

Episode 1: Joe Kimble

The house style for In-Game Learning does not use a hyphen for "plain language" when it's an adjective. Out of respect for Professor Kimble, who prefers the hyphenated version, we've used the hyphen in this transcript.

Joe Kimble I think it's fair to say that most lawyers are pretty intelligent, pretty smart, but they haven't learned to draft in plain language. Lawyers greatly overestimate. They exaggerate their talent when it comes to legal writing. They may be intellectually smart, but they haven't developed the skill that it takes to write in plain language. And it does take work. Writing well is a lifelong job and good writers do make it look easy, same way a good athlete makes a tough play look easy. But it takes skill and it takes practise and it takes critique. Good writers seek out critique, crave critique, crave editing.'"

Bob Milstein Welcome to the inaugural episode of Top of Their Game, the show where we speak with the people making communications clearer, fairer, and just plain better. I'm your host, Bob Milstein: a lawyer, plain-language trainer, practitioner, and advocate. In each episode, we'll hear from seasoned pioneers and fresh voices, alternating between the long-view legends and today's change makers. Through this, we'll be building a conversation. A conversation that spans generations, disciplines, cultures, countries, languages, and perspectives. And who better to kick things off than a true pioneer in the world of plain-language communication, Professor Joe Kimble?

It's not an overstatement to say that Joe is a true legend in the field of plain language and the law. Joe taught legal writing for 30 years at Cooley Law School. He has published extensively and given more than 175 seminars and presentations throughout the United States and abroad. Joe is a senior editor and former editor in chief of The Scribes Journal of Legal Writing, the long-time editor of the Plain Language column in the Michigan Bar Journal, a founding director of the Center for Plain Language, the past president of the international organization Clarity, and the drafting consultant on all federal court rules in the USA. For his mighty efforts, Joe has received numerous awards. He's also the author of many landmark publications on the topic of clear writing in general and clear writing for lawyers in particular. In today's episode, we'll talk about how Joe got started, what he's learned, and the messages he most wants writers, legal and otherwise, to hear right now. So let's get into it.

Joe. Thanks so much for joining us today.

Joe My pleasure, Bob, thanks for inviting me.

Bob Now, many listeners know Joe Kimble and the Joe Kimble story, but for that small subset who doesn't could you tell us a little bit about your background and how you came into the world of plain language? I'm guessing plain language for lawyers?

Joe Yes, well, it's interesting. The short answer is mostly by accident. I was a lit major in college, went to law school at the University of Michigan Law School, and it never occurred to me during all that time in law school that there was something terribly wrong with the way lawyers write. I mean, like most law students, I just said, "Well, this is the way it is, this is the way it has to be." Then not long after law school — we're going all the way back to the mid-70s — I was working on the staff of the Michigan Supreme Court and I was assigned to

draft — basically because nobody else wanted to do it — to draft a new and amended Michigan Court Rules, rules of court procedure. Well, of course, way back then, no law school had any kind of a legal writing program, so I didn't have a clue about how to draft rules, you know, any kind of a codified law. So I went down to the law library and pulled out what I think at the time was just about the only book on legal drafting by Reid Dickerson called *The Fundamentals of Legal Drafting*. And I was browsing through that and he had several pages where on the left hand side of the page it said something like "instead of" and then a list and then the right hand side of the page — you've seen these side by sides — the right hand side of the page "try this." And you know, instead of "prior to" try "before" instead of "pursuant to" try "under." And that's when the light started to go on. I said, "Yeah, why do we do this?" But it's 'interesting that with the somewhat of a, you know, background in literature and having done some writing, you know, during all that time it never hit me until that day when I discovered that book by Reid Dickerson. You know and I was immediately a convert and have been ever since.

Bob When you say "Why do we do this?" have you worked out the answer to that?

Joe Well, I've tried to in my books, but I think it's a combination of things. It's the endless recycling of the cumbersome old forms. It's a belief in some of the myths about what plain language is, what plain language entails. Inertia, of course, one of the strongest forces in the universe. And habit, bad habit. And for a lot of people, they just, they don't realize — And we've tested this. I've tested this. — that readers strongly prefer plain language. They don't understand. They think that readers expect legalese, but most readers dislike it intensely. And that includes not just the public, that includes judges and lawyers. And there's lots of empirical evidence on this. But if I wanted to boil it down, I'd say lack of will because of inertia and lack of skill. A lot of lawyers just haven't learned how to do it. So it's a combination of all these things, I think

Bob In addition to those factors, is it also possible that lawyers have taken away bad lessons or wrong lessons from the document role models that they grew up with in law school?

Joe That's what I say. They recycle the old forms and models and somehow this seeps in. You know, law school is largely a matter — at least in the States — of reading from casebooks. And the casebooks, you know, are full of appellate opinions. And so that's all they read is bad legal writing from the time they hit law school. Somehow this soaks in. And as I said, even for me, it wasn't until I read the Dickerson book going back many decades that it began to occur to me that it doesn't have to be this way and it shouldn't be this way.

Bob In defense of some judges, I imagine you'd acknowledge that there are some judges in the US — and probably elsewhere — who are beautifully skilled writers.

Joe Absolutely. You know, I don't mean to say that all legal writing is bad and I think it's slowly, gradually improving, although it's very hard to measure. But yes, I mean, you know, here in the States, you mentioned judges. There are some excellent writers on the, for instance, on the United States Supreme Court. I mean, Justice Kagan is a superb writer. Justice Roberts is a good writer.

Bob What's it about their technique that justifies those sort of accolades?

Joe They have a they have a straightforward, crisp, relaxed, conversational, idiomatic style. They have a very readable style, an energetic and forceful style as well.

Bob And yet so many legal writers seem to have antibodies to being seen to embrace a style that is conversational.

Joe It's hard to understand. They think that somehow that legal prose has to be elevated for some reason. It has to be elegant, it has to be highfaluting. And why do they think that? I don't know. It's one of the messages, of course, that we are trying to put forward through the plain-language community as I mentioned earlier. I mean, I have tested this and other people have tested it. And you'll find evidence for this in my book, *Writing for Dollars, Writing to Please*, that even judges and lawyers strongly prefer to read plain language. The problem is that a lot of judges and lawyers, when they sit down to write, you know, forget that message. In other words, they don't practise what they preach. They don't follow the golden rules. Everybody wants the other person's writing to be plain. They need to remember that when they sit down to write for themselves.

Bob Is there another possible issue that, even where the lawyer has the will to craft and draft in a way that purportedly embraces plain language, they have a rather narrow understanding of what the elements of plain-language writing are? They think it's word substitution.

Joe You're right on the money. There are too many lawyers that think that plain language is just about plain words — as you say word substitution — plain words and short sentences. And of course, there's much, much more that goes into it. In my book *Writing for Dollars*, I try to list out what I call the "elements of plain language" — and I can't remember the exact count — but it's dozens of techniques that go into plain language and they range over design, organization, sentences, words. So yes, way too many lawyers have, as you say, a narrow view of plain language. And they don't realize that it does require some work. It requires some attention. It requires some attention to what good writers do. I like to call it forensic reading. You know, when you read an opinion, say, by Justice Kagan, what makes it good? You need to be able to identify what makes it good.

Bob Just want to draw on two things that came out of what you just said, Joe. The first is design. I talk with lawyers about design — I'm no expert in design, but I suspect neither are they. So when it comes to a bang for buck — not too scary, but efficient design gestures that lawyers can more frequently build into their advisory documents, contractual emails, information sheets. Any thoughts on what low-hanging fruit might be?

Joe Again, I don't hold myself out as an expert in design and I'm learning about this all the time. But lots of white space, lots of headings. You know, the headings and subheadings somehow distinguish graphically either by larger bold, smaller bold, italics for subheadings, lots of vertical lists, a readable font, a good-sized font, at least 12 point for written materials, at least 13 point for on screen. Again, I don't hold myself out as an expert on this. We all kind of know it when we see it. A document that's inviting, which invites the reader in, a lot goes into that as well.

Bob And that's one of those other nasty habits that we were acculturated to: the slab of paragraphs followed by another slab of paragraph.

Joe Right, long paragraphs, not enough line spacing between lines, single spacing instead of trying to space it out. There's an excellent book called *Typography for Lawyers* by Matthew Butterick that goes into a lot of these elements. And legal design is a growing area and I need to learn a lot more about it.

Bob In fact, I came across two excellent articles on that topic in the Michigan Bar Journal, which I know you edit a column in. Would you care to tell us a little bit about how you came to that and how it's evolved over literally the decades in which you've been involved?

Joe Well, the first thing is that it wasn't even on my radar, even when I was getting more and more into it until the 80s and until the 90s. I didn't even start thinking about it until well into my journey on this. I think the article that you're mentioning from the Michigan Bar Journal was actually written by an Australian law firm. Am I right about that?

Bob Yeah, that article was called "The Brave New World of Legal Design." It was written by people at a law firm in which I used to work — and where I've subsequently done some training — called Corrs Chambers Westgarth. That's terrific, but there are a couple more there as well that I often talk about.

Joe You're testing my memory here. This is because I've been the editor of that column for 37 years. I can't remember all the columns, of course. I can't believe it myself that that column has been around for 41 years. No legal writing column has that kind of longevity. It has been described as a gold mine of information about plain language and all of the columns are online, available free. All you have to do is search online for Plain Language column and you will find every column going back to 1984.

Bob It is an amazing resource. I always talk about it when I'm running training for lawyers. I just say, well, gold mine is the word that I use as well. Just a lot of high-quality thinking and writing from the leading exponents and proponents.

Joe Just about everybody, by the names that you would recognize from the plain-language world. Christopher has written several articles for the journal, Robert Eagleson. Bryan Garner, as a matter of fact, very next column. I was just looking over the page proofs today, will be by Martin Cutts, another name that's familiar to you. So great many of the leading lights in plain language have written a column for the Plain Language column.

Bob As much as I have a deep love for and respect for the column, could I ask a devil's advocate question? 40 years of columns on plain-language writing for the legal profession. Surely there's nothing new under the sun

Joe Oh well ... I hate to say that there's nothing new that we can learn. I think we are learning new things about legal design all the time, but I hope that most of what we need to know is out there. There may be some new things come along the pike, but certainly if legal writers would apply what we already know about good legal writing and how readers prefer good legal writing, if they would just apply what we know even now, that would go a long, long way to transforming the state of legal writing.

Bob Over that 40 years — 37 years — I think you mentioned your role as editor. Have you seen any trends in the topics that authors submit on or do you actually identify what you would like them to write on and guide them along the road?

Joe Mostly Mostly I have to seek out articles. I have a group of people that are fairly regular contributors. I try to look for things maybe in various publications that I think, "Oh, that would be good for the Plain Language column. That's how I gathered the material.

Bob A few minutes ago, I said I wanted to ask two things. The second was to quote something at you that you once wrote. It's one of —

Joe Uh-oh.

Bob Oh, it's good, it's good. It's one of several things I quote-attribute to you when I'm writing my versions of training. But it's this: "Although writing clearly and plainly and directly looks easy, only the best minds and best writers can accomplish it. Writers who've taken stock and freed themselves from the bad habits that plague professional writing everywhere." Now you've already touched on what some of those bad habits are or might be. If you want to elaborate on that, that'd be great. But I wanted to take you to an early part of that quote where you say only the best minds and best writers can accomplish it. What does that say to and for the statistic likelihood that not every lawyer is the best mind, not every lawyer is the best writer?

Joe Not every lawyer is the best mind, but, you know, most lawyers are pretty educated people. They've gone through undergraduate. They've gone through law school. And so I think it's fair to say that most lawyers are pretty intelligent, pretty smart, but they haven't learned to draft in plain language. Lawyers greatly overestimate. They exaggerate their talent when it comes to legal writing. They may be intellectually smart, but they haven't developed the skill that it takes to write in plain language. And it does take work. Writing well is a lifelong job and good writers do make it look easy — same way a good athlete makes a tough play look easy. But it takes skill and it takes practise and it takes critique. Good writers seek out critique, crave critique, crave editing.

Bob What do you say then to the lawyer or the manager of a law firm who says, "well, the reality is we don't have the time to "plain language" our document. We're under deadlines. We're under costing pressure. So as nice as that would be, it's not going to happen."

Joe Well, you know, we get a lot of excuses, but "we don't have time" is one of the common ones. You know, I kind of have maybe a two-fold answer. Number one, some of it is easy. You can immediately stop starting your legal documents with "Know all men by these presents. Are lawyers are still doing that? I found out recently that they are. That's an easy fix. You don't have to start your complaints with "Now comes the plaintiff by and through his attorney, blah blah blah blah blah blah blah blah." You don't have to end your contracts with "in witness." I mean, there are some parts of it that are easy. The second part of that answer would be just make a start. Just take your most common document. If you, you know, if you're an estate lawyer, start with your standard will, which you're using repeatedly. Take the document that you use most commonly. Just make a start. You might find that the results are actually pretty satisfying and you move on to the next one. In short, get off the dime. Make a start.

Bob What do you say to the lawyers who say, "If I was to use this form of writing, these expressions—" and the one I have in mind is starting a sentence with an *and* or a *but*—"if I was to use that one and to give it to this very important client, they would be outraged. They would change lawyers, because they'd say "these lawyers don't know the rules of communication or grammar."

Joe I'd like to find that mythical client. Right, really? I mean, I'd like to find that client that says "My Gosh I can actually read this. I can understand it." I've yet to hear a consumer say "This document is so clear to me and so easy to understand, so comprehensible, that I'm insulted by it."

Bob How dare you? How dare you?

Joe Yeah, how dare you? I'd like to find that client.

Bob Of course, one initiative that's all about helping writers, including lawyers, to get better at this is the ISO's International Plain Language Standard, which is now two and a bit years old. And the way more recent birth of part two, the Legal Communication Standard. The publicly accessible information about that standard has a short bibliography at its end. Three resources, one of which is the great Joe Kimble's book. What I wanted to ask though, Joe, is what would you like to say to lawyers and to managers of law firms about the potential role and value and utility of embracing the standard or both parts of the standard.

Joe If you care about your readers, if you care about your clients, if you care about whether your clients can understand what you're telling them, if you want to be in a kind of partnership with your client — rather than just saying “Oh, I know you can't understand it, but trust me it's all good.” — if you want engaged clients that you partner with and if you want to satisfy your clients by writing in a way that they can understand, then you will write in plain language. Because, again, the empirical evidence on this is overwhelming. I mean, we all thought this in the beginning that, well, God, this is obviously clearer. Obviously, people are going to prefer this. But then we got “Well, how do you know?” Well, so we started testing documents and, lo and behold, consumers overwhelmingly prefer plain language. They may expect legalese from lawyers, but down deep they don't like it.

Bob Joe, you talk about testing. Is there testing and testing? Is there sort of large scale, high-cost testing option, but also sometimes a low-cost, relatively easy way to test documents?

Joe Listen, again, I'm not the expert on testing, Bob, so I want to issue that caveat, but, at the very least, you can have 5 or 6 people read it and informally ask them 3 or 4 critical questions. Then you give them some scenarios to say, “Okay, you've read this, now what happens if X? What happens if y? What happens if Z?” I mean, you can do very informal kinds of testing. There are lots of ways to test. As a matter of fact, for some of the documents that we have on the website of the Center for Legal Drafting here at Cooley, I've actually enlisted the help of testing experts. But, of course, it's not always possible to pay for testing, so sometimes you're going to have to test more informally.

Bob Thank you. Joe, I wanted to shift the focus a little bit away from your long and storied career engaging with the legal profession to a slightly different target market — maybe the future legal profession: *Mr. Mouthful*.

Joe My two children's books, *Mr. Mouthful Learns His Lesson* and *Mr. Mouthful and the Monkeynappers* and ... Mr. Mouthful, the main character, is this fancy talking character who has these encounters with children and he talks over their heads and it leads to all kinds of different comic misadventures. In both books, he sort of learns his lesson at the end and he uses plain words to deal with ... two emergencies arise, one in each book, and sort of becomes converted. It's interesting. After I wrote the first one, *Mr. Mouthful Learns His Lesson*, I wanted to call the second one *Mr. Mouthful Has a Relapse*. But some of my readers thought that wasn't the best message to send to kids, so I had to change it to *Mr. Mouthful and the Monkeynappers*. I thought it was a hilarious title, but I got some pushback from my readers.

Speaking of readers — getting back to plain language — all writers need to be critiqued. All writers need editors. All writers should crave editing. I realize there's not always time to do this, but, when there is time and an especially important document, have somebody else read it. Somebody that knows what they're doing.

Somebody asked me one time, “What particular writing technique or tool do you swear by?” Good editors. I have a regular group of people. I send my articles out to them and they read mine and I read theirs. And you just don’t know how a reader is going to respond to a piece until you are able to put yourself in your reader’s shoes. And that’s what, of course, the editors are. Good editors are invaluable.

Bob If I could move briefly from writing techniques that people swear by to writing techniques that people swear at, could you reflect on some techniques that, in your observation, are the most irritating when it comes to legal writing? And I’m going to park to one side the technical, puffed-up preparatory language that you mentioned earlier and perhaps ask you to focus on writing in an advisory context rather than, say, legislative.

Joe It’s hard to single out any one. Long sentences are one of legal writing’s oldest and worst curses.

Bob What’s the cure for a long sentence?

Joe Periods. More periods. Start more sentences with *and*, *but*, and *so*, among other things. Long sentences, a kind of an impersonal style, especially in consumer documents. Not using the word *you*. Abstract nouns or verbs should be, you know, “came to the conclusion” rather than “concluded,” “made a determination” rather than “determined. There’s so much, you know. Unnecessary prepositional phrases, not enough headings and subheadings, not enough vertical lists, more and more. And all the work I did in redrafting the US Federal Rules of Civil Procedure, we more than doubled the number of headings. Many, many, many more vertical lists. Vertical lists are critical to clear legal drafting and analytical writing as well.

Bob I imagine it may be the case that those design flourishes mean that overall we end up with a longer document than the original. But plain language isn’t about making things as short as possible. It’s about making things as clear as possible.

Joe That’s right. Every once in a while, you will need to explain, say, a legal term for a lay audience. And formatting, because you’re adding more white space, you’re adding more vertical lists, you’re adding more headings and subheadings — will sometimes make the document look longer, even though it might not have more words. On the whole, if you take a legal document, more often than not, converting it into plain language will result in fewer words. But not always. And you’re right, that is not the test. The test is whether the reader can easily find the information to understand it and use it.

Bob Yeah. I want to take you back to your earlier comment about using the second person *you* in consumer-facing documents. Do you have a view about using a similar strategy in a legal advice document in circumstances where the *you* is pretty unambiguous?

Joe Why not? If you’re addressing a client, you know, “You should do this, You should do that.” I would say use it whenever it fits. You’re not going to address a court as *you*. — you certainly wouldn’t use *you* in that context. But in the right context, it’s very effective. It draws the reader into the picture, so the reader can see themselves in the picture.

Bob It moves away from being a legal reflection or essay into a piece of focused communication and advice-giving.

Joe, I’ve only got two more questions for you: one is plain language-like, the other is not.

Joe Okay.

Bob You've mentioned writers like Elena Kagan as models of clarity. Are there any other writers, whether in the legal world or elsewhere, who you'd recommend to, say, a young lawyer who wants to get their writing improved, wants to get some guidance as to what "really good" looks like?

Joe Well if you're talking about literature, of course, I love George Orwell. I like E.B. White. I don't know if that name is going to be familiar to all of your listeners. I'm a big fan of E.B. White and his essays in particular.

Bob He also did some children's books.

Joe He did indeed. *Charlotte's Web*, the much beloved *Charlotte's Web*. William Cinsser is a wonderful writer and he's also written a great book. C-I-NS-S-E-R. William Cinsser is a great essayist.

Bob He wrote on writing well?

Joe He did, sort of a classic in the field. Any of Bryan Garner's books are going to be very, very helpful to any aspiring legal writer. There's writers you wouldn't call "plain-language writers" that I love. Thomas Hardy. My favorite poets Robert Frost, Emily Dickinson. I still read Shakespeare. And that's one of the myths. "Plain language has nothing to do with literature." I was once accused of wanting to simplify Shakespeare. It has nothing to do with it. We have no objection to a literary style in literature, but in legal writing, you're not looking for a literary style. I don't want to overstate that. I mean, in the right context, plain language can be, and should be, direct, relaxed, conversational, idiomatic, forceful, engaging. And it can be.

Bob Joe, you mentioned a minute ago simplicity. And you are familiar, I'm sure, with the aphorism that "Everything should be as simple as can be but no simpler." How do you deal with lawyers who have concerns about what they might identify as a friction between the need to be as simple as can be and the need to get it right in a way that is bulletproof, defensible, compendious.

Joe It's one of the great myths about plain language is that you can't write in plain language and be legally accurate or precise and it is indeed a myth. And I've been writing about this for a long time and I turn it around — and I think it's true — the plain language is more accurate, more precise, than traditional legal style. And anybody that's ever been involved in a plain-language project will, I think, tell you the same thing: That when they actually went back to their original document — you know, that they've recycled time after time after time — and looked at it carefully, they find all kinds of ambiguities, uncertainties, inconsistencies in the original. So when you shine the light of plain language on complex legal documents, you will actually improve the accuracy and improve the precision. I call it the myth of precision. Plain language will produce documents that are not only more readable, but more accurate than traditional legal style. And in *Writing for Dollars*, you'll see lots of quotes to that effect and lots of studies to that effect.

Bob Amen to that. Joe, I have one final question for you. It has nothing to do with plain language. It's all about your other life as a music buff. Do you want to say a little bit about that?

Joe Well, yeah, I'm just an old rock and roller, you know? I mean, I discovered rock and roll in my teenage years and I've loved it ever since. Rock and roll and blues, you know, which is sort of the precursor to rock and roll. As a matter of fact, I'm sitting right here now at Cooley Law School on the 6th floor and if you walked around the 6th floor at Cooley Law School, you would find over 250 pieces of blues and rock original art, memorabilia, posters, signed posters, photographs. I even give tours, I mean, this —

Bob Are these things that you collected over the journey?

Joe Oh yeah.

Bob And how'd you come into their possession? Is it auctions? Was it gifts? Was it theft? How did you do it?

Joe All kinds of different ways. I go to art fairs, I go online. There's auctions. I have certain artists that I follow and I collect from them. And so, just in various ways, it's just grown and grown and grown over the years. I could probably use an intervention of some. But no, I love it. And the students, I mean, they wander around. Of course, it's, you know, a few generations before their musical life, but they still get a kick out of it. You know, everybody knows the Beatles. I've got a lot of Beatles stuff, a lot of Rolling Stones stuff, posters, the original artwork. It's a lot of fun to collect that. It's a passion. And I love rock and roll and blues music.

Bob Clearly you've got multiple passions, not just for music, but plain language as well. And I'm so grateful to you for spending time with us today, sharing your wisdom, your experience, and your insights. Thanks so much, Joe.

Joe Well, thank you so much, Bob. It's been a pleasure. Great questions and I hope people who are listening to this pick up a few tips and ideas.

Bob Thank you.

Joe Thank you.

Bob What a fantastic way to kick off our Top of Their Game series. A huge thank you to Professor Joe Kimble for sharing his time, his story, and his wisdom with us today. To learn more about Joe's work — whether it's his publications, his talks, or his mighty music memorabilia collection — be sure to check out our show notes.

Top of Their Game has been brought to you by In-Game Learning: The most fun you'll ever learn. Visit ingamelearning.com and see how much fun online plain-language training can be. If you've enjoyed today's episode, share it with a colleague. Leave us a review. Or better yet, rewrite something terrible and send it to us. We'll love you forever and so might your target readers.

I'm Bob Milstein and, until next time, go forth and clarify.