Plain English Comes to Court

By Robert W. Benson

If you are one of those lawyers who lament the demise of the Latin Mass and the dry martini, I am afraid there is more bad news in store for you: The plain English and Perrier crowd is coming after you in the courtroom. They want you to change your writing style, in your complaints, your motions, and your briefs.

Out go your *comes now the plaintiff,* your *hereinafter known as,* your *prays this honorable court.* Pure medievalisms, for God's sake! Out go your 100-word sentences, your passive verbs, your double and triple negatives. Embalming fluid for the mind, like your martini! And out go all the rest of the jargon, syntax, and techniques of legalese that you have nurtured over a professional lifetime as carefully as you have nurtured your golf score. Bad habits, all of them! From now on, your prose must run clear and clean and lively like a line of Hemingway or a glass of sparkling water.

I am not talking here about the way you draft your loan notes, leases, and forms for the installment purchase of major appliances like Sony CDP302 compact disc players. No doubt you already know that in Connecticut, Hawaii, Minnesota, Montana, New Jersey, New York, and West Virginia it is actually illegal to use legal gobbledygook in these and virtually all other contracts intended for average consumers. And if you practice law elsewhere, a bill to require plain English in consumer contracts is probably pending in your state legislature.

You are also aware that nearly half the states require that insurance policies be written in lucid language that is intelligible to Harry Homeowner. Indeed, the illuminati of the National Association of Insurance Commissioners have elevated plain English to an official article of faith.

If you work with bureaucratic regulations, you have watched in silence as legalese has been consigned to government paper shredders from New York to California, Arkansas to Oregon, Montgomery County, Maryland, to the City of Los Angeles, and in dozens of federal agencies. Even the crusty National Labor Relations Board has issued a new style manual whose goal is unabashedly "to eliminate legalese."

You have noted all this and more. You have worried about malpractice for failure to pick out the plain English requirements buried in the federal Truth-in-Lending Act, the Magnuson-Moss Warranty Act, the Employee Retirement Income Security Act of 1974, the Electronic Funds Transfer Act, the Civil Rights Act of 1964, the Uniform Commercial Credit Code, and other statutes, as well as in the cases on adhesion contracts, due process notice, jury instructions, and informed consent.

So grudgingly, you have accommodated your law practice to the new legal landscape that the plain English movement has shaped. You have learned the differences between gobbledygook and clarity, figured out how readability formulas work, and changed some of your boilerplate forms. And you have laid in a shelf of how-to-do-it books like Richard C. Wydick's *Plain English for Lawyers,* Rudolf Flesch's *How to Write Plain English,* Ronald L. Goldfarb and James C. Raymond's *Clear Understandings,* Veda R. Charrow and Myra K. Erhardt's *Clear & Effective Legal Writing,* and Carl Felsenfeld and Alan Siegel's *Writing Contracts in Plain English* and *Simplified Consumer Loan Forms.*

This, alas, is not enough. Next come the papers you file in court.

Admittedly, this is paring your lawyerly soul pretty close to the core. It is one thing to be forced to write ordinary English for the benefit of folks who could not otherwise understand their legal rights. But court papers are rarely read by anyone except judges and other lawyers—members of the club all, and fully baptized in the customs of its jargon. Understandably, you resist.

You writhe furiously, like a bull caught in a barbed wire fence. Or you seethe in quiet indignation. Your jowls puff, your pen spurts out *aforesaid hereinafter knowns,* you slap down your pleadings for filing, and you snort to your bartender, "The usual, straight up."

This is not healthy for you. Relax. Adjust to the new regimen. The truth is, styles change and your dated writing style is hurting you in court.

"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.*

Once an instrument of power, legalese no longer carries clout. It is considered a limp club, or worse: A pathetic attempt to display the accoutrements of classy breeding, like wearing a fedora or spats. Once an instrument of meticulous administration of the courts, legalese in court papers today is a symbol of red tape and inefficiency. The judges who know about good writing suspect that beneath your legalese lurks linguistic, and perhaps legal, incompetence.

Last year, at the California Court of Appeal in Los Angeles, my colleague Joan Kessler and I gathered evidence of the judges' reactions to legalese. Kessler was a university professor of communications and is now a lawyer. At the time of the study, she was an intern at the Court of Appeal.

We surveyed about one-third of the justices (10 out of 33) and about half (33 out of 65) of the research attorneys who help them analyze the briefs. The relish with which many of them told stories about lawyers' bad writing was interesting in itself. But it is the empirical data that should cause the scales to fall from your eyes.

We took portions of two pleadings in legalese that had actually been filed in California courts. Then we rewrote them into plain English. We showed the passages to the judges and research attorneys, and we asked a lot of questions.

The first sample of legalese was the headnote from a brief. It read:

> *The trial court erred in giving flawed essential elements instructions to the jury and thereby denied the defendant due process and fundamental fairness since it is error to give the jury, within the essential elements instructions, one statement containing more than one essential element of the crime and requiring the jury simple and singular assent or denial of that compound proposition, fully capable of disjunctive answer, which if found pursuant to the evidence adduced would exculpate the defendant.*

Here is how we rewrote it in plain English:

> *The trial judge erred by instructing the jury to affirm or deny a single statement that contained more than one essential element of the crime. By combining all of the major elements, the court denied the defendant his due process right to be acquitted if found innocent of any one of the elements.*

The second sample of legalese was a paragraph from a petition for rehearing. It read:

> *Needless to say, we disagree with much that is set forth in the Court of Appeal's* Opinion *herein. Nevertheless, the* Petition for Rehearing *is restricted to but a single aspect of the said* Opinion. *This single aspect is the one which pertains to that ratification of an act of his agent which is submitted to flow from the facts as represented by Mr. Jones to the Superior Court* (Opinion: *page 4, line 2 to page 5, line 2, page 11, line 7 to page 12, line 19). Specifically, we respectfully submit that the Court of Appeal's views relative to the assumed non-existence of such ratification, are predicated upon a factual assumption which is disclosed by the* record *to be* incorrect. *This being so, we submit that the* actual facts, *revealed by the* record, *are such as clearly to entitle us to prevail in respect of the ratification* theory.

We rewrote it to read:

> *Although we disagree with much of the Court of Appeal's opinion, we limit this Petition for Rehearing to a single aspect: the question of whether Mr. Jones ratified the act of his agent. The Court found that he did not (Opinion, pp. 4-5, 11-12). We respectfully submit that this finding was based on a misreading of the facts. The Court assumed facts that were clearly contrary to those in the trial record which pointed to ratification. We are, therefore, entitled to a rehearing.*

We divided the judges and research attorneys into two equal groups, showed one group the legalese segments, and the other group the plain English. Those who read the legalese were quite put off by it.

By large margins, the legalese segments or their writers were labeled "unpersuasive," "ineffective," and "incomprehensible," And—here comes the sting—the judges and their research attorneys inferred that the lawyers who wrote the legalese were "not from a prestigious law firm." In contrast, the plain English versions were well received and their writers did not suffer the stigma of being associated with law firms of low prestige.

You object and move to strike. You point out that our sample passages were very short. Perhaps so, but we ran tests and found that the two groups' different opinions of the legalese and the plain English were what the statisticians call "very significant." In other words, the contrasting evaluations of the two passages did not happen by mere chance. Something caused the difference, and the only likely cause was the difference in writing styles.

This is a reprint of a part of an article in the Fall, 1986 issue of **Litigation** *magazine.*

For further details of the study see ***Legalese v Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing,*** 20 *Loyola of Los Angeles Law Review* 301 (*January* 1987).