents.

Q. What do you see as the principal writing problems of entering law students? What steps can entering law students take to avoid overblown legalese?

A. I'm sure that the problems are pretty much the same as they have always been. Back in 1939, in an article called *English as She Is Wrote*, William Prosser lamented that "very, very many" of his students were "hopelessly, deplorably unskilled and inept in the use of words to say what they mean or, indeed, to say anything at all." (Later, after changing schools, he said the situation at his new school was not quite as bad.) Now, what are the principal problems? Writing coherently, so the ideas connect. That might be the big one. Too often, I can't follow the line of thought. Then writing clearly and simply, so I can easily understand the particular point. Then getting the mechanics right. It's not one problem, really. Students who are deficient in some aspect are usually deficient in others. The underlying cause, I think, is that many students have not read enough, written enough, or been critiqued enough. They have not made a habit of attending to words.

Of course, you hear the same complaint in other fields. But law students are entering a verbal profession — lawyers are paid professional writers — so we can't just throw up our hands and blame the high schools and colleges. Law schools have to provide rigorous writing programs so that their

students get better. And, indeed, most schools have strengthened their programs in the last 10 to 15 years. The trends are in the right direction.

Q. What steps can entering law students take to avoid overblown legalese?

A. First, inoculate yourself. Realize that the opinions you read every day are probably not models of good writing. Don't try to imitate their style. Second, listen to your writing teachers. Most of them are committed to purging legalese. Third, read Richard Wydick's *Plain English for Lawyers* or Bryan Garner's *Legal Writing in Plain English*. Fourth, get over the idea that jargon and highfalutin language are signs of a great mind. Strive for simplicity — without oversimplifying. Finally, realize that writing well is a lifelong job that requires constant attention and practice.

Q. If you were appointed to teach at a school for new judges, what would you tell newly appointed jurists about writing better judicial opinions?

A. There's an essay in my book called *The Straight Skinny on Better Judicial Opinions*. I actually tested an opinion. I gave readers an O and a Y version. O was the original and Y was the revised version, although I didn't tell readers that. The result: 39 percent of readers preferred the original, and 61 percent preferred the revised version, which followed plain-language principles. I also asked readers why they preferred O or Y. For readers who chose Y, the top reason was that it left out a lot of unnecessary detail. And the next reason was that it had a summary at the beginning. In the essay, I examine the differences between the two versions and even edit the original.

Incidentally, in another essay, called *First Things First: The Lost Art of Summarizing*, I discuss the importance of summaries and what makes for an effective one. I took a random volume of the *Michigan Reports*, read every opinion, and concluded that only 9 of the 27 in that volume used an effective summary at the beginning. The essay includes a bunch of examples.

Q. Why do you single out the SEC in your open letter in your book?

A. At the time, the SEC was considering a rule to require plain English in certain parts of prospectuses. Of course, the SEC was hearing all the usual false criticisms of plain language — that it's not precise, that it doesn't allow for technical terms, that it's too subjective to enforce, and so on. So I published an open letter in the *Michigan Bar Journal* supporting the rule.

Q. What are your recommendations for the five or six best books on legal writing?

A. Well, I've already mentioned the books by Wydick and Garner. Certainly, you can't go wrong with any of Garner's books. But in a way, I hate to mention some books because I'll leave out other good ones. My book includes an Appendix 2, called "A Plain-Language Bookshelf," in which I list four indispensable guides to usage and style, more than 25 good books on plain writing, and two valuable journals (*Clarity* and *The Scribes Journal of Legal Writing*).

Q. How does your new book compare with Bryan Garner's book on writing a persuasive brief?

A. *The Winning Brief* is superb, and not many books compare with it. Mine is more eclectic; it's a collection of essays. I include empirical evidence about plain language from the testing I've done. I address (and I hope explode) the terrible, stubborn myths about plain language, as well as the excuses for traditional style. I use some high-profile examples — the orders in the Clinton impeachment trial and part of the USA Patriot Act — to illustrate the bad and the good. And I try to provide some inspiration and some writing advice along the way.

Q. Why do judges have so many problems with jury instructions, given that model jury instructions are so readily available? What are some of the pitfalls you've seen in model instructions based on your own experience as a consultant in Michigan?

A. The word *model* doesn't necessarily mean "good." We have standard, or pattern, instructions in most jurisdictions, but many of them are appalling. We might as well be speaking to jurors in Greek. And people's lives may literally depend on instructions. What an indictment — that when we have to communicate with the public, we so often make a hash of it.

Why? Again, I address some of the reasons in the essay *How to Mangle Court Rules and Jury Instructions*. For instance, we don't treat accuracy and clarity as equally important. (I'm convinced from experience that striving for clarity also improves accuracy.) Too often, we slavishly follow the exact language of statutes and opinions. We don't let a writing expert prepare the first draft. We neglect legal drafting in law school. There are lots of reasons. But the winds of change are blowing. You may have heard about California's huge project to rewrite all its civil and criminal instructions in plain English. Some other states have done or are doing the same.

As for the pitfalls, you can guess my answer: the instructions are not written in plain language. I don't just mean that they use long, involved sentences and unfamiliar words. I mean that they violate dozens of guidelines for writing clearly. Besides that, they ignore some other principles that would improve instructions in particular — principles that usually don't apply to other forms of drafting. For instance, use questions, use controlled repetition, state things in alternative ways.

Q. You single out the Patriot Act as an example of poor drafting. What drafting problems did you see with the Act?

A. I list 12 kinds of small-scale deficiencies, without even getting into format, organization, sentence structure, and the like. An aversion to pronouns. An aversion to possessives. Ten others. I try to identify some of the persistent, inexcusable failings that pervade not just drafting but all legal writing. Good stylists or editors would fix these things almost routinely. And the great irony is that most lawyers consider themselves rather good writers; it's everybody else's writing that needs work.

Q. I was wondering whether you have any theories about why bad writing continues to thrive. I have recently reviewed a large number of arbitration agreements intended for nursing homes. Few of these agreements make any attempt to explain arbitration or its procedures. Do you have any explanation why so many top corporate attorneys are so determined to avoid writing in a clear, concise, or specific way? My private theory is that the fog of legalese deliberately keeps consumers in the dark. Do you have an opinion on the cause of unclear writing in so many consumer contracts?

A. I don't think it's a conspiracy. I think there are various reasons: the overwhelming influence of poor models, not enough good training at all stages of schooling, a tendency (especially among law students) to overrate oral skills and underrate written skills, false notions of prestige, a general lack of self-awareness, and simple inertia — to name some of the more obvious ones. If you want to boil it down, lack of will and lack of skill.

Q. Tell our readers a little about your experience editing *The Scribes Journal of Legal Writing*.

A. I plan to write an article about that — an editor's pleasure and pain. I'm the editor in chief among four veterans. I think many legal writers are not used to having their work marked up by seasoned editors. Once in a great while, an author becomes angry. Sometimes, authors resist what seem to be obvious improvements. Then you have the author who doesn't want to use dashes or hyphenate

phrasal (compound) adjectives or use contractions. But there are ways of handling the process and working out the differences. Most of our authors are very grateful — and say so.

At any rate, we put an enormous amount of time into the *Scribes Journal*, and I hope it shows. We try to make it informative, practical, and lively.

Q. If legal writing is so critical to the law-school mission, why has legal writing been so marginalized in the curriculum?

A. I'm afraid it comes down to money. Any of the skills courses — legal writing, trial practice, a clinic — require more resources than the doctrinal courses.

Q. What steps has Cooley taken to help students develop plain-writing skills?

A. Some of the ways: (1) Cooley was the first law school to put its writing teachers on tenure track and keep them there. Our writing teachers stay at the school, so our students are generally taught by veteran profs. Of course, as the school has grown, we have hired new profs. (2) As part of the hiring process, we ask candidates to write comments on a student paper. A performance test, if you will. The results are very revealing. (3) We teach the first writing course in the third term, not the first term. That's rather heretical, but I think students are so overwhelmed by the new subject matter that skills are harder to teach at the very beginning. And there's the matter of time: students grumble about how much time the writing courses take. I ask them to imagine how they would have managed in the first term. (4) We teach another required course in the last year, trying to bridge between the earlier course and entry into practice. The lessons from the first year are, sadly, too soon forgotten. (5) We require legal drafting (contracts, statutes, etc.) as part of our program. The legalese is thickest in legal drafting — more than in the other forms of legal writing (briefs, memos) — so we can attack it at its worst. (6) Above all, our Research and Writing Department is strongly committed to teaching clarity and simplicity. We make no bones about it.

Q. What is your primary audience for *Lifting the Fog of Legalese*?

A. Lawyers and law students. But I think that any government or business writer could also benefit from it.

Q. How can practicing attorneys benefit from your book?

A. For those who doubt the value of plain language, I hope to open their eyes and move them off dead center. For those who want to improve their writing, I hope they will find some useful advice and examples. I even hope that the essays are enjoyable to read — and, as I said, provide a little inspiration.