

Software Programs for Legal Writers

By Janice G. Spodarek

For some time, the Michigan Standard Criminal Jury Instructions Committee has been reviewing and rewriting the entire body of criminal instructions. This article grows out of a study by the Subcommittee on Juror Comprehension.

Another subcommittee, the Plain English Subcommittee, has rewritten the first ten chapters in a concerted effort to make them easier to understand. These chapters will soon be published by ICLE, with the rest to follow.

Projects like this remind us that drafting is the hardest form of legal writing, and the most underestimated.

Now, how about the civil instructions?
—J.K.

Today there are several computer software programs that analyze writing and make editorial suggestions. Some are word-processing programs with standard features such as spell-checkers. Others are more sophisticated programs that use a form of artificial intelligence.¹ Some of these more sophisticated programs can generate a variety of grammar and style measurements. Some can also generate readability measures—the average educational level required to understand the document.

How useful are these programs to the legal profession? Recently, a subcommittee of the Michigan Standard Criminal Jury Instructions Committee studied juror comprehension using RightWriter Version 3.0, one of the more popular software programs.² This article examines the utility of such programs to legal writers by ex-

amining the subcommittee's use of RightWriter.

Evaluating the Criminal Jury Instructions

The Michigan Standard Criminal Jury Instructions were published in 1977. Following their publication, the State Bar formed a committee—the Standard Criminal Jury Instructions Committee—to evaluate, update, and revise the CJI's. The committee has been concerned with a host of questions. Are the CJI's widely used? For what cases and charges are they most and least often used? Do judges present them verbatim or modify them? And how can they be improved? Koenig, Kerr & VanHoek, *Michigan Standard Criminal Jury Instructions: Judges' Perspectives After Ten Years' Use*, 4 Cooley L R 347 (1987).

To answer these questions, the committee formed a Juror Comprehension Subcommittee in 1986, chaired by Professor Dorean M. Koenig of Thomas M. Cooley Law School. The subcommittee teamed up with Dr. Norbert Kerr, a nationally recognized expert in juror research from Michigan State University, and Geoffrey Kramer, a doctoral candidate in the Department of Psychology.

The subcommittee set up two phases of research. First, it surveyed Michigan judges. The study found that most judges used the CJI's, most used them verbatim, and many were concerned about the instructions on specific intent, lesser included offenses, criminal sexual conduct, and of course reasonable doubt. Koenig, Kerr & VanHoek, pp 349-355.

Second, the subcommittee conducted an empirical study to measure juror comprehension. Questionnaires with true/false and open-ended questions were filled out by over 600 jurors who completed jury assignments in Detroit Recorder's Court and Ingham County Circuit Court. In preparing the questionnaire, the subcommittee used RightWriter to help analyze the true/false questions. The results of the study will be published next year in an article by Professor Koenig and Mr. Kramer in the *University of Michigan Journal of Law Reform*.

A critical third project is in progress. Another subcommittee—the Plain English Subcommittee—is trying to make the CJI's more comprehensible.³ Ten chapters, or Volume I, has been rewritten and will soon be published by the Institute of Continuing Legal Education.

Using RightWriter

Using RightWriter is easy. To begin, RightWriter creates a copy of the document from a compatible word-processing program. RightWriter then analyzes the document by inserting comments directly on the copy, which RightWriter calls the "marked-up

"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.

copy." You must decide whether to make the changes.

RightWriter analyzes five types of writing: general business, technical report or article, manual, proposal, and fiction. You can also select one of three educational levels of your reader: general public, high school, or college. RightWriter strongly encourages using the general public level to keep the writing clear and simple.

RightWriter automatically flags all long sentences. However, what is long varies by the type of writing selected. The business writing option flags all sentences with more than 25 words. Another option allows you to change the length.

RightWriter performs two types of analyses: grammar and style comments inserted within the text; and summary indexes placed at the end that give an overall critique of the document.

Grammar and Style Comments

Grammar and style comments are based on conventions for grammar, capitalization, and punctuation, along with other style and usage guidelines. RightWriter uses over 50 rules and comments, including noun-verb mismatch, incomplete sentence, run-on sentence, wrong pronoun, passive voice, long sentence or paragraph, wordy, ambiguous, redundant. RightWriter will even flag sexist language. Each of these 50 items can be turned on or off.

Each comment also contains a letter and a number so you can refer to the manual for more information. For example, RightWriter might insert the comment

P2. IS COMMA NEEDED?

"P2" refers to the punctuation chapter in the *RightWriter User's Manual*.

For some of these comments, RightWriter will suggest an alternative. Here is one of the true/false questions from the juror questionnaire:

In order to find the defendant guilty by a reasonable doubt, you must be 100% certain of his or her guilt.

RightWriter's response is

U12. WORDY. REPLACE *In order to BY to.*

To take another example, the following true/false question was designed to test juror comprehension of Criminal Sexual Conduct in the Fourth Degree, CJI 20:5:02:

In order for a person to be found guilty of criminal sexual conduct, they must have intentionally touched someone, used coercion or force, and done so because they were attempting to obtain sexual arousal.

RightWriter's response:

*In order for a person to be found <<*S1. PASSIVE VOICE: be found *>> guilty of criminal sexual conduct, they must have intentionally touched someone, used coercion or force, and done so because they were attempting <<* S13. REPLACE attempting BY SIMPLER try? *>> to obtain <<* S13. REPLACE obtain BY SIMPLER get? *>> sexual arousal. <<* S12. CAN SIMPLER TERMS BE USED? *>><<* G3. SPLIT INTO 2 SENTENCES? *>><<* S3. LONG SENTENCE: 34 WORDS *>>*

Incorporating most of RightWriter's suggestions, the new question would read:

To be guilty of criminal sexual conduct, a person must intentionally touch someone, use coercion or force, and do so because they are trying to get sexually aroused.

Notice that RightWriter did not flag "in order for" in the preceding example as wordy, but did flag "in order to" as wordy in the reasonable doubt example above. Apparently "in order for" was not programmed into RightWriter.

On the other hand, RightWriter will flag a programmed item every time. Take this true/false question:

A reasonable doubt is based on your common sense.

RightWriter's response:

PASSIVE VOICE is based.

But this passive seems unavoidable, and other times the passive may be preferable. See Wing, *Where's the Verb?*, 68 Mich B J 150 (February, 1989). Again, you must decide whether to make the change. RightWriter cannot make judgments or qualitative decisions.

Another aspect of RightWriter is the legalese indicator.

The word or phrase is jargon from the legal profession. Do not use in non-legal writing. There is a serious question whether legalese should even be used in legal writing. We're going to stay out of that argument. Legalese definitely has no place in non-legal writing. RightWriter User's Manual, p. 6-27.

For example:

You are hereby notified that a default judgment has been entered.

Wherefore, the defendant prays that the judgment of trial court be reversed.

RightWriter will alert the user to legalese after the words "hereby" and "wherefore." Sometimes RightWriter will suggest an alternative, such as replacing "whereas" with the more common "since." But notice that RightWriter did not flag the archaic "pray."

Summary Indexes

At the end of the marked-up copy, RightWriter gives an overall critique of the document using summary indexes. These indexes are also represented on bar graphs. They are measures of the document as a whole.

The most well-known of these indexes is the readability index, a measure of the average educational level required to understand the document. RightWriter uses the popular Flesh-Kincaid formula. You can choose two other readability formulas—the Flesch and the Fog indexes. All these formulas are based on the average number of words per sentence and syllables

per word. RightWriter's readability index range is from 1.0—first grade, to 50.0—totally unreadable. An index of 12.3 means that the reader needs a high school education to understand the document.

However, RightWriter does not recommend writing for a twelfth grade level, even for high school graduates.

Good business writing ranges between the 6th and 10th grade level. A high readability index (over 13th grade) does not mean that the writing is appropriate for college educated readers. Rather, it indicates that the writing is complex and difficult to read. Even highly technical information is best presented using a simple sentence structure and as many common words as possible. RightWriter's User Manual, p 7-3.

RightWriter's readability index of the Definition of Reasonable Doubt, CJI 3:1:04, is 16.78; the Alternate Definition of Reasonable Doubt, CJI 3:1:05, is 14.90; Involuntary Manslaughter as a Lesser Included Offense of Murder, CJI 16:4:04, is 10.73.⁴

RightWriter also generates a strength index—a value from 0 to 1 measuring the strength of delivery. Writing with too many qualifiers, uncommon words, and complex sentence structures will be scored as weak—near 0. Strong writing will be scored at .8 and above. RightWriter says that technical writing should have a strength index above .8.

If the strength index is below .5, RightWriter makes specific recommendations. For example, the strength



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index of Involuntary Manslaughter as a Lesser Included Offense of Murder, CJI 16:4:04, is 0. RightWriter recommends making the writing more direct by using the active voice, shorter sentences, and more positive wording. Other possible recommendations under the strength index are to use fewer clichés, more common words, and less wordy phrases.

Another measure is the jargon index. Jargon is often created by changing verbs into nouns, which plain English especially deplores. Take Multiple Defendants, CJI 3:1:14:

Each defendant is entitled to your separate and individual consideration of his or her case.

In plain English:

You should consider each defendant separately.

A measure of 0 to .5 on the jargon index is generally acceptable.

Jargon was not a problem with most of the CJI's that the subcommittee examined. For most of them, the jargon index was 0. However, in Criminal Sexual Conduct in the Fourth Degree, CJI 20:5:02, the jargon index was .56. This is probably because of the number of words that RightWriter classifies as uncommon—*buttock, arousal, groin, genital*.

RightWriter also summarizes overall sentence structure patterns in the text. In both the Definition of Reasonable Doubt, CJI 3:1:04, and the Alternate Definition of Reasonable Doubt, CJI 3:1:05, RightWriter's recommendation is that most sentences contain multiple clauses; try to use simpler sentences.

RightWriter will also generate a list of words for review. It lists words that are possibly negative, jargon, colloquial, misused, misspelled, or hard to understand.

The Upshot

Grammar and style programs are a new and valuable form of feedback

for writers. But as we have seen, these programs are only guides; they do have limitations.

One limitation is that some of the measures are rigidly quantitative. Obviously, not every sentence longer than 25 words needs to be shortened.

The programs are rigid and literal in other ways. Not every passive should be replaced. Similarly, in the juror project each time the program encountered the phrase "not guilty," RightWriter would respond with "negative, consider rephrasing not guilty." Probably not a good idea.

And the programs will not catch everything. RightWriter missed "pray." It caught "in order to," but not "in order for."

Finally, the most important limitations: writing programs cannot measure literary quality or understand the meaning of words. Tom Wolfe might not do so well on the readability index. But the following sentence would do fine: Guilt comes from the green sky. Then again, since no one deliberately writes gibberish, this limitation does not defeat the value of the programs as a guide.

In the end, writing depends as always on mind and not machine—one person thinking.

Footnotes

1. For example, RightWriter, DecisionWare Corporation, Sarasota, Fla. 1988; Readability, Scandinavian PC Systems, Inc., Rockville, Md.; Grammatik III, Reference Software, San Francisco, Calif.
2. RightWriter has recently issued or will soon issue an updated 3.1 version.
3. The project is under the direction of the committee chair, Judge William Caprathe, and two reporters, Timothy McMorro and Judge Randy Tahvonen. ICLE has provided considerable help through Lynn Chard, publications director, and two University of Michigan students, Mary Hiniker and Anna Headly.
4. The readability index of this article is 10.56.