

The Straight Skinny on Better Judicial Opinions

*This is an excerpt from one of 15 essays in the book *Lifting the Fog of Legalese: Essays on Plain Language*, published by Carolina Academic Press.*

May it please the court: this article presents the first empirical testing of judicial opinions. Of course, you will find no end of commentary on writing opinions—and several books.¹ So we have lots of sensible advice based on perception, experience, judgment, and a feel for good style. But as far as I know, no one has ever tested opinions on readers to see what works and what doesn't.

You will probably not be surprised by the results or by the recommendations for writing effective opinions. Nothing in here will be radically new. My testing confirms what judges and lawyers should have long known but don't regularly practice: if you care to write better opinions (or letters or memos or briefs), then make them straightforward and lean.

Method of Testing

The method was simple: ask lawyers to read two versions of the same opinion, decide which one they like better, and give the reasons why.

So I started by taking a volume of the *Michigan Appeals Reports* from the shelf, and I spent maybe 10 or 15 minutes picking an opinion. I had only three criteria. First, it had to be fairly short so that readers would take the time to read the two versions. Second, it had to deal with an uncontroversial subject. I picked a case involving insurance coverage. Pretty bland, but I did not want readers to be distracted by impressions of how the case should have been decided. Third, the writing had to be fairly typical. I did not try to find a

case that I thought was quite badly written. Of course, that would have skewed the results, and readers and reviewers would have seen through that game easily enough. You can be the judge of whether the writing in the opinion seems about average for most of the opinions you read.

The case is *Wills v State Farm Insurance Co.*² It seems that Robert Wills was driving along one day, minding his own business, when another car pulled alongside him in the passing lane, fired shots toward his car, and kept right on cruising down the road, never to be seen again. Wills wanted to collect uninsured-motorist benefits. To collect under his policy, he needed to show that the other car had "struck" his car.

I revised the published opinion, did pilot-testing on third-year law students, and then randomly mailed the original and revised versions to 700 Michigan lawyers. Actually, I sent them out in two mailings and tinkered a little with the revised opinion between mailings. But the tinkering made almost no difference in the results. I labeled one opinion O (my own clever code for "original") and the other opinion X (first mailing) or Y (second mailing). For simplicity, I'll just call the revised opinion the Y opinion.

I had someone else sign the cover letter, since Michigan lawyers might recognize me

"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee. We seek to improve the clarity of legal writing and the public opinion of lawyers by eliminating legalese. Want to contribute a plain-English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901, or at kimblej@cooley.edu. For more information about plain English, see our website—www.michbar.org/generalinfo/plainenglish/.

as the editor of the "Plain Language" column in the *Michigan Bar Journal*. Along with the cover letter and two opinions, I included a one-page sheet called "Questions About the Opinions." Readers were asked which opinion they liked better, how they rated the two opinions on a 1-to-10 scale, and the top two reasons why they liked the one better than the other.

Readers who liked the O version better had these reasons to choose from:

- It's more traditional.
- It's better organized.
- It cites more cases, so it will be more helpful for research.
- The other opinion leaves out important details.
- Other reason: _____

Readers who liked the Y version better had these reasons to choose from:

- It has a summary at the beginning.
- It uses headings.
- It's better organized.
- It leaves out a lot of unnecessary detail.
- Other reason: _____

I tried hard to identify what I thought the most likely reasons would be and to state them dispassionately. I also asked trusted colleagues to look them over.

In Appendix A [not included in this excerpt], you'll find the complete package that readers received. There was just one variable. I thought that it might make a difference which opinion the readers looked over first, so in half the packages the O opinion appeared first, and in the other half the Y opinion appeared first. If the O opinion came first, then the O opinion came first in the choices on the "Questions" page. And I just reversed it if the Y opinion came first.

Of the 700 lawyers who received the package, 251 responded by returning the “Questions” page. I considered that a good response, since they had to read seven pages of opinions and then answer the questions.

The results, as I said, were no surprise: readers strongly preferred the revised version. I’ll dissect the results in a moment, but first let me put them alongside some other testing of legal and official writing.

Previous Studies— Mine and Others’

This testing of opinions was my fourth round of testing.

First, a colleague and I prepared a study that was eventually conducted in four states. We asked readers to check off their preference for the A or B version of six different paragraphs from various legal documents. One version of each paragraph was in plain language and the other in traditional legal style—although they were not identified that way, but only as A and B. Altogether, 1,462 judges and lawyers responded, and in all four states they preferred the plain-language versions by margins running from 80% to 86%.³

Second, I tested a contract used by a Michigan state agency. I tested it on the agency staff and on law students. Half got the original contract, half got the plain-language version, and they all got the same questions to answer. The agency staff was 45% more accurate and 16% faster using the plain-language version. The law students were 23% more accurate and 20% faster.⁴

Third, I tested a South African statute that two colleagues and I had redrafted as part of a demonstration project for that country’s new Ministry of Justice. I tested it on law students and on a law-school staff. The law students were 17% more accurate and 5% faster using the redrafted version, and they rated it 41% easier to use. The law-school staff was 21% more accurate and 9% faster, and they rated it 26% easier to use.⁵

I summarized these three studies—along with dozens more—in *Answering the Critics of Plain Language* and *Writing for Dollars, Writing to Please*, which appeared in Volumes 5 and 6 of *The Scribes Journal of Legal Writing*. Once and for all, the weight of all these studies should put to rest the terrible, stub-

born myths about plain language—that it dumbs down the language, that it involves a few limited guidelines (use short sentences, the active voice, and simple words), that legal readers won’t like it, that it’s not accurate or precise, that it’s a matter of personal style and does not entail any larger public benefit, and that there’s no evidence it works. Here’s what I said at the end of *Writing for Dollars, Writing to Please*: “There is now compelling evidence that plain language saves money and pleases readers: it is much more likely to be read and understood and heeded—in much less time. It could even help to restore faith in public institutions.”⁶

Results of the Opinion-Testing

Out of the 251 lawyers who responded to my mailing, 98, or 39%, preferred the original opinion; 153, or 61%, preferred the revised opinion.

Readers rated the original opinion at an average of 6 on a 1-to-10 scale; they rated the revised opinion at 7. Given the strong preference for the revised opinion, I was a little surprised at those two numbers. Then again, the number for the original opinion seems to confirm that I succeeded in choosing one that’s about par for the course. Also, because I was concerned about the amount of reading required, I shortened the original opinion by omitting 500 words of unnecessary detail even before I sent it out. So readers were already seeing a somewhat improved version of the original.

Finally, readers were asked to mark the top two reasons for their preference. Those results appear below. Each number shows how many readers marked that reason as their first or second reason. (The numbers do not add up perfectly because some readers did not follow the instructions.) For readers who liked the O (original) opinion better:

It’s more traditional.	9
It’s better organized.	52
It cites more cases, so it will be more helpful for research.	53
The other opinion leaves out important details.	43
Other reason: better analysis (most common “other reason”).	34

For readers who liked the Y (revised) opinion better:

It has a summary at the beginning.	77
It uses headings.	37
It’s better organized.	72
It leaves out a lot of unnecessary detail.	84
Other reasons: clearer, easier to read, more succinct, in plain English, not so much legalese.	34

Although both of these distributions are fairly even, two things seem noteworthy. First and foremost, readers who preferred the revised opinion gave the greatest weight to leaving out unnecessary detail. And since that reason overlapped with many of the “other reasons” those readers gave (more succinct, in plain English, and so on), the exceptional importance of conciseness becomes even more exceptional.⁷ Second, readers greatly value a good summary at the beginning of an opinion, and judges should take pains to provide one. Let’s hope these two lessons, at least, are reflected in every opinion from now on. That would be almost revolutionary. ♦

I examine the differences between the original and revised opinions in the rest of the essay.

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FOOTNOTES

- Ruggero J. Aldisert, *Opinion Writing* (1990); Appellate Judges Conference, American Bar Assn., *Judicial Opinion Writing Manual* (1991); Joyce J. George, *Judicial Opinion Writing Handbook* (4th ed 2000); Robert A. Leflar, *Appellate Judicial Opinions* (1974); see also Federal Judicial Center, *Judicial Writing Manual* (1991).
- 564 NW2d 488 (Mich App 1997).
- Strike Three for Legalese*, this book at 3, 13 (article originally published in 69 Mich B J 418 (May 1990)).
- Answering the Critics of Plain Language*, 5 Scribes J Legal Writing 51, 69–70, 83–85 (1994–1995).
- Id. at 69, 71.
- 6 Scribes J Legal Writing 1, 37 (1996–1997).
- See Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 Legal Writing: J Legal Writing Inst 257, 279 (2002) (noting, in a survey of federal judges about lawyers’ briefs, a “strong, recurring, and unmistakable cry for conciseness and clarity”—qualities that judges ought to strive for in their own writing as well).