

Survey: Plain English Wins Every Which Way[©]

By Steve Harrington and Joseph Kimble

The vote is in. And judges and lawyers in Michigan have left no doubt that they prefer plain English over traditional legal style. Moreover, they prefer it decisively and in every context.

Survey Method

The survey was simply titled "Legal Language Survey." It was mailed in late April, 1987 to a random sample of 300 Michigan judges and 500 attorneys. The sample was selected from directories of the State Bar of Michigan and the Michigan Supreme Court, using random number tables.

The sample size was determined by size of the population, expected response from a single mailing, and the response necessary to yield a maximum standard error in a credible range. We used a large sample size and fairly small maximum standard error to ensure accuracy and credibility.

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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.

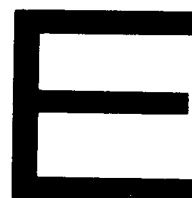
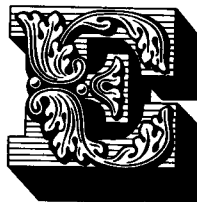
The overall response rate was 53 percent — enough to draw valid conclusions about attitudes toward plain English. Specifically, 180 judges (60

percent) and 245 lawyers (49 percent) responded. Those results yielded a maximum standard error of plus or minus 3.0 percent and 3.2 percent. The maximum standard error was calculated by using the variance of proportion formula.

Questions were carefully drafted to avoid bias and the words "plain English" did not appear in the survey or in an accompanying letter of introduction. The letter introduced the survey as part of a student research project.

Readers were simply asked to mark their preference between six pairs of legal passages covering a range of contexts. Buff-colored, 8½ x 11 inch paper was used to catch the eye, and the survey was printed on two sides of a single sheet for convenient handling and mailing. A self-addressed, stamped envelope was enclosed with each survey.

Each of the six pairs of questions was designed to test for particular aspects of plain English: 1) wordy, obsolete formalisms v concise, direct language, 2) inflated, archaic diction v simple words; use of first person; abstract nouns v action verbs, 3) long sentences with intrusions between subject and verb v short sentences without intrusions; abstract nouns v verbal forms, 4) long sentences with redundant phrases v short sentences; use of second person, 5) negative form v pos-



itive form; passive voice v active voice; abstract nouns v action verbs; and 6) choppy, intrusive phrases v if-then form.

The Survey

The questions were presented exactly as in the box on the opposite page:

The plain English passages are B, A, B, B, A and A. Some of the choices are a little more subtle than the others. The results were nevertheless consistent; readers can recognize plain English even when it doesn't jump off the page.

What Does It Mean?

This column has suggested more than once that it's pointless to argue about plain English in the abstract. Given two passages, we naturally prefer the greater clarity and readability of the plain English version. As readers we prefer it, if we're objective and honest. This survey confirms that.

Hence the moral imperative for writers: Write as you would want to read. The Golden Rule is as appropriate here as elsewhere: Do unto others. . . .

Nor is there any apparent reason to think the results would vary greatly across the country. To some extent, the decisive results here may reflect the influence of this column, which has been widely read and cited but primarily has a Michigan audience. Yet in the only other formal study we know of (Benson and Kessler), ten California justices and a group of

research attorneys, looking at two passages from appellate briefs, rated plain English versions to be significantly more persuasive and credible. Different place, somewhat different focus, same winner.

Our survey was prompted by repeated comments from law students that plain English would not be accepted by judges and established law firms. That apprehension can be laid to rest, at least as far as judges go.

Note that judges voted even more strongly than lawyers for plain English — 85 percent to 80. In addition, judges were more likely to respond (60 percent to 49) and almost twice as likely to add comments or editing (12.8 percent to 7.3). Finally, the judges' responses showed the greatest disparity from the lawyers' (84 percent to 71) on question 1, which involved perhaps the most traditional of all pleading language, the dreaded "Now comes so-and-so."

Let's give it up, and with it the notion that judges and fellow lawyers appreciate the old style and aren't ready for plain English. Nobody likes it including, we suggest, most clients. Suppose we gave questions 2, 4, and 5 to a random sample of the public. Who will bet that the results would be much different? Clients may tolerate legalese, but it must bemuse and annoy those who are minded to think about it.

If all that's true, there remains an overwhelming question: Why do so many lawyers continue to write in the old style? Why does it persist? The usual answers are habit, inertia, apprehension, use of forms, and so on. True enough, but another, overlooked reason may run deeper. Why don't more lawyers write in plain English? They *don't know how*.

We're serious. Plain English is not child's play. It only *looks* easy. Of course some of the principles are obvious — eliminating obsolete formalisms, for instance (that's why it's ironic that 21 percent of lawyers still resist taking the easy first step, as represented by question 1). But plain English also involves a collection of principles, guidelines, techniques that have to be learned and practiced.

Think back to your law school writing courses. You may have been instructed in how to analyze and apply law, but probably not so much in how to write clearly and simply. ►

Legal Language Survey

Below are paragraphs taken from legal documents. Please mark your preference for paragraphs A or B in the space provided.

A [] Now comes the above named John Smith, plaintiff herein, by and through Darrow & Holmes, his attorneys of record, and shows unto this Honorable Court as follows:

B [] For his complaint, the plaintiff says:

A [] I received a completed copy of this note and disclosure statement before I signed the note.
Date _____

B [] Maker(s) hereby acknowledge receipt of a completely filled in copy of this note, and disclosure statement prior to execution hereof this ___ day of ___, 19___.

A [] Petitioner's argument that exclusion of the press from the trial and subsequent denial of access to the trial transcripts is, in effect, a prior restraint is contrary to the facts.

B [] Petitioner argued that excluding the press from the trial and later denying access to the trial transcripts is a prior restraint. The argument is contrary to the facts.

A [] One test that is helpful in determining whether or not a person was negligent is to ask and answer whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he would have foreseen or anticipated that someone might have been injured by or as a result of his action or inaction. If such a result from certain conduct would be foreseeable

by a person of ordinary prudence with like knowledge and in like situation, and if the conduct reasonably could be avoided, then not to avoid it would be negligence.

B [] To decide whether the defendant was negligent, there is a test you can use. Consider how a reasonably careful person would have acted in the same situation. To find the defendant negligent, you would have to answer "yes" to the following two questions:

- 1) Would a reasonably careful person have realized in advance that someone might be injured as a result of the defendant's conduct?
- 2) Could a reasonably careful person have avoided behaving as the defendant did?

If your answer to both of these questions is "yes," then the defendant was negligent. You can use the same test in deciding whether the plaintiff was negligent.

A [] The company will pay benefits only if the insured notifies the company of the loss.

B [] Payment of benefits will not be made by the company if the insured fails to provide notification of the loss.

A [] If attorneys want to comment on the proposed change in court procedures, they may send comments in writing to the Clerk, 233 Main St., Gotham City, by Feb. 20, 1987.

B [] Interested attorneys may, on or before Feb. 20, 1987, submit to the Clerk, 233 Main St., Gotham City, written comments regarding the proposed change in court procedures.

Although this may be changing as law schools have moved to strengthen their writing programs, the lessons learned are too-easily forgotten. Protecting your writing from law practice is a life-long assignment.

The literature on writing these days contains much about the process of writing and about rhetorical factors such as audience, purpose, and tone. Most writing programs have not caught up with this new learning. Nor have they successfully taught the elements of clarity and simplicity: logical organization; sentence construction, including order and placement of words for accuracy and right emphasis; choice of words; concision; and linking between sentences and paragraphs. Nor have most schools made a serious effort to teach the most difficult and intellectually liberating form of legal writing, which is legal drafting.

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All this suggests the need to train — or retrain — lawyers. Do we dare mention continuing legal education? It's hard to think of a better application.

All this suggests, too, a conceivable argument against plain English statutes, but one that doesn't outweigh their incentives and potential benefits. The statutes seem to assume that we can all produce plain English on demand. Again, not so. But we can decently learn how, given the right attitude and some practice.

Remember: It has to be worked for.

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Judges			
Question	1	2	3
plain English	151 (84%)	157 (87%)	165 (92%)
legalese	26 (14%)	22 (12%)	11 (6%)
no response	3 (2%)	1 (1%)	4 (2%)
Question	4	5	6
plain English	166 (92%)	134 (74%)	143 (79%)
legalese	10 (6%)	43 (24%)	30 (17%)
no response	4 (2%)	3 (2%)	7 (4%)
Total number of plain English responses on all questions: 916			
Total number of legalese responses on all questions: 142			
Total number of no responses on all questions: 22			
Percent of plain English responses on all questions: 85%			
Percent of legalese responses on all questions: 13%			
Percent of no responses on all questions: 2%			

Lawyers			
Question	1	2	3
plain English	174 (71%)	189 (77%)	222 (91%)
legalese	69 (28%)	54 (22%)	22 (9%)
no response	2 (1%)	2 (1%)	1 (.4%)
Question	4	5	6
plain English	223 (91%)	186 (76%)	186 (76%)
legalese	17 (7%)	58 (24%)	54 (22%)
no response	5 (2%)	1 (.4%)	5 (2%)
Total number of plain English responses on all questions: 1180			
Total number of legalese responses on all questions: 274			
Total number of no responses on all questions: 16			
Percent of plain English responses on all questions: 80%			
Percent of legalese responses on all questions: 19%			
Percent of no responses on all questions: 1%			