Point-Counterpoint

"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/committees/pengcom.html.*

THE WAR AGAINST WORDS—RETHINKING "PLAIN LANGUAGE"

By Barbara H. Goldman

The "plain language" movement began as a laudable campaign to shear legal writing of Latin, legalisms, and redundancy for the benefit of lay users of legal documents.[1] It has degenerated into a verbal witch hunt, a veritable war on words, in which the goal seems to be to skewer every syllable that the plain language police decide should be eliminated. Like the formerly-obese individual who now obsesses over every excess ounce, the proponents of such ultrasimplicity attack harmless phrases in any legal writing with the vigor of Moses crushing the golden calf.[2]

Lawyers, judges, and law clerks, by necessity, are proficient users of written English. For skilled readers, the process of decoding the meaning of letters on a page is psychologically effortless. That is, the reader has no perception that any work is required. An adult must read at least 200 words a minute, in order to comprehend the meaning of the text.[3] Undergraduates' reading rates have been measured at 230–382 words per minute[4] and average reading speeds of 300–350 wpm have been reported.[5] "Fast" readers exceed 450 words a minute.[6] The difference in the time needed to process two words silently as opposed to one,[7] then, is so small that it cannot be measured reliably.

In addition, reading does not happen one word at a time. Rather, the reader's eyes rest for a short time,[8] then jump to another spot on the same line of text.[9] Adult readers make four fixations per second[10] and under normal conditions, the reader takes in 10–15 characters—about three words—at a time.[11] In addition, a skilled reader's eyes will literally jump over function words, such as "the" and "of,"[12] and he or she can anticipate upcoming words based on cues about their length and shape.[13] Highly predictable words are also omitted[14] and word length does not relate to reading speed.[15] Experienced readers also group words into chunks of information, based on their knowledge of what the text is likely to contain.[16]

The time it takes a good reader to comprehend two, three, or even four words in a passage of text, then, is trivial. And when those words compose a familiar phrase, it is indistinguishable from a smaller grouping. In short, we must apply some sense to this subject.

Continued on next page

THE STRUGGLE AGAINST SUSPECT ARGUMENTS

By Joseph Kimble

I'd like to respond not only to Barbara Goldman, but also to the September letter from Cameron Phillips and this month's letter from Thomas Dilley.

Anyone who has followed this column over the last 20 years will know that I have answered these criticisms many times before.[1] This time, I have to do it in an abbreviated way.

First, in answer to the Phillips and Dilley letters:

(1) Mr. Dilley refers to those "engaged in the practice, as opposed to the teaching, of law." I practiced. Mr. Phillips mentioned that he was an "English Comp" major. For me, it was English Lit.

(2) Although I've tried to poke fun at a few words and phrases in the last four columns, I want to remind readers that preferring familiar words (usually the shorter ones) is only one element of plain language—one among dozens that I listed in the October 2002 column. Plain language, rightly understood, involves all the techniques for clear communication: planning a document, designing it, organizing it, constructing sentences, choosing words, and testing mass documents on typical readers. Check the October 2002 column, and I think you'll see that the guidelines are varied and flexible.

(3) For each of the words and phrases in these last four columns, I cited at least five legal-writing experts who recommend against using them. The Phillips and Dilley letters cite no contrary authorities. In fact, they cite no authority at all for any of their arguments. Would they go into court without any authority?

(4) Mr. Dilley refers to "the implicit suggestion that lawyers generally are guilty of willful obfuscation in oral and written presentations." I have never said or implied that. I have said that our linguistic plight is caused by centuries of poor models, bad habits, and inadequate training—not to mention the kind of resistance to change that these two letters reflect.

(5) Mr. Phillips emphasizes the need for "certainty" in legal writing. Likewise, Mr. Dilley refers to the need for "subtle, precise" language. This is the myth of precision—the notion that traditional legal writing is more precise than plain language. That myth has been debunked by our two great scholars of legal language, David

Continued on next page

THE WAR AGAINST WORDS—RETHINKING "PLAIN LANGUAGE"

Continued from page 42

Identifying and eliminating "excess"[17] words from a brief or opinion does not begin to match the savings it is alleged to produce.

By all means, we should advocate for "plain" language in legal writing:

> *Let us eschew the formulaics of our forefathers' generations. "Now comes," "your plaintiff," and "defendant prays" should go the way of the office of chancellor and the equity side of the court.*
>
> *Let us teach our students to avoid archaic usage. "Thereto," "whence," and "hereinbefore" should stop our spell-check programs dead in their digital tracks.*
>
> *Let us be vigilant against resorting to needless Latin.* Arguendo, sub silentio, *and* ex delicto *should remain within the pages of our legal dictionaries.*
>
> *Let us expect our clerks to favor short sentences in active voice and strike unneeded repetitions. "It" need not be "further ordered and adjudged" to be effective.*

But let us not say that three words are always two too many or that short words must be preferred to long ones. Give credit to the reader and freedom to the writer.

Plain English, yes. Pale English, no. ✦

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FOOTNOTES

1. See, generally, 79 Mich Bar J 1, pp 36–38.
2. Exodus 32:20.
3. Smith, *Understanding Reading: A Psycholinguistic Analysis of Reading and Learning to Read* (New York: Holt, Rinehart and Winston, 2nd ed, 1982), p 39.
4. Taylor and Taylor, *The Psychology of Reading* (New York: Academic Press, 1983), p 129.
5. Pollatsek, *Eye Movements in Reading* in Willows, Kruk and Corcos, *Visual Processes in Reading and Reading Disabilities* (Hillsdale, New Jersey: Lawrence Erlbaum Associates, 1993), p 194; Crowder, *The Psychology of Reading: An Introduction* (New York: Oxford University Press, 1982), p 9.
6. Taylor and Taylor, supra at n 4, p 129; Rayner, *Eye Movements and the Perceptual Span in Reading* in Pirozzolo and Wittrock, *Neuropsychological and Cognitive Processes in Reading* (New York: Academic Press, 1981), p 146.
7. "In Terms of *in terms of*," 81 Mich Bar J 11, pp 44–45; "A Pox on *prior to*," 83 Mich Bar J 5, pp 54–55.
8. Two hundred to 400 milliseconds (.002–.004 second). Pollatsek, supra at n 5, p 192.
9. Pollatsek, supra at n 5, p 192.
10. Crowder, supra at n 5, p 8.
11. Pollatsek, supra at n 5, pp 194, 195; Crowder, supra at n 5, p 18.
12. Taylor and Taylor, supra at n 6, p 132; Rayner, supra at n 6, p 146. See also, e.g., Crowder supra at n 5, p 11.
13. See, e.g., Haber and Haber, *Perceptual Processes in Reading: An Analysis-by-Synthesis Model,* in Pirozzolo and Wittrock, supra at n 6, p 186. See also, e.g., Spoehr and Schuberth, *Processing Words in Context* in Tzeng and Singer, Perception of Print: *Reading Research in Experimental Psychology* (Hillsdale, New Jersey: Lawrence Elrbaum Associates, 1981), p 115 (highly skilled readers benefit from context).
14. Pollatsek, supra at n 5, p 195.
15. For example, experiments have found no difference in reading speed between three- and eight-letter words and three- and twelve-letter words. Johnson, *Integration Processes in Word Recognition,* in Tzeng and Singer, supra at n 12, p 53.
16. "[M]ature readers . . . extract information in the largest units of which they are capable and that are suitable to their purposes." Gibson and Levin, *The Psychology of Reading* (Cambridge, Massachusetts: MIT Press, 1975), p 544.
17. "Skimming the Fat Off Your Writing," 82 Mich Bar J 5, pp 32–33; "Some Particularly Useless Words," 82 Mich Bar J 7, pp 56–57; "It Is What It Is," 83 Mich Bar J 5, p 54–55; "Plain Words (Part 1)," 80 Mich Bar J 8, pp 72–74: "Plain Words (Part 2)," 80 Mich Bar J 9, pp 72–73.

THE STRUGGLE AGAINST SUSPECT ARGUMENTS

Continued from page 42

Mellinkoff and Bryan Garner.[2] If anything, the opposite is true because plain language uncovers the ambiguities and errors that traditional style, with all its excesses, tends to hide. I could cite many examples from the major projects to restyle the Federal Rules of Criminal Procedure (completed in 2002) and the Federal Rules of Civil Procedure (in progress).[3]

(6) Mr. Phillips charges that I seem to advocate "the writing style of a fourth grader." Mr. Dilley makes a similar comment about what can be understood by "your average third grader." This is the most stubborn and most profoundly distorted of all the criticisms of plain language. Plain language is, at bottom, about writing clearly and effectively for your intended reader. Have you ever heard anyone object that a piece of legal writing is too clear? Moreover, a clear, plain style—far from being unsophisticated—only *looks* easy; it takes skill and hard work. And it has a long literary tradition. (See the quote from Jacques Barzun below.)

(7) Mr. Dilley asserts that "the great protectors of the integrity of the English Language . . . may be found in only three spheres: the ministry, the Senate, and the legal profession." I'm sorry to say that, by nearly all accounts, the history of legal writing is anything but glorious. It has been criticized, even ridiculed, by everyone from Jonathan Swift to Thomas Jefferson to Fred Rodell. David Mellinkoff, in his classic study, describes legal writing as having four main characteristics: it's wordy, unclear, pompous, and dull.[4] Bryan Garner says that lawyers "have a history of wretched writing, a history that reinforces itself every time we open the law books."[5] John Lindsey adds that law books are "the largest body of poorly written literature ever created by the human race."[6]

Now a response to Ms. Goldman's balanced and thoughtful comments (aside from her first paragraph):

(1) Reading and readability are complex and controversial. The most commonly used readability formulas, to the extent they have any validity, depend on how long the sentences are and on how long or familiar the words are.

(2) Of course, a few extra words here and there will not affect a piece of writing. But the cumulative effect of a lot of extra words surely will. Consider the logical extension of Ms. Goldman's

argument. Does she mean to say that wordiness and inflated diction don't matter enough to be worth fixing? Every writing book and style guide on the planet says otherwise. Here's one:

> *[T]o eliminate the vice of wordiness is to ensure the virtue of emphasis, which depends more on conciseness than on any other factor. Whenever we can make twenty-five words do the work of fifty, we halve the area in which looseness and disorganization can flourish, and by reducing the span of attention required we increase the force of the thought. To make our words count for as much as possible is surely the simplest as well as the hardest secret of style.*[7]

And here's Strunk and White:

> ***Omit needless words.*** *Vigorous writing is concise. A sentence should contain no unnecessary words . . . for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. . . .* ***Avoid fancy words.*** *Avoid the elaborate, the pretentious, the coy, and the cute. Do not be tempted by a twenty-dollar word when there is a ten-center handy, ready and able.*[8]

(3) Apart from sheer word count, a phrase like *prior to* often leads to clumsy, indirect constructions. It's symptomatic, if you will. Example: "This will be the last recorded message you hear prior to your call being answered." Or: "Prior to the argument by the attorneys on the objection, the court excused the jury." Imagine if Frost had written "And miles to go prior to my sleeping."

(4) In short, there is always the matter of tone, of the impression your writing makes. Consider this from Jacques Barzun:

> *[T]he best tone is the tone called plain, unaffected, unadorned. . . . It is the most difficult of all tones, and also the most adaptable. When you can write plain, you can trust yourself in special effects. The plain tone is that of Lincoln always, that of Thoreau, Emerson, William James, Mark Twain, "Mr. Dooley," Fitzgerald, and Hemingway at their best. It is the tone Whitman urged on his contemporaries: "The art of art, the glory of expression . . . is simplicity. Nothing is better than simplicity . . . nothing can make up for excess or for the lack of definiteness."*[9]

(5) As far as testing goes, there is a great deal of empirical evidence that plain language, taken as a whole, improves readers' comprehension of legal documents.[10] And there is evidence that readers strongly prefer plain language in legal and official documents.[11] In fact, some of the first testing of legal documents was reported in this column, in October 1987 and May 1990. When judges and lawyers in four states, including Michigan, were asked to choose between the A and B version of different passages from legal documents, they preferred the plain-language versions by numbers running from 80 to 86 percent.

(6) Ms. Goldman ends with "Pale English, no." This is a first cousin to the grade-school argument discussed earlier. Does she really think that provisos and *prior to* and *in terms of* breathe life into prose? More likely to deaden it, I'd say.

In the August and September 2001 columns, called "Plain Words," I offered lists of words and phrases that writers might consider replacing. I included several qualifications and cautions, yet still made this prediction: "I will be accused of promoting baby talk, of constricting and dumbing down the language, of denying writers their expressive voice, and of corrupting legal discourse."

No wild predictions this time. I'll just invite all writers to consider the evidence, consult the books on writing, keep reading the column, and make your own choices. ✦

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FOOTNOTES

1. See, e.g., *Strike Three for Legalese* (May 1990); *Plain English: A Charter for Clear Writing* (Part 3) (Dec. 1992); *Plain Words* (Part 1) (Aug. 2001); see also *Answering the Critics of Plain Language,* 5 Scribes J. Legal Writing 51 (1994–1995).
2. David Mellinkoff, *The Language of the Law* 290–398 (1963); Bryan A. Garner, *A Dictionary of Modern Legal Usage* 580 (2d ed. 1995); see also Joseph Kimble, *The Great Myth That Plain Language Is Not Precise,* 7 Scribes J. Legal Writing 109 (1998–2000).
3. See *How to Mangle Court Rules and Jury Instructions,* 8 Scribes J. Legal Writing 39, 56–57 (2001–2002).
4. Mellinkoff, supra note 2, at 24.
5. Bryan A. Garner, *The Elements of Legal Style* 2 (2d ed. 2002).
6. John M. Lindsey, *The Legal Writing Malady: Causes and Cures,* N.Y. L.J., Dec. 12, 1990, at 2.
7. Wilson Follett, *Modern American Usage* 14 (1966).
8. William Strunk, Jr. and E. B. White, *The Elements of Style* 23, 76–77 (4th ed. 2000).
9. Jacques Barzun, *Simple and Direct: A Rhetoric for Writers* 90 (rev. ed. 1985).
10. See *Answering the Critics of Plain Language,* supra note 1, at 62–65.
11. See Joseph Kimble, *Writing for Dollars, Writing to Please,* 6 Scribes J. Legal Writing 1, 19–31 (1996–1997).