

## Results of the "Too Complex for Plain English" Search

By George Hathaway

In the June 1989 Plain Language Column we asked readers if they thought there were some legal topics that were "too complex" for plain English. If they did, we asked them to send in an example sentence from one of these topics. We received 40 responses. Thirty-four people (85% of the responses) said they thought no topic was too complex for plain English. Four people (10%) submitted example sentences that purportedly were too complex for plain English. However, as discussed below, they weren't. Finally, two people (5%) wrote long comment letters but did not submit example sentences. Therefore, our search failed to uncover a legal topic "too complex for plain English."<sup>1</sup>

### No Topic Too Complex for Plain English

The 34 people who agreed that no topic was too complex for plain English included a federal judge, an assistant attorney general, a law school professor, a corporate counsel, and a title insurance attorney. Many of the 34 responses simply checked the box corresponding to no legal topic is too complex for plain English. But some also commented "I agree with your position," or "I enjoyed your article," or "I think your article is great," or "I really enjoy your column. I use many of your suggestions in my own writing. Thanks," or "Keep up the good work... the job you do is worth doing." Two said "I love your column," and two others said "Keep up the good work."

### Declaration of Independence Quote

The first example sentence that purportedly was too complex for plain English was from the Declaration of Independence:

*"Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed."*

My reply is that this is written in plain English. (As for "hath shewn," I'm sure that Jefferson would have used "has shown" if he were writing today.) Therefore, the sentence is not too complex for plain English. The problem is that the submitter probably assumed that "plain English" means Dick and Jane language. It doesn't. It means clear and direct writing. It means writing like Strunk and White recommend in "The Elements of Style"—a book, like the Bible, that most people highly praise, rarely read, and never follow.

### Patent Claim

The second example sentence was a 259-word patent claim. The submitter said "It is the policy of the U.S. Patent Office to insist that all patent claims be presented as single sentences. It is impossible to draft single sentence patent claims without violating many parts of your definition of plain English."

My reply is that the patent claim, like the Declaration of Independence

quote, is written in plain English. The first concern was the 259 words in the sentence. This, of course, is an exaggeration required by the Patent Office. But plain English doesn't require every sentence to be 25 words or less. It simply requires a rule of reasonableness that the average sentence length be relatively short. The entire patent application, considered as a whole, satisfied this requirement. And as for "violating many parts of my definition of plain English"—there were no violations. Most of the verbs were strong active verbs (e.g., I claim). The sentence was written in positive, parallel form. And there were no obsolete formalisms, old English words, redundant phrases, word clusters, or unnecessarily long words.

### Trust Clause

The third example sentence was a 130-word sentence from a trust.

*If Settlor's spouse shall survive the Settlor, then as soon after the death of the Settlor as the Successor Trustees determine to be practicable, the Successor Trustees shall set aside in a separate trust to be known as the Marital Trust, to be held, administered and disposed of in accordance with the provisions of Paragraph Four hereof, that additional amount, if any, when taken*

"Plain Language" is a regular feature of the **Michigan Bar Journal**, edited by Joseph Kimble for the State Bar Plain English Committee. Assistant editor is George H. Hathaway. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a plain English article? Contact Prof. Kimble at Cooley Law School, P.O. Box 13038, Lansing, MI 48901.

together with all other deductions allowed in computing the Settlor's taxable estate, necessary to reduce the Settlor's taxable estate for purposes of the federal estate tax to the largest amount which, after the appropriate credit for state death taxes paid and after giving effect to the unified credit available to the Settlor's estate, will produce a federal estate tax payable to the United States of zero.

The submitter said, "This is as clear as marital deduction language gets in estate planning, but it hardly qualifies as plain English. Can you improve upon it? Shorter sentences might help."

My reply is I agree, shorter sentences will help. For a first step, try separating the 130-word sentence into the following 26, 20, and 73-word sentences (total of 119 words):

*If Settlor's spouse survives the Settlor, the Successor Trustees shall establish a separate trust ("Marital Trust") to be held, administered, and disposed of under Paragraph 4 above. The Successor Trustees shall establish the Marital Trust as soon after the death of the Settlor as they determine is possible. The Marital Trust shall consist of that additional amount, if any, when taken together with all other deductions allowed in computing the Settlor's taxable estate, necessary to reduce the Settlor's taxable estate for purposes of the federal estate tax to the largest amount which, after the appropriate credit for state death taxes paid and after giving effect to the unified credit available to the Settlor's estate, will produce a federal estate tax of zero.*

The last of these three sentences is 73 words long and still fairly difficult to understand. Therefore, as a second step, one possibility may be to rewrite the 73-word sentence in the following 49-word sentence:

*The Marital Trust shall consist of the additional amount, if any, which, when taken with all other deductions allowed in computing Settlor's taxable estate, will reduce Settlor's taxable estate to the largest amount that, after state death tax and unified credits, will produce a federal estate tax of zero.*

Then, as a third step, one possibility may be to rewrite the 49-word sentence in the following 31-word sentence:

*The amount of the marital trust shall be the smallest amount required to reduce Settlor's federal estate tax to zero, considering all other deductions, unified credits, and state death tax credit.*

Writing clear trust documents is hard. It should be done only by probate attorneys who know what they are doing. And since I'm not a probate attorney, some of them may disagree with my revisions. But my point is that a probate attorney who was interested in plain English could write trust clauses in plain English.

### Second Amendment

The fourth, and last, sentence that purportedly was too complex for plain English was the second amendment to the United States Constitution, the right to bear arms of the bill of rights:

*A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*

The submitter said, "The United States Constitution Second Amendment Bill of Rights was put into plain English obscuring the RIGHT as an option whether to bear arms or not; so the USSC has largely avoided citing it: The plain English rule requiring dependent relative clauses to come first in the sentence allows the militia clause to obscure the basic right as an option like all the other rights of the Bill of Rights. Put it back in legal English and the Selective Service Act becomes Unconstitutional: The right of the people to keep and bear arms (or not) shall not be infringed, a well regulated militia being necessary to the security of a free State."

My reply is that the second amendment is written in plain English. And even though I disagree with the submitter's logic and definition of plain English, I thank him for participating in this survey.

### Bruno Letter

The first letter I got was from Jim Bruno, who wrote:

*Your article misses the point of those who tell you plain English is not effective in many areas of the law. Of course, every sentence can be broken down into shorter sentences or otherwise modified to meet your definition of plain English. Also, every complex legal phrase can be explained. The problem is that plain English is not always effective or efficient in legal writing. You say that plain English includes "true legal terms of art," but that is begging the question.*

*Many legal fields, such as tax, are too complex to use simple everyday words. There are so many concepts such as "adjusted basis" or "accumulated earnings and profits" which cannot be explained every time they are used. The reader of a tax article must be assumed to have knowledge of those*



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technical terms. Even letters to clients will use those terms. The degree to which everyday language is used (even with clients) depends in part on the knowledge of the reader and the importance of a particular part of the communications. For example, in letters to clients the explanation of a result may properly include a number of words or phrases which would not be considered "plain," but the result itself should be expressed in layman's terms.

I believe that when lawyers tell you that plain English is not appropriate for some topics they are not referring to the 10 commandments you preach. They are referring to the need for a great number of the "true legal terms of art" you would permit. . .

### Reply to Bruno Letter

I agree that some lawyers don't realize that "plain English" includes true legal terms of art. (Furthermore, since you draw a difference between technical terms of art and legal terms of art, I consider "plain English" to include all terms of art regardless of whether they are technical or legal.) However, 85% of the responses to the survey article correctly understood the definition of plain English and agreed that no topic was too complex for plain English. Furthermore, the 10% of the responses that submitted sentences purportedly too complex for plain English based their belief on reasons other than terms of art. Therefore, this survey indicates that at least 95% of the lawyers who responded realize that plain English includes terms of art.

### Ziembra Letter

The second letter was from Carl Ziembra, who wrote the following to the *Michigan Bar Journal*:

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*George H. Hathaway is a staff attorney at the Detroit Edison Company and the chairperson of the Plain Language Committee of the State Bar of Michigan. He received his law degree from the University of Detroit School of Law.*

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The more strictures I read of Mr. George H. Hathaway on the subject of "plain English" the greater my unease that his true objective is other than that implied in the phrase. Everything that Mr. Hathaway deems desirable—the elimination of archaisms, euphuism and pleonasm from legal writing—can be achieved by exhorting lawyers to write good English. Writing good English automatically results in the elimination of those sins of rhetoric against which Mr. Hathaway rightfully rails and at the same time happily preserves the possibility of the author's yielding up pleasant dividends of attractive and interesting style. Mr. Hathaway, I suspect, is a crypto-high-priest of minimalism in the high arts, a worshipper of the idol "less is more."

It seems that Mr. Hathaway's view of "plain English" entails the elimination of all polysyllabic words and complex sentences and the apotheosis of Ernest Hemingway's style. Most American journalists are in thrall to the Hemingway style with the result that, for me at any rate, *Time*, *Forbes*, etc. and the daily newspapers are unreadable. The minimalist concept reigns—less is more and ornamentation of any kind is ostentatious and superfluous. It is understandable that the mass circulation periodicals strive to achieve higher profits by reaching a wider readership, and this means writing down to the level of the fifth grade dropout.

But, legal writing is done by lawyers and mostly done to be read by lawyers who are, it is to be presumed, educated persons with more than a rudimentary knowledge and grasp of the English language. Documents which concern the person in the street, if that is the term, such as insurance contracts, leases, loan agreements, and so forth, should and must be written with terminology which is understood by one of lower educational achievement, but briefs, judicial opinions, law journal articles, etc. which are intended to be read by other lawyers, should be written in a manner both informative and pleasant to read. This means that the writer of legal material should strive to write in an interesting and attractive style.

When it comes to defining an interesting or attractive style of expression in the English language, the difficulty for me is the same as that encountered by Justice Stewart in connection with a definition of hard core pornography, but to paraphrase Justice Stewart, I know an interesting and attractive style of writing when I read it. Robert Louis Stevenson, Willa Cather, Virginia Wolf (in Orlando), to mention three writers off the top of the head, and any opinion (virtually) by Justices Christiancy, Campbell, Graves, Cooley.

In Mr. Hathaway's articles, I am sad to say, I have not encountered a well-turned phrase, a felicitous expression, a *bon mot*; his style is pedestrian and plodding and studded with awkward sentences such as "My definition of plain English is ten items, five items on sentence (sentence structure) and five items on words (word usage)." It might be rejoined that such writing gets the job done. The sentence "Pass the salt" also very likely gets the job done, but "Perhaps you will permit me to ask you to pass the salt" gets the job done and makes dinner a lot more pleasant.

Sincerely yours, Carl Ziembra

### Reply to Ziembra Letter

I believe that your letter is an excellent example of plain English. The object of the plain English movement is to get all lawyers to write as well as you do. But I disagree with your logic. Plain English doesn't mean that you have to write like Hemingway. Plain English simply means having to write "hereby" and all the other elements of legalese. Therefore, plain English means writing like Hemingway or Orwell or Holmes or Cardozo or any number of other good legal or non-legal writers.

### Footnote

1. A recent search of Loch Ness has also failed to uncover "Nessie," the Loch Ness Monster. And since neither our search nor the Loch Ness search can be considered final, the big question on everyone's mind is...Which elusive monster, if any, is going to be uncovered first—Nessie or Plexie?