

There Must Be a Pony in Here Somewhere

By T. Selden Edgerton ©

The following conversation between two partners, Winfield and Jenkins, was recently overheard in the halls of a large metropolitan law firm.

"WHY is Selden writing all these articles?" demanded Winfield.

"The simple answer is that Seldy is an eternal optimist," replied Jenkins. "And to explain this I must tell you a little story."

A Nursery Story

Seldy has been an optimist ever since one day long ago when he was in nursery school. A school psychologist set up an experiment to test for pessimistic attitudes versus optimistic attitudes in the pupils. The psychologist set up 15 electric train sets in one room. A student named Johnny was led into the room and just stood there. When the psychologist asked Johnny why he didn't play with the trains, Johnny replied, "Aw, they're probably broken." The psychologist labeled Johnny a pessimist.

In a second room the psychologist placed a shovel and a huge pile of horse manure. When Seldy was led into this room he grabbed the shovel, ran to the pile and began to dig into the pile furiously. When the psychologist asked what he was doing Seldy replied, "I know it looks bad, smells bad and feels bad, but there must be a pony in here somewhere." That is what Seldy has been doing all his life — looking for a pony in the language of the law.

An Experiment

"But WHY," continued Winfield, "is he writing the articles this way? He's now written four articles in which he's tried to make a complete mockery

out of legalese. He's appeared with a paper bag, a surgical mask, a pile of paper and a blanket over his head. What is he trying to accomplish?"

Jenkins explained, "For many years lawyers have written article after article after article on clear writing in the law. And many lawyers haven't paid any attention. Every once in a while some small, tired, bored voice would yawn and mumble that the articles were all a rehash of the same old dull stuff.

Seldy figured it was time for a new idea, a change of pace, an experiment. He wanted to catch people's attention. He wanted to ram a red hot fireplace poker all the way up their throats and get them to giggle while he was doing it. He wanted to break the inertia of legalese. Whether they love him or hate him, he wants them to read him — to turn straight to the Plain Language column when they pick up the *Michigan Bar Journal*.

He provides something for everyone. For people who advocate plain English he mentions all the legal writing now in plain English. For the cheap-shot artists who hate plain English he purposely includes some mistakes for them to find when they scour his articles for insignificant errors in grammar, plain English or fact.

"I don't know," said Winfield, "it sounds risky to me. You remember that John Kenneth Galbraith observation:

"Complexity and obscurity have professional value — they are the academic equivalents of apprenticeship rules in the building trades. They exclude the outsider, keep down the competition, preserve the image of a privileged or priestly class. The man who makes things clear is a scab. He is criticized less for his clarity than for his treachery."



T. Selden Edgerton with the cowboy hat and kerchief he will wear when he rides the pony he eventually hopes to find in the language of the law.

A lot of lawyers probably would like to see Seldy not with a paper bag over his head, but with a rope around his neck.

The Big Point

"That's where you're so very wrong," corrected Jenkins. "That's the big point that Seldy is trying to make. It's not many lawyers, it's just some lawyers, the bad lawyers. And they are a dwindling minority of lawyers.

Let's analyze this step by step. First, the general public has always wanted plain English in the law. That means about 230 million people in the U.S. who support what Seldy is trying to do.

Second, there are about 600,000 lawyers in the U.S., 24,081 of them in Michigan. The key fact is that the lawyers' leadership supports the plain English movement in the law. The American Bar Association supports plain English. Every legal writing textbook and legal writing instructor in

every law school in the U.S. supports plain English. In Michigan, George Roumell, Jr., President of the State Bar of Michigan supports plain English. And the Michigan State Court Administrator's Office supports plain English.

Third, in the last 10 years many legal documents have been rewritten in plain English. The best examples are insurance policies. Most are now written in plain English.

Fourth, the last step is to break the inertia surrounding legalese. The few remaining lawyers who love legalese are like trees — no matter how good your logic or how long you talk to a tree, the tree doesn't seem to change.

The Battle Plan

Here's how Seldy figures it has to be done. The lawyers who love legalese will scour the earth for any argument, however irrational, to defend legalese. Seldy wants to hit hard on the items of legalese that really can't be defended. There are four of these: 1)

legal size (8½ x 13 or 14 inch) paper; 2) obsolete formalisms such as "SS"; 3) Old English words, such as "hereby"; and 4) redundant phrases such as "fit and proper." The first item is non-standard size paper and the last three items are unnecessary words.

It's impossible for lawyers who love legalese to justify their use of these four items. Therefore, Seldy's definition of legalese is these four items and only these four items. Plain English in the law simply means to get rid of these four items which Seldy defines as legalese.

You may have noticed that each of Seldy's first four articles is devoted to one of these four items. If the plain English advocates keep focusing the attack on these four items, the bad lawyers can't defend themselves — they're caught between a rock and a hard place.

They can't trot out their worn-out arguments such as a) you can't legislate plain English; b) legalese is ►



precise; c) legalese is supported by case precedent; d) some subjects are so complicated that they can't be expressed in plain English; and e) terms of art can't be replaced by any other words. These arguments are no good because they don't apply to legalese if legalese is defined as Seldy's Items 1 through 4.

Legal Writing v General Writing

"But what about other things," asked Winfield. "What about avoiding long sentences, use of the passive voice and use of the third person?"

"These items," replied Jenkins, "are characteristics of poor writing in general, not just poor legal writing. Poor legal writers are even worse than poor general writers, because in addition to all the latter faults, poor legal writers add Items 1 through 4. If you can get a poor legal writer to eliminate Items 1 through 4, you will elevate the

poor legal writer to the same level of incompetence as the poor general writer. As the mathematicians say, you reduce the problem to a previous case. And the previous case is how to get the general writer to write better. That's a problem for everyone, not just lawyers.

Once Items 1 through 4 are eliminated you can then focus on the specifics of poor writing in general. The main items are long sentences, non-action verbs, passive voice, negative form, use of third person, noun strings, non-parallel construction, separation of related words and unnecessary words.

But I repeat. These general items do not enjoy universal agreement. If you include them in your definition of legalese you give the bad lawyers who love legalese enough arguments to stonewall plain English forever. The

discussion gets so complicated and people get so confused that nothing ever gets done.

"But not everyone in the plain English movement agrees with Seldy that you should restrict your efforts to only Items 1 through 4," said Winfield. "Many plain English advocates talk about all the items of clear writing."

"No problem with that," countered Jenkins. "The more people who advocate all the items of clear English the better. The two approaches can work together. It's just that a breakthrough can be made by advocating Items 1 through 4 at the same time that others are advocating all the elements of good English."

The Last Straw

"But will Seldy's plan really do any good?" asked Winfield. "Even if the bad lawyers read these articles, aren't they just going to continue to do as they please?"

"Maybe," said Jenkins. "But remember, the timing is just right. Instead of 10,000 lawyers in Michigan there are now 24,081. It's not the closed club it once was. Like the original 10,000, the new 14,081 also know there's no reason to continue legalese. Many insurance companies, state agencies and others are rewriting their documents in plain English. Plain English now has more support than Dolly Parton. However, some lawyers, the bad lawyers, still stubbornly resist. And Seldy realizes that you can lead a horse to water but you can't make a donkey drink. But if Seldy is right, this "mock-the-hell-out-of-the-few-bad-lawyers-who-still-stubbornly-insist-on-using-legalese" approach just might be one of the straws that breaks the donkey's back. ■

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"Plain Language" is a regular feature of the Michigan Bar Journal, edited by George H. Hathaway, Chairperson of the State Bar Plain English Committee. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a Plain English article? Contact Mr. Hathaway at The Detroit Edison Co., Room 688 WCB, 2000 Second Ave., Detroit, MI 48226.

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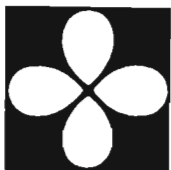
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